Neutral Citation Number: [2021] EWHC 213 (Ch)

Case No: BL-2019-000604

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

Rolls Building, 7 Rolls Building
Fetter Lane, London, EC4A 1NL

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date of hand-down is deemed to be as shown opposite:

Date: 09/02/2021

Before :

MASTER KAYE

- -

Between :

(1) MRS EDELTRAUD UDESHI	**Claimants**
(2) MR OSCAR UDESHI	
(3) MR PETER UDESHI	
- AND -	
DR JECHIL SALOMON SIERATZKI	**Defendant**

- -
- -

Mrs Udeshi appeared in person assisted by her husband **Mr Ramesh Udeshi** as her McKenzie Friend.
The Second and Third Claimants did not appear and were not represented.
Christopher Lloyd (instructed by **Howard Kennedy LLP**) for the **Defendant**

Hearing dates: 20 August 2020

- -

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.

.....

MASTER KAYE

Master Kaye :

1. This was a hearing to determine the First Defendant's applications dated 11 August 2019 and 23 February 2020. The First Defendant seeks to strike out the claim or alternatively seeks summary judgment ("**the Defendant"** and "**the Defendant's applications**").

2. The Defendant submits that:

   i) the Claimants' claims are statute barred;

   ii) the Claimants have no standing to bring the claims; and

   iii) the Claimants deliberately breached certain provisions of the CPR when the claim was issued, including paying the incorrect issue fee.

3. The Defendant's applications are therefore brought on the basis that the Claimants have failed to disclose reasonable grounds for bringing the claim and/or the claim has no real prospect of success and there is no other compelling reason why the claim should proceed to trial.

4. The dispute arises out of the collective enfranchisement of Parkside, Knightsbridge, London SW1X 7JW ("**the Property**") in 2003 and the settlement of a subsequent dispute in 2007.

5. At all material times, Mrs Udeshi and her adult sons, the second and third Claimants, were the registered leasehold proprietors of Flat 10, Parkside, Knightsbridge, London SW1X 7JW and have been joint holders of one share in Parkside (Knightsbridge) Residents Limited ("**the Company**") since around April 2003.

6. At all material times, the Defendant was either the sole or joint leasehold proprietor of Flat 39 and the sole or joint holder of one share in the Company from around April 2003. He was one of the directors of the Company from its incorporation in December 2002 until 8 April 2013.

Procedural History:

7. On 21 March 2019, the Claimants issued a claim seeking "…equitable compensation; an account or enquiry; further or other relief; and costs". The claim was issued against 13 defendants. The Defendant was the First Defendant, the Company was the Second Defendant.

8. The other defendants were all said to have been directors of the Company. The third to tenth defendants were all directors during 2003. The third, sixth, eighth, twelfth and thirteenth defendants were said to be directors in 2007. The eleventh defendant was said to have been a director between 2004 and 2006. However, it appears that the eleventh and twelfth defendants may never have been directors at all.

9. On Saturday 20 July 2019 at the end of the four-month life of the claim form it was served on the Defendant without a response pack, contrary to CPR 7.8(1).

10. On 11 August 2019, the Defendant issued his first strike out application which relied on late service, the payment of the wrong court fee and the absence of a response pack. He subsequently filed and served a witness statement dated 31 October 2019 in support of his application.

11. Between August and December 2019, the second, third, fourth, sixth, seventh and eighth defendants all issued applications to strike out and/or for summary judgment. Some served defences and some filed witness evidence in support of their applications. The applications relied on the expiry of limitation such that the claims were statute barred, reflective loss, and an absence of standing as the basis for the strike out and/or summary judgment.

12. Some of the applications were listed on 17 March 2020. As further applications were issued by more of the defendants it became apparent that there would be insufficient time to address all the applications on 17 March 2020. The court directed that all the limitation arguments would be heard on 17 March 2020 and a separate one-day hearing was fixed for 12 May 2020 to address the balance of the applications should that be necessary.

13. In the meantime, the Defendant issued a further application to strike out and for summary judgment dated 23 February 2020 supported by a witness statement of the same date. This application relied on the expiry of limitation, no standing and reflective loss consistent with the applications issued by the represented defendants.

14. The hearing on 17 March 2020 was vacated due to Covid-19 concerns raised by Mr and Mrs Udeshi. As a consequence, the entirety of the applications were to be heard on 12 May 2020.

15. On 16 April 2020 Howard Kennedy LLP filed a Notice of Change on behalf of the Defendant, since when he has been represented.

16. On 22 April 2020, the Claimants filed notices of discontinuance in respect of their claims against the Company and the third to eighth and eleventh and twelfth defendants. This left the Defendant as the only active defendant.

17. On 05 May 2020, and in light of the discontinuances in relation to the claims against the other defendants, the Defendant sought permission to file an amended Defence. The proposed amended defence reflected both that the Defendant now had legal advice and that he was not able to rely on the evidence and defences filed by the other defendants against whom the Claimants had discontinued. At about the same time Mrs Udeshi notified the court that she had limited access to technology and would be unable to participate in a remote hearing. The hearing on 12 May 2020 was vacated and the Defendant's applications were re-listed for an in-person hearing on 20 August 2020.

18. On 03 June 2020, the Defendant was given permission to file and serve an amended defence. On 17 June 2020, the Claimants applied to set aside that order which application was dismissed on paper.

19. In support of the Defendant's applications in addition to the Defendant's two witness statements and his amended Defence there was a witness statement from Ayesha

Salim of Howard Kennedy LLP served in support of the application seeking permission to amend the defence.

20. The Claimants have not filed or served any evidence in response to the Defendant's applications nor had they filed any evidence in response to the other defendants' applications. Mrs Udeshi does rely on a skeleton argument signed with a statement of truth as well as a small bundle of documents including some authorities. In addition, the Reply to the amended Defence sets out a combination of legal submissions and reply evidence and is signed with a statement of truth.

21. Mrs Udeshi is unrepresented. She is assisted by her husband and McKenzie Friend Mr Ramesh Udeshi. Neither of her sons, the Second and Third claimants, attended the hearing nor do they appear to have taken any active part in the claim. For ease references in this judgment to Mr Udeshi are therefore to Mr Ramesh Udeshi unless otherwise stated.

22. As noted above an in-person hearing had been arranged to assist Mr and Mrs Udeshi who are 89 and 79 years old respectively with limited access to technology. Mr Udeshi has impaired hearing and wears hearing aids. Mrs Udeshi asked that Mr Udeshi be permitted to make representations on her behalf rather than just assist her. Unfortunately, Mr Udeshi was unable to connect to the hearing loop made available in the court room. Covid-19 restrictions meant that despite the socially distanced best efforts of the court staff it was not possible to resolve this difficulty. As a consequence, Mr Lloyd was asked to take various steps to assist Mr and Mrs Udeshi and their ability to follow his submissions including turning to face them and directing his submissions to them rather than the court. During the hearing other steps were taken to assist them where possible given the limitations presented by social distancing and Covid-19. I would like to thank Mr Lloyd for the manner in which he conducted the hearing, made his submissions, and sought to assist Mr and Mrs Udeshi. I am satisfied that they were able to fully participate in the hearing.

23. I read with care the written submissions and evidence relied on by both parties and have considered their oral submissions. Mr Lloyd had provided a detailed skeleton argument on 14 August 2020 which set out the legal principles and the authorities on which the Defendant relied together with extracts from those authorities and what Mr Lloyd said was the relevant factual background to his arguments. He also provided schedules setting out details of contemporaneous documents which he said supported his case on various aspects of the limitation arguments. All the documents were in the hearing bundle. This should have assisted Mr and Mrs Udeshi with their preparation.

24. Although this judgment does not rehearse the full extent of the submissions and evidence from the parties, I have taken them into account in reaching this decision.

Factual Background

25. In about 2002 the then freehold owner of the Property offered to sell the freehold to the lessees for a price of £1.505m by operating the mechanism set out in the Landlord and Tenant Act 1987. Not all the lessees were interested in acquiring the freehold at that time.

26. The Defendant wrote to the lessees on 9 October 2002 making it clear that he was willing to make up any shortfall in the purchase price and to thereby acquire the reversionary interest in the non-participating flats.

27. The Defendant says that although some of the other lessees expressed an interest in paying for the "*balance of the freehold shares*", in the event, none were either willing or able to do so.

28. He says that Mr Udeshi approached him in October 2002 in relation to the acquisition of the non-participating flats. He says that he made it clear to Mr Udeshi that it was open to the Claimants to invest in the freehold by providing funds in relation to the non-participating flats. He says that the Claimants and Mr Udeshi did not come back to him with a proposal. It would appear therefore that Mr Udeshi was aware of the Defendant's intention to fund the balance of the purchase price in return for a reversionary interest in the non-participating flats by October 2002.

29. Following a meeting attended by about 20 of the 49 lessees in about November 2002, Mr Jaffe of Roiter Zucker was appointed to act for the lessees in respect of the purchase of the freehold. The Company was incorporated in December 2002 for the purpose of acquiring the freehold of the Property.

30. In 2003 the majority of the lessees did in fact participate in the proposed collective enfranchisement scheme (the "**Participating Lessees**"). There were 11 non-participating flats. The Defendant provided the balance of the purchase price as he had proposed.

31. The Claimants have not provided any evidence in response; however, they do not accept that this represents the position in 2002 and 2003. Mr and Mrs Udeshi say that all the Participating Lessees should have been allowed to participate in paying the balance of the purchase price and then the entitlement to the reversionary interest could also have been divided up. They point out that the shortfall from the 11 non-participating flats was only £258,112 and when divided by the 38 Participating Lessees it would only have been £6,792 per flat. Mr and Mrs Udeshi argue that the acquisition by the Defendant was concealed from the Participating Lessees in some way or "hushed up". They do not provide any evidence that all the other Participating Lessees were in a position to or wanted to pay £6,792 to participate and/or that they were precluded from doing so. They do not explain how the Defendant's acquisition was concealed or "hushed up". Indeed, the documents available do not support that theory with a number of the contemporaneous documents between 2002 and 2007 demonstrating that a number of the Participating Lessees were supportive of the Defendant.

32. The Claimants' allegation of concealment and unfairness has been their position since at least March 2003 prior to completion of the acquisition of the freehold. On 21 March 2003, after exchange of contracts but before completion, Mrs Udeshi wrote to Mr Jaffe to complain: (i) that the Defendant's intention to provide the funds to purchase the interests of the non-participating flats had been deliberately concealed from the other Participating Lessees and (ii) that the reversionary interests in the non-participating flats "*was never offered to [the] 38 [other] tenants; you had no intention to offer it and you went out of your way to ensure that [the Defendant] acquires it*."

33. The Directors of the Company (the third, fourth and seventh defendants but excluding the Defendant), responded refuting those allegations on behalf of the Company in a letter dated 25 March 2003. They said, amongst other things, that the allegations were unjustified, and that the Defendant had been open and honest about his intentions in relation to the non-participating flats. Mr Jaffe also responded refuting the allegations on 31 March 2003 saying that nothing was hidden by the Defendant who had acted with the full agreement of the majority of the Participating Lessees.

34. It appears that Mr and Mrs Udeshi were aware that the Defendant intended to provide the funds to enable the completion to take place and in return to take the benefit in relation to the non-participating flats by at least October 2002. Further they had complained about the Defendant's proposed acquisition to the directors of the Company and Mr Jaffe prior to completion in March 2003.

35. On 31 March 2003, the Company completed the purchase of the Property with the Defendant making up the balance of c.£258k in respect of the 11 non-participating flats. On 7 April 2003, the Company allotted one share to each Participating Lessee including the Defendant and the Claimants. The 11 shares for the non-participating flats were allotted to the Defendant's company ("**Babajit**").

36. The Claimants remained concerned about the manner in which the freehold of the Property had been acquired and the Defendant's acquisition of the reversionary interest in the non-participating flats.

37. From June 2003 onwards Mr and Mrs Udeshi raised complaints and made allegations about the Defendant and his conduct in respect of the acquisition of the reversionary interest in the non-participating flats. Mr and Mrs Udeshi complained to the Directors of the Company; to other Participating Lessees; to and about Mr Jaffe; and others. They asserted that the Defendant had acted in conflict of interest in contributing the purchase price in respect of the 11 non-participating flats; he had been motivated by profit; his financial interest in making the contribution had been concealed and/or that the Defendant's interest had been disclosed too late for any other Participating Lessee to seek to take advantage of the opportunity to acquire an interest in the non-participating flats. The complaints raised in 2002 and 2003 relating to the Defendant's role in the acquisition of the Property form the factual background to the allegations now made in the particulars of claim.

38. In or about March 2004 the Company granted 999-year leases to each Participating Lessee in respect of his/her/its flat. The Company did not grant Babajit or the Defendant 999-year leases in respect of the 11 non-participating flats.

39. A dispute arose between the Company, the Defendant and Babajit. The Defendant argued that he/Babajit were entitled to receive 999-year leases of the 11 non-participating flats as that was the basis upon which he had paid the balance of the purchase price of c.£258K to enable the Company to acquire the Property in 2003. The Company denied his entitlement.

40. The Defendant instructed David Venus & Company (Chartered Secretaries) ("**David Venus**") to prepare a report on the transparency of the acquisition of the Property and its efficacy as a matter of company law. David Venus was provided with a large number of documents which they identify at the end of their report. Their report,

dated 25 April 2005, was supportive of the Defendant's position concluding for the reasons set out in the report that the Defendant had been "open, honest and fair in his dealings with the Company and the residents of Parkside". The Defendant provided a copy of the report to the Company at the end of April 2005.

41. At about the same time the Company sought advice from counsel Mr Stephen Boyd about the enforceability of the arrangements by which the Defendant and Babajit acquired the reversionary interest in the 11 non-participating flats. Mr Boyd's advice dated 3 June 2005 sets out extracts from letters, faxes, emails and the David Venus report between 1 October 2002 and 31 May 2005.

42. Based on the information provided to him Mr Boyd concluded that it was arguable that the transaction was open to challenge and might be unenforceable. Further, he concluded that the Defendant, as agent for the Participating Lessees, was in breach of a fiduciary duty as he had not made full and frank disclosure or obtained informed consent in relation to his acquisition of the non-participating flat interests. He noted that in the event that the transaction was undone the Defendant would have to be repaid the £258K. He suggested that an EGM be called to seek to resolve matters but that in the meantime extended leases should not be granted to the Defendant/Babajit. The advice was relied on and referred to in correspondence to enable the Company to resist the Defendant and Babajit's claims. However, it was not disclosed to the Defendant until September 2005 nor was an EGM called. Mr and Mrs Udeshi rely on Mr Boyd's advice as support for the position they have adopted. Their claim substantially adopts the analysis in that advice.

43. The dispute continued between the Defendant and the Company through 2005 and 2006. The Defendant and Babajit sought counsel's advice from Mr Willer. Mr Willer's advice dated 7 September 2006, was critical of and disagreed with Mr Boyd's analysis and advice. Mr Willer concluded that Mr Boyd could not have been provided with some of the documents. Mr Willer identified those documents in his advice. He recommended that the Defendant and the Company should seek to resolve matters amicably and that a copy of his advice should be sent to the Company, and each director and lessee. He was critical of the Company for not having called an EGM as recommended by Mr Boyd.

44. On 21 September 2006, the Defendant sent a letter to the Company, the directors and all shareholders (including the Claimants) with a robust defence of his and Babajit's position providing a copy of both the David Venus report and Mr Willer's advice.

45. The Company and the Defendant sought to reach a resolution of the dispute. Terms of settlement were reached. In summary, Babajit agreed to return its shares to the Company and the Company agreed that all financial benefits from any sale/extension of the leases in respect of the non-participating flats would be paid over to Babajit. The share capital of the Company would be reduced from £49 to £38 to reflect the return of the shares. Thus, the shareholdings would reflect the number of Participating Lessees.

46. Notice of an EGM, for the purpose of approving the settlement and authorising the directors to enter into it, was sent out to all shareholders, including the Claimants, dated 22 February 2007. The EGM was held on 21 March 2007. The resolution approving entry into the settlement was passed by 23 votes in favour including proxy

votes out of a possible 38 and none against. The Claimants did not attend the EGM and did not vote by proxy.

47. On 22 March 2007, the Defendant, Babajit and the Company entered into a settlement agreement (the "**2007 Agreement**").

48. On 16 April 2007 Mrs Udeshi wrote to the directors of the Company saying:

> "I understand that an agreement between the Company and [the Defendant] and [Babajit] will be concluded soon. Please ensure that in the best interests of the Company there are no loose ends unresolved which might result in future disputes. "

49. The documents exhibited to the witness evidence include all the correspondence and documents referred to above including the David Venus report, both counsels' advices, notice of the 2007 EGM, minutes of various meetings, letters and emails recording the Claimants' allegations, enquiries and concerns, letters, emails and other documents from the Defendant, Mr Jaffe, other Participating Lessees and the Original Directors, various solicitors and a number of company documents covering the period from October 2002 to April 2007.

The Claim

50. The Claimants' particulars of claim, drafted by counsel, Mr Hodgkin, essentially adopt Mr Boyd's analysis from 2005 in claiming that the Defendant acted as the Participating Lessees' agent in the collective enfranchisement and/or owed fiduciary duties to the Participating Lessees. The Claimants contend that the Defendant breached those fiduciary duties in that he:

    i) failed to disclose his intention to retain any benefit to be derived from his contribution to the purchase price in respect of the non-participating flats;

    ii) failed to offer the other Participating Lessees (including the Claimants) the opportunity to make such contributions themselves;

    iii) caused the Company to unlawfully allot shares to Babajit; and

    iv) caused the Company to enter into the 2007 Agreement without consulting the shareholders and contrary to the best interests of the Company.

51. The Claimants plead that the Defendant has made profits of in excess of £2m from the sale or extension of the leases of the non-participating flats, which is the sum in respect of which they seek an account or equitable compensation. The relief sought includes a claim for immediate repayment by the Defendant of the sum found due upon the taking of an account, alternatively equitable compensation in an equivalent amount and such sums to be paid to the Company for distribution to the current shareholders.

52. The Defendant denies that he owed any fiduciary duties to the Participating Lessees and/or the Company shareholders, including the Claimants, or that he acted as anybody's agent in the collective enfranchisement process.

53. Mr Lloyd says that the Claimants have not pleaded an adequate case as to the creation of any such agency relationship or the "*special circumstances*" by which Directors including the Defendant assumed fiduciary duties to the Participating Lessees and/or the shareholders.

54. The Defendant says that if he owed any duties to the Participating Lessees and/or the shareholders he denies that he acted in breach of those duties. In particular he relies on his disclosure to the Participating Lessees of his interest in contributing the purchase price in respect of the non-participating flats.

55. However, he argues that even if he had the duties alleged and is found to have breached them, there is no loss as nobody came forward saying that they were willing and able to pay the portion of the purchase price represented by the non-participating flats.

56. In relation to the 2007 Agreement the Defendant also denies that he owed fiduciary duties for the same reasons or that he acted in breach of fiduciary duty. He points to the fact that the 2007 Agreement was approved by a majority of the shareholders at the EGM on 21 March 2007 and that the Defendant was not involved in the board's decision to enter into the agreement.

57. For the purposes of the Defendant's applications the Defendant says:

    i) that the Claimants claims are statute barred by s.21(3) Limitation Act 1980 ("**LA**"); alternatively, by laches/delay. It is the Defendant's case that the Claimants have been aware of all material facts since at the latest March 2007;

    ii) that the claim is a claim for the benefit of the Company or the other (current) shareholders but in respect of breaches of duties purportedly owed to the Participating Lessees/Company shareholders in 2003 and 2007. Consequently, the Defendant says that the Claimants have no standing to pursue their claims.

The Legal Principles:

Strike Out

58. The CPR 3.4 (2) provides:

> 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;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order.

> (3) When the court strikes out a statement of case it may make any consequential order it considers appropriate.
>
> …
>
> (5) Paragraph (2) does not limit any other power of the court to strike out a statement of case.

59. The court uses its power to strike out sparingly and only in a clear and obvious case but will use it where a party is pursuing a claim which has no reasonable basis or is an abuse of process or where there would be a waste of resources to all parties if the claim continued.

60. Claims can be struck out where the statement of case relied on discloses no reasonable ground for bringing the claim. If for example it discloses no legally recognisable claim or is incoherent or does not make sense, or where it identifies an unwinnable case where allowing the proceedings to continue is without any possible benefit and would be a waste of resources of both parties and the court.

61. It is for the applicant to persuade the court that there are grounds for striking out. Once that is established it is for the respondent to persuade the court that it would be inappropriate or unjust to make the order to strike out.

62. The court has to have in mind the overriding objective. This includes considering the overall effect of the order to strike out if made.

Summary Judgment

63. CPR 24.2 provides:

> 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 … and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

64. On a Summary Judgment application pursuant to CPR 24 the relevant well-established principles were helpfully summarised by Lewison J (as he then was) in *Easy Air Ltd v Opal Telcom Ltd* [2009] EWHC399 (Ch) ("***Easy Air***"):

> "(i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success;
>
> (ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable;

> (iii) In reaching its conclusion the court must not conduct a 'mini trial';
>
> (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;
>
> (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;
>
> (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;
>
> (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. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

65. The Defendant must therefore establish that the Claimants have no real prospect of success and there is no other compelling reason for the claim in question to go to trial. In doing so, the burden of proof rests with the Defendant.

66. Whilst the court is limited to focussing on the statements of case when considering a strike out application a broader approach is possible on a summary judgment application where the court considers the evidence. Thus, even if an application to strike out is not successful an application for summary judgment can succeed if on a wider consideration of the evidence available or that may become available the summary judgment test can be met.

67. Issues of limitation and standing can be grounds for both strike out and summary judgment and I note in particular principles (iv) and (vii) identified in *Easy Air*. In a case such as this the factors for consideration on strike out or summary judgment overlap. Mr Lloyd in particular focussed on principle (vii) arguing that the limitation and standing points were short points of law which the court could determine without a mini trial. He submits that there was no reasonable prospect of any additional evidence coming to light that would put the documents in any different light or change the position at trial.

68. The court can grant summary judgment if the claim is fanciful and where reasonable grounds exist for believing that a fuller investigation of the facts would not add to or alter the evidence available so as to affect the outcome of the case. If for example the Claimants had no standing or the claim were barred by limitation, then the claim would not have a real prospect of success and would also be susceptible to summary judgment.

69. For the reasons set out below it does not seem to me that there is any prospect of evidence emerging that would alter the position in this case. Whilst the court should not conduct a mini trial it is possible to test if there is any real substance in the assertions and submissions made by Mr and Mrs Udeshi by reference to the evidence available to the court. This is particularly so where Mr and Mrs Udeshi already have available to them the relevant contemporaneous documents.

70. Whilst I take that into account that Mr and Mrs Udeshi were unrepresented, there was no suggestion in any of their submissions or in any of the documents they have prepared for these proceedings that there were likely to be additional documents that might come to light that it would be necessary for the court to consider on the limitation or standing points.

71. Indeed, there is no suggestion by any party that any further documents would emerge which would change the position in relation to standing or limitation. It is difficult to see what else could emerge that would have any significant impact on those two issues.

72. This is therefore exactly the type of case in which the court should grasp the nettle and decide both the limitation and standing issues. If the Claimants' case on limitation or standing are bad at law, as Mr Justice Lewison said in *Easy Air*, the Claimants will have no real prospect of succeeding on the claim.

73. Before turning to the submissions on limitation there is one additional issue that arises. Following the discontinuance of the claims against the Company and all the other directors, the Claimants had not sought to amend the particulars of claim. Consequently, large parts of the particulars of claim are framed as claims against what are described as the Original Directors (which include the Defendant) and the

Subsequent Directors (which again include the Defendant) (those who were directors at the time of the 2007 Agreement).

74. The Claimants' claim that the Defendant was in breach of duty in relation to his acquisition of the reversionary interests in the non-participating flats, and if successful asks that the Defendant pay equitable compensation or account for the profits he has made to the Company who will then pay the due proportion of that equitable compensation or profit to the current shareholders of the Company. The Company is no longer a party to the claim. The Claimants had not sought to grapple with this issue.

75. In order to assist Mr and Mrs Udeshi the hearing took place in three sections. First Mr and Mrs Udeshi and Mr Lloyd made their submissions in relation to limitation, then on standing and finally on the breach of the rules. I intend to follow the same format.

Limitation:

76. The starting point is that the cause of action for breach of fiduciary duty accrues on the date of the breach. It seems to me therefore that in the absence of a claim in fraud or concealment the Claimants' claims would be governed by a six-year limitation period commencing at the date of breach.

77. The events giving rise to the claim occurred in about 2003 or 2007. The alleged breaches of duty as set out in the particulars of claim and consequently the dates of breach on which the causes of action accrued in this case are:

    i) 31 March 2003 when completion of the acquisition of the Property took place;

    ii) 7 April 2003 being the date on which shares were allotted to Babajit in relation to the non-participating flats; and,

    iii) 22 March 2007 being the date on which the 2007 Agreement was entered into.

78. The events in relation to which the Claimants seek to bring their claims therefore occurred between 17 and 13 years ago. This did not seem to me to be a promising start in terms of limitation. In the absence of being able to persuade me that there was no time limit applicable in this case on some proper basis, such as fraud or concealment, or that there was a later date for breach, none of which were currently pleaded, the likelihood was that the claims would be statute barred by reason of the expiry of any relevant six-year limitation period either in 2009 or 2013.

79. Mr Udeshi had attended Lincolns Inn law library when it reopened in July to undertake research and prepare the Claimants' submissions. Mr and Mrs Udeshi did not have any legal representation or assistance in relation to the Defendant's applications. Mrs Udeshi explained that they did not have the funds available to enable them to seek legal advice in part due to monies expended on earlier legal disputes.

80. Mrs Udeshi explained that the principal reason for the claim was that the Claimants did not consider that what had happened in 2003 was fair. They were not seeking to take this action because they wanted money but because all of the 38 Participating

Lessees should have been able to participate in the acquisition of the non-participating flats. Mrs Udeshi points to the fact that only about £6.5K per Participating Lessee would have been needed for them to share equally in both the acquisition of the non-participating flats and to subsequently benefit from the profits made by the Defendant. She says that the 38 participating lessees should have been able to share.

81. Mrs Udeshi explained that the majority of the flats were second homes so she did not believe that the majority of the lessees would have known what was going on. At the heart of her submission was an assertion that the Defendant did not but should have obtained the informed consent of all 38 Participating Lessees. Mr and Mrs Udeshi therefore argued that everything was "hushed up" in 2003 and 2004.

82. The Claimants rely in particular on an extract from an email from Mr Jaffe to the Defendant on 11 June 2003 in which he acknowledged that the Defendant had at all times made clear his intention to acquire the non-participating flats but notes that he did not obtain formal written agreement from the Participating Lessees. Mr Jaffe comments that he did not believe that the Defendant would have be able to obtain formal approval from all the Participating Lessees.

83. However, there are a number of emails and letters from Participating Lessees which evidence that they knew that the Defendant was acquiring, or had acquired, the non-participating flats in return for contributing the balance of the purchase price and were supportive of him. This is inconsistent with Mrs Udeshi's submission that the Participating Lessees did not know about the Defendant's proposal and intentions for which she provides no evidence.

84. Mrs Udeshi also objects to the 2007 Agreement which although entered into after a majority resolution at an EGM, she says did not have the consent of all the shareholders. Neither she nor Mr Udeshi explained why this was necessary.

85. Mr and Mrs Udeshi say that the Defendant simply would not have been able to obtain written consent from all 38 participating lessees in 2003 or all of the shareholders in 2007.

86. The Claimants' limitation argument was primarily articulated in their Reply. Section 2 of the Reply focussed on the nature of fiduciary duties. The Defendant's applications assume against him for the purposes of the applications only that he will be found to have a fiduciary duty. It is therefore not necessary to focus on that aspect of the Reply.

87. It is, however, important for Mr and Mrs Udeshi to understand that the Defendant's acceptance of that position for the purposes of the Defendant's applications is not an admission that such a fiduciary duty exists. If the claim were to proceed the Claimants would have to persuade a judge that the Defendant did, in fact, have such a fiduciary duty.

88. Mr and Mrs Udeshi's submissions on limitation were set out in section 3 of the Reply which Mr Udeshi expanded on in oral submissions.

89. The Claimants' position is that the relevant sections of the LA are those relating to land and in particular ss.15 to 17 LA. Mr Udeshi argued that as the definition of land

in s.38 LA included an interest in land it applied to this claim because the claim relates to the acquisition of the Property and the reversionary interest in the non-participating flats. The sections Mr Udeshi relied on address limitation periods for actions to recover land and rent which in some cases extend to 12 years.

90. These sections were not obviously helpful since the claim was, in fact, for breach of fiduciary duty against the Defendant rather than a claim to an interest in land. In any event even if applicable they did not appear to assist since even the 2007 Agreement had been entered into 13 years ago.

91. However, Mr Udeshi relied on ss.96 and 97 of the Land Registration Act 2002 (LRA). The Claimants position as set out in their Reply was that in light of s.96 LRA the limitation period in ss.15 to 17 of the LA was unlimited and the claim against the Defendant was not time-barred. S.96 and s.97 of the LRA however, relate to the disapplication of the period of limitation in adverse possession claims not breach of duty claims or money claims.

92. The claim as pleaded seeks an account of profits or equitable compensation – it is a money claim. Mrs Udeshi explained that the claim is being made to recover the profits the Defendant had made so they could be paid to the Company and then distributed to the shareholders. Such a claim is simply not a claim about an interest in land for the purposes of the LA or at all. The sections of the LA and LRA on which Mr Udeshi sought to rely do not assist the Claimants.

93. The second part of Mr Udeshi's argument on limitation was a broader submission based on the unpleaded allegation of concealment or "hushing up". Mr Udeshi explained that the Defendant's actions both in 2003 and when the 2007 Agreement was entered into amounted to an illegal misappropriation of the non-participating flats without informed consent and amounted to a criminal offence for which he relied on the Fraud Act 2006.

94. The Claimants relied on Lord Toulson's majority judgment in *Patel v Mirza* [2016] UKSC 42. They quoted an extract which was said to summarise the important points of the judgment, but they did not say where the extract had been taken from.

95. However, the point that Mr and Mrs Udeshi seek to emphasise can be found at [99]:

> "Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand."

96. And in Lord Toulson's conclusion at [120]:

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of

> which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

97. Mr and Mrs Udeshi submit that because the Defendant's intention to acquire the interest in the non-participating leases was "hushed up" in 2003 and not transparent and that there was no informed consent from all 38 Participating Lessees it was an illegal transaction. Consequently, they argue that there is no limitation on bringing a claim. Mr and Mrs Udeshi argued that there should be consistency of approach between the criminal and civil law and the Defendant should not be allowed to profit from his own wrongdoing.

98. Although no allegation of fraud or deliberate concealment has been advanced in the particulars of claim, and there is no application to amend, for completeness I consider s.32 LA at this stage in light of Mr and Mrs Udeshi's arguments in relation to *Patel v Mizra* and their submission that evidence or information had been "hushed up". S.32(1) LA provides that time does not begin to run for limitation purposes if the claim is based on the fraud of the Defendant or any fact relevant to the Claimants' right of action has been deliberately concealed from them by the Defendant.

99. Mr Lloyd set out in a detailed annex to his skeleton a schedule of the contemporaneous documents demonstrating that the Claimants had had the relevant material knowledge and facts available to them more than six years ago. I have already referred to some of those documents in the course of this judgment.

100. It is clear that Mr and Mrs Udeshi hold very firm views about the Defendant and the manner in which he acquired the reversionary interest in the non-participating flats. They have held those views since at least late 2002. It is trite law that once they had knowledge of the material facts time would run for limitation purposes.

101. Mr and Mrs Udeshi have not identified what it is that was "hushed up" nor any material fact they did not know. It was clear from their own contemporaneous documents that they were aware of the Defendant's intention to acquire the reversionary interests in the non-participating flats and by no later than 21 March 2003 Mrs Udeshi had already formed the view that the opportunity to participate had deliberately not been offered to the Participating Lessees. She concluded the letter saying:

> "I have come to the sorry conclusion that the freehold reversion in respect of the 11 non-participating flats was never offered to 38 tenants; you had no intention to offer it and you went out of your way to ensure that [the Defendant] acquires it."

102. On 2 July 2003, Mr Peter Udeshi emailed the Participating Lessees:

> "Acrimony in meetings has resulted from the [Defendant's] attempted concealment of details of the acquisition of the 11 flats"

103. The Claimants' correspondence continued in this vein continued throughout 2003 and 2004 and indeed through to and after the 2007 Agreement.

104. As Mr Lloyd identifies the particulars of claim track Mr Boyd's 2005 advice which itself relies on and quotes from some of the 2002 and 2003 correspondence including the 11 June 2003 email from Mr Jaffe.

105. In September 2006 the Claimants were sent the Defendant's response to Mr Boyd's advice which included the David Venus report, which exhibited a number of the contemporaneous documents and Mr Willer's advice which included reference to and an analysis of Mr Boyd's advice. It would therefore have been clear to them from no later than September 2006 what the competing views were and the material available both in support of and opposed to each view.

106. The subsequent settlement of the dispute between the Defendant and the Company arising out of those same facts was entered into by the 2007 Agreement. The 2007 Agreement was approved by the majority of the shareholders of the Company at an EGM. Mr and Mrs Udeshi do not explain the legal basis for saying that a majority of those voting at the EGM could not approve the resolution to enter into the 2007 Agreement.

107. Drawing these elements of the limitation arguments together, Mr and Mrs Udeshi's reliance on *Patel v Mizra* is misplaced. The claim pursued against the Defendant is not a claim in fraud or dishonesty but of breach of fiduciary duty. Fraud and dishonesty would have to have been specifically pleaded with full particularisation.

108. However, a claim in fraud and dishonesty would not help with the limitation difficulties which the Claimants have as such a claim would not disapply the limitation period for all time. It is absolutely plain that the Claimants knew the material facts and had the necessary knowledge to pursue this claim prior to completion of the acquisition in March 2003. They were given notice of the EGM in 2007 and knew about the proposed settlement in advance of the Company entering into the 2007 Agreement. The Claimants have not identified any fact, material or otherwise, that they say they did not know that might enable them to seek to persuade the court that the limitation period did not start to run until a date less than six years prior to the date upon which they issued this claim.

109. Once Mr and Mrs Udeshi knew about the Defendant's actions which, for the reasons set out above was by March 2003, time started to run for the purposes of limitation.

Consequently, even if Mr and Mrs Udeshi could have pleaded a claim in fraud it would still have been time barred from March 2009. If it could be argued they did not have all the material factual knowledge until later perhaps as late as the 2007 Agreement, which does not seem to me to be the correct analysis, that would only have extended time up to 2013. Thus, on either basis the allegations that something was "hushed up", even if they could be pleaded, would still now be time barred.

110. I find that on either of the grounds relied on by Mr and Mrs Udeshi the time for bringing a claim against the Defendant expired more than six years ago and the claims are time barred. Further the time for bringing any claim pursuant to s.32 LA would also have expired on the same basis.

111. As set out above Mr Lloyd identified that the general rule was that an action by a beneficiary in respect of breach of trust was governed by a six-year limitation period, either pursuant to s.21(3) LA or by analogy with other causes of action pursuant to s.36 LA.

112. Mr Lloyd submitted that the Claimants' case appeared to be that the Defendant owed fiduciary duties to the Participating Lessees/Company's shareholders before any alleged misconduct by the Defendant. However, the Claimants had not identified any property which would have been the subject of the Defendant's pre-existing fiduciary obligation. Consequently, the Defendant could only ever have been a 'class 2 fiduciary', to whom section 21(1) would not apply. If so, all the claims would be governed by a six-year limitation period by analogy with the claims in unjust enrichment, tort and/or contract pursuant to s. 36 LA.

113. S. 36 LA provides that the limitation periods for claims in tort, contract etc. may apply to a claim for an equitable remedy by analogy. The limitation period for a claim for an equitable account or equitable compensation is (unless brought against a trustee in respect of trust property) six years from the date of the breach by analogy with claims in contract or tort. This was considered by Millett LJ in *Paragon Finance v Thakerar* [1999] All ER 400 ("***Paragon***") at [415]–[416] and subsequently reiterated by Waller LJ in *Cia de Seguros v Heath* [2001] 1 WLR 112 at [122] where after quoting the passage from *Paragon* he summarised the position as follows:

> "Thus, Millett LJ made clear that even where equity was acting in its exclusive jurisdiction the [LA] was applied by analogy. "

114. Such an analysis was likely to include most claims for breach of fiduciary duty by a principal against his agent; a company against a director; or a shareholder against a director said to owe fiduciary duties directly to shareholder. Mr Lloyd referred to the exposition of the position in relation to fiduciary duties and limitation set out by Mummery LJ in *Gwembe Valley v Koshy (No 3)* [2004] 1 BCLC 131 at [111] and [112] ("***Gwembe***"). I agree with Mr Lloyd's analysis. It seemed to me that would encompass all the claims made against the Defendant in this case.

115. For completeness Mr Lloyd referred me to s.23 LA which provides: "An action for an account shall not be brought after the expiration of any time limit under this Act which is applicable to the claim which is the basis of the duty to account." Accordingly, he submitted that if the claim for breach of duty was governed by

section 21(3) LA, the claim for an account would also be governed by the six-year limitation period. I agree.

116. Section 21 LA provides so far as relevant as follows:

> "S.21 Time limit for actions in respect of trust property.
>
> (1)No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> (a)in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b)to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> …
>
> (3)Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued."

117. The Defendant's primary position was therefore that even if he were a fiduciary, limitation had still expired in relation to all the claims because the alleged breaches would all fall within s.21(3) LA and would be subject to a six-year limitation period expiring six years after the date of breach.

118. Mr Lloyd's submissions on s.21 LA were undertaken in a careful, clear and patient manner providing a full opportunity for Mr and Mrs Udeshi to engage with the arguments. However, save for one point which I address below Mr and Mrs Udeshi did not make any submissions in relation to s.21(1) and (3) LA, preferring to focus on their own limitation arguments which I have already addressed.

119. Mr Lloyd submits that s.21(1) LA only applies to express trustees, *de facto* trustees or 'class 1 fiduciaries' (those who have assumed the duties of a fiduciary by a transaction which is independent of and preceded the breach of duty complained of) or to put it simply true trustees. S.21(1) does not extend to 'class 2 fiduciaries' which are those fiduciaries who are impressed with equitable obligations as a result of their involvement in an impugned transaction (*Paragon* at [408] to [409]).

120. The Claimants would therefore need to first establish that the Defendant fell within s.21(1) which in this case would mean being able to satisfy the court that the Defendant was a class 1 fiduciary. In order to establish that the Defendant was a 'class 1 fiduciary' "*there must be a trust (or trustee-like responsibility) for specific existing property, not merely for the means to obtain it in the future*." *Halton International v Guernoy* [2006] EWCA Civ 801 at [23]. For the Defendant to be a class 1 fiduciary

the Claimants would therefore have to satisfy the court that he held property on trust for the Participating Lessees or the Company's shareholders.

121. Whilst no period of limitation applies if the claim for breach of trust against a 'class 1 fiduciary' alleges fraud or fraudulent breach of trust: s.21(1)(a) LA, there is no pleaded allegation of fraud in this case so s.21(1)(a) does not apply.

122. No limitation period would also apply if the claim fell within s.21(1)(b) LA. However, to bring the claim within that subsection the Claimants would have to first demonstrate that the Defendant held property on trust for the Participating Lessees or the Company's shareholders and that he had misappropriated it.

123. Importantly however, even if the Defendant could be brought within s.21(1) LA as a "class 1 fiduciary", not every breach of duty falls within section 21(1). A "class 1 fiduciary" may commit a breach of duty which does not involve fraud (s.21(1)(a)) or the misappropriation of property held on trust (s.21(1)(b)) (*First Subsea v Balltec* [2018] Ch. 25 at [49]-[59] ("***First Subsea***")) and in such a case the six-year limitation period is not disapplied.

124. Mr Lloyd drew to my attention *Burnden v Fielding* [2018] A.C. 857 at [19]-[22] ("***Burnden***"). A company director is treated as being in possession of a company's property for the purposes of s.21(1)(b) if the director receives company property (or converts it to his use, including by causing the property to be transferred to another company in which the director is interested). In such circumstances the claim to recover the property from the director will not be subject to a limitation period.

125. Mr Udeshi sought to rely on *Burnden* as support for the Claimants' argument that there was no limitation period applicable in this case on the basis that the Defendant was a director of the Company and was therefore a trustee. However, for the Claimants to be able to argue that the Defendant was a "class 1 fiduciary" and s.21(1)(b) applied, they would have to show there had been a misapplication of the Company's property. The Company would have to be the beneficiary not the shareholders. *Burnden* did not therefore seem to assist the Claimants' argument on the disapplication of the limitation period.

126. Mr and Mrs Udeshi did not identify any specific existing property the Defendant had held on trust for the Participating Lessees or the Company shareholders in respect of which he had breached his fiduciary duties such as to bring him within s.21(1)(b).

127. In fact, the Claimants do not allege that the Defendant misappropriated property belonging to the Participating Lessees and/or the Company's shareholders. The Claimants' claim is that the Defendant, in breach of fiduciary duty, made secret profits. That includes cases in which the director was alleged to have made a secret profit or taken advantage of an opportunity which should have been acquired by the Company.

128. Mr Lloyd submitted that where the director's breach of duty did not involve the misapplication of company property (as is the case here) s.21(1)(b) did not apply. In such a case the six-year limitation period in s.21(3) applied. I agree, it seems clear to me that those are claims which are governed by the six-year limitation period in s.21(3) not s.21(1)(b). As Mummery LJ said in *Gwembe* at [119]:

> "As the judge recognised, in that case the director transferred to himself property which had previously belonged to the company, and in relation to which he had 'trustee-like responsibilities' before the transaction in question. By contrast, Mr Koshy's liability to account for undisclosed profits, and any constructive trust imposed on those profits, do not depend on any pre-existing responsibility for any property of the company. They arose directly out of the transaction which gave rise to those profits, and the circumstances in which it was made. The fact that Mr Koshy was in a pre-existing fiduciary relationship with the company was not enough, by itself, to bring the case within class 1..."

129. *Lewin on Trusts*, 20th Ed. at 50-062 explained it as follows:

> "Where, say, a director makes an unauthorised profit for himself in breach of his fiduciary duty but without misappropriating or receiving any pre-existing property of the company, the claim against him falls outside paragraph (b); that will be so if the director seeks to obtain a contract in competition with the company or procures the company to enter transactions under which he will obtain a secret benefit."

130. Patten LJ explained it in *First Subsea* at [59];

> The provisions of section 21(1)(b) in respect of the property of the company have no application to cases like the *Gwembe* case where there is no misappropriation or receipt of pre-existing company property but only a breach of duty which gives rise to a constructive trust over (for example) the secret profit. This is because in such cases the director is not a trustee virtute officii in respect of the profit. He has no proprietary relationship with what he acquires other than as the recipient of the proceeds of his breach of duty. He is not therefore in the terms of section 21(1)(b) in possession of trust property.

131. It seemed to me that the Defendant's position, if he had any fiduciary duty at all, was akin to the position identified by Patten LJ in *First Subsea*.

132. However, in order to consider whether Mr Lloyd is right it is necessary to look at the alleged breaches of duty relied on by the Claimants. Mr Lloyd carefully analysed each alleged breach of duty relied on by the Claimants to demonstrate why they did not fall within s.21(1) but in fact fell within s.21(3) giving rise to a six-year limitation period which would mean that each of the claims was time barred.

133. At paragraph 32 of the particulars of claim the Claimants plead:

> "[The Defendant] failed, sufficiently or at all, to make clear to [the Claimants] that in making contributions to the Non-Participating Flats, he was intending to keep all of the benefits and/or profits for himself and, further, he failed, sufficiently or at all, to give other participating tenants, including [the claimants], equal opportunity to make such contributions."

134. This alleged breach, which occurred in 2003, was based on the Defendant having a fiduciary duty not to act in conflict of interest and/or not to act for his own benefit without the informed consent of his principal.

135. The substance of this allegation was that the Defendant was liable to account for profits made by exploiting the opportunity of making profits by the acquisition of the reversionary interest in the non-participating flats without the fully informed consent of all the Participating Lessees including the Claimants. Mr Lloyd points to *Gwembe* as support for his submission that such an allegation is exactly the kind of claim that is outside s.21(1)(b) LA and governed, instead, by s.21(3) or s.36 by analogy.

136. It seems to me that Mr Lloyd is correct in his analysis. The fiduciary duty which the Claimants say the Defendant breached was one owed by him to the Participating Lessees and to the Company's shareholders. The Claimants do not identify any property which was caught by that fiduciary relationship nor do they allege that the Defendant had obtained pre-existing trust property or proceeds from such trust property. I agree that the claim as pleaded falls outside s.21(1) LA and is therefore subject to a six-year limitation period which has expired.

137. At paragraph 36 of the particulars of claim the Claimants plead:

> "The Original Directors failed, sufficiently or at all, to make clear to [Claimants] that in making contributions to the Non-Participating Flats [Defendant] intended to keep all of the benefits and/or profits for himself, and that they intended [Defendant] to keep those benefits and/or profits, or to ensure that other participating tenants, including [Claimants] were given equal opportunity to invest in the Non-Participating Flats…"

138. Here the substance of the allegation was that the Original Directors (which included the Defendant) breached their duties to the Company's shareholders in 2003, by permitting the Defendant to purchase the reversionary interest in the non-participating flats and to keep the profits derived from that contribution. It is therefore alleged that the Original Directors (including the Defendant) acquiesced in an arrangement which permitted the Defendant to make secret profits in breach of trust.

139. Again, the Claimants have not identified any pre-existing trust property or proceeds of trust property obtained by the Original Directors of the Company including the Defendant. Consequently I agree with Mr Lloyd that this claim would also fall outside s.21(1)(b) and is therefore subject to a six-year limitation period which has expired.

140. At paragraph 37 of the particulars of claim the Claimants plead:

> "the Original Directors unlawfully allotted shares in relation to the Non-Participating Flats to Babajit Limited in that they did so otherwise than in accordance with [the Company's] articles of association and without the consent of the shareholders and/or contrary to the interests of the shareholders."

141. This allegation suffers from two problems, first it does not give rise to any claim for relief as the shares were returned as part of the 2007 Settlement and second, there is no pleaded claim that the 11 shares in the Company allotted to Babajit constituted property held on trust by the Original Directors for the Company's shareholders. Again, the Claimants have not identified any misappropriation or acquisition of trust property by the Defendant. The breach arose in 2003 when the shares were allotted. I agree with Mr Lloyd's analysis that this too falls outside s.21(1)(b) for limitation purposes.

142. At paragraph 43 of the particulars of claim the Claimants plead:

> "Instead of consulting with the shareholders as to the steps which should best be taken and as to the wishes of the shareholders, the Subsequent Directors instead entered into the 2007 Agreement, the effect of which was contrary to the best interests and wishes of [Claimants] (and other shareholders) and which was to confirm the entitlement of [Defendant] and/or Babajit Limited to profits derived from the grant of new leases of the Non-Participating Flats at the expense of the other shareholders."

143. This is a claim that a fiduciary duty was owed by the Subsequent Directors to the Company's shareholders but again there is no allegation that the Subsequent Directors held any property on trust for the Company's shareholders nor that there had been any misappropriation or acquisition of such trust property by the Subsequent Directors. This is an allegation about a failure to consult or act in the best interests of the Company in about 2007, not an allegation that the Defendant received property held on trust by the Subsequent Directors for the Company's shareholders.

144. The allegation of a failure to consult is itself curious given the evidence of an EGM referred to above the very purpose of which was to obtain approval from the shareholders to enter into the 2007 Agreement. Mr and Mrs Udeshi sought to suggest that the EGM was not legitimate because there had not been the unanimous consent of all the shareholders and only the Subsequent Directors attended. They did not explain the legal basis for that submission. There appeared to be a misunderstanding. The EGM minutes record who was present including non-directors and they record that there were 23 shareholders of a possible 38 who resolved to approve the entry into the 2007 Agreement. In any event, I agree with Mr Lloyd that the alleged breach of fiduciary duty would not appear to fall within s.21(1)(b) and a six-year limitation period would apply from the date of the alleged breach in 2007.

145. Consequently, all of the pleaded allegations of breach of duty appear to me to fall within section 21(3) LA and be subject to a six-year limitation period. As the causes of action relied on by the Claimants accrued in March and April 2003 and March 2007, they are all now statute barred.

STANDING

146. Save in limited circumstances in order to pursue a claim a claimant needs to have legal standing to do so. The issue of standing/the capacity in which it might be possible to pursue the Defendant was considered by Mr Boyd in his advice in 2005 so it should not have come as a surprise to the Claimants when the issue of standing was raised by the Defendant.

147. The Claimants seek orders that the Defendant should account/pay equitable compensation to the Company and that the Company should thereafter distribute any sums to the Company's current shareholders. The Claimants argue that they are not seeking any orders for their own benefit but are acting either for the benefit of the Company's current shareholders, or for the Company itself.

148. However the claim, as pleaded, is not a class action nor is it a representative action and nor is it a derivative claim and, in any event, there is no permission in relation to either any representative action or any derivative action.

149. Mr Lloyd says that on a proper analysis the claim as pleaded must be that the Defendant is liable to account to the Participating Lessees/Company shareholders (not the Company itself) in respect of the monies received by him/Babajit in respect of the non-participating flats. Such an action would have to be on the basis that the Defendant was a constructive trustee in respect of those monies. On that basis Mr Lloyd submits that the Claimants were highly likely to require permission to bring the claim in a representative capacity pursuant to CPR 19.7(2). No application for permission for the Claimants to act as representatives for the Participating Lessees or Company shareholders has been made.

150. The claim proceeds on the basis that if the claim were successful, any profits or compensation would be paid to the Company to be distributed to the current shareholders not the original 2003 Participating Lessees and/or the Company's shareholders at the time of the 2007 Agreement. However it is the Participating Lessees or the Company shareholders in 2007 who the Claimants say were adversely affected by the alleged breaches. If the claim were successful, as pleaded, it would result in monies being paid to all the current shareholders. Unless, like the Claimants, the current shareholders were also Participating Lessees in 2003 or Company shareholders in 2007, the Defendant would not have owed them any duties at all. Mrs Udeshi acknowledged that the shareholders in 2020 were not the same as those in 2003 and/or 2007. This just highlights the difficulties with the Claimants' claim as pleaded.

151. I further note that the Company, which had been the second defendant, is no longer a party to the claim. This means that there is no jurisdictional basis enabling the court to direct how the Company, now a non-party, should distribute any monies recovered. Even if the Claimants' intention had been to bring a claim for the benefit of all the Company's shareholders and use the Company as a mechanism to distribute the proceeds to those entitled, they would not now be able to achieve that outcome.

152. Mr Lloyd's final points on standing focussed on whether it could be argued that the claim was being brought for the benefit of the Company. If such an argument was sustainable it might have been possible for the Claimants to seek permission to

continue the claim as a derivative action pursuant to s260(1)(a) Companies Act 2006. However, the particulars of claim do not identify any alleged breach of duty said to be owed by the Defendant to the Company which the Claimants could seek pursue on its behalf by way of derivative action.

153. In any event the Company compromised the very claims which the Claimants wish to pursue when it entered into the 2007 Agreement following the resolution at the EGM. There is simply no evidence that any of the other Company shareholders considered that there was a claim against the Defendant and/or one that they wanted to pursue. By the time of the EGM in 2007 the dispute had been widely canvassed amongst the Participating Lessees and the Company shareholders as set out above. Indeed, such evidence as there is, is to the contrary. Any proposed derivative claim would therefore fail at the permission stage.

154. For completeness, Mr Lloyd went on to consider the position in the event the claims were, in substance, vested in the Company. He argued that even if that were the case the Claimants would be precluded from bringing such claims by the rule in *Foss v Harbottle* (the rule against reflective loss). This is the principle that where the Company has suffered a loss by the wrongdoing of another the cause of action vests in the Company not the shareholders who have no legal or equitable interest in the Company's assets.

155. The no standing argument and the reflective loss argument were all points of substance which Mr and Mrs Udeshi simply did not address either in their Reply, skeleton or submissions.

156. Mr and Mrs Udeshi's only response to Mr Lloyd's submissions on standing was to refer to themselves as minority shareholders and to refer me to the passage in their skeleton on minority shareholders which said the following:

> "The directors of a company have no authority to condone the criminal acts of the Defendant.
>
> "It is pertinent to remember, however, that a minority shareholder's action in form is nothing more than a procedural device for enabling the court to do justice to a company controlled by miscreant directors or shareholders. Since the procedural device has evolved so that justice can be done for the benefit of the company, whoever comes forward to start the proceedings must be doing so for the benefit of the company and not for some other purpose. It follows that the court has to satisfy itself that the person coming forward is a proper person to do so." Lord Browne-Wilkinson""

157. Neither Mr nor Mrs Udeshi were able to explain how this assisted them in relation to the claim as pleaded or the position in relation to standing.

158. The claim as pleaded is not a representative action and even if it were, it would be the type of representative action that would require permission. The claim is not a class action or a derivative action. I agree with Mr Lloyd that if the claim were (and it is not) said to be a claim on behalf of, and for the benefit of, the Company, it would fail

at the permission stage for the reasons given above. I find that the Claimants do not have standing to pursue the claims as pleaded.

FAILURE TO COMPLY WITH THE CPR

159. For completeness I consider Mr Lloyd's submissions in relation to what are said to be breaches of the CPR. A failure to comply with the CPR can also be a basis for striking out in its own right in some circumstances or can be an additional factor in considering an application under CPR3.4(2)(b). It would form part of the consideration of all the circumstances in the exercise of the court's discretion.

160. Mr Lloyd reminded me that the Claimants had served the claim on the Saturday before the claim form expired without any pre-action correspondence or a response pack. The Defendant believed this was deliberate in the hope that he would not respond in time. However, service was in time and the Defendant did respond. The Claimants took a risk serving so late, but they were not out of time. The absence of a response pack though an omission was not fatal to service of claim.

161. Mr Lloyd did identify the failure to pay the correct issue fee. The Claimants paid an issue fee of £528.00. Mr Lloyd argued that the fee paid by the Claimants was deliberately too low and the correct fee was £10,000. This had not been addressed by Mr and Mrs Udeshi prior to the hearing even though it has been raised in the Defendant's first application dated 11 August 2019.

162. Mrs Udeshi explained that when issuing the claim she paid what she understood to be the correct issue fee. She explained that when she was told that the claim attracted the higher fee, she contacted Mr Hodgkin who spoke to the issue clerk after which Mrs Udeshi was told that if she deleted the damages claim on the claim form, an issue fee of only £528 would be payable. She therefore deleted the damages claim to avoid the higher £10,000 court fee which she candidly explained she could not pay.

163. However, the deletion of the damages claim does not avoid the need to pay the £10,000 court fee. Where there is a claim for immediate payment on the taking of an account or equitable compensation the fee of £10,000 should have been paid and the incorrect fee has been paid.

164. Where it can be shown that a party has deliberately sought to pay the wrong issue fee that can properly be a basis for considering the strike out of a claim. Here however, in light of Mrs Udeshi's explanation it appears clear that the failure to pay the £10,000, though deliberate, was not intended to avoid payment of the correct issue fee. In those circumstances I am not satisfied that the failure to pay the £10,000 can be said to be deliberate in a culpable sense that would attract the sanction of strike out.

165. I will therefore dispose of this point shortly. I agree with Mr Lloyd that the incorrect fee has been paid. The balance of authority weighs in favour of payment of the wrong issue fee alone not invalidating proceedings in the absence of deliberate wrongdoing. I am not persuaded there was deliberate wrongdoing given Mrs Udeshi's explanation. If the proceedings were to be allowed to proceed the additional fee would, however, have to be paid.

166. I accept that in this case there is also the failure to provide the response pack but that caused the Defendant no prejudice, he was able to acknowledge service and issue his application to strike out.

CONCLUSION

167. I have set out the legal principles applicable to an application for summary judgment and strike out above. This is precisely the sort of claim where the court should grasp the nettle and determine the application on a summary judgment basis where the issues of limitation and standing are determinative and objectively it is difficult to see what additional evidence or documents could emerge that would have any significant impact on those two issues.

168. At the heart of the submissions advanced by the Claimants is the unpleaded allegation that the Defendant's acquisition of the reversionary interest in the non-participating flats was concealed or "hushed up". However, it is clear that the assertions made by the Claimants do not stand up to scrutiny. There can be no doubt at all that the Claimants had all the material information and knowledge necessary to have commenced any claim against the Defendant in 2003 or at latest in 2007. However, the pleaded claim is in fact based on alleged breaches of fiduciary duty in 2003 and 2007 in any event and not on fraud, concealment or similar. The applicable limitation periods were for the reasons set out above six-years from the date of the alleged breaches in 2003 and 2007 and have long since expired. The claims are all time barred.

169. This is a claim brought by the Claimants on the basis that they are seeking to obtain equitable compensation, or an account of the profits made by the Defendant so that those monies can be paid into the Company, which is no longer a party to the claim, and for the Company to then distribute that to the current shareholders of the Company. Again, for the reasons set out above the Claimants do not have standing to bring those claims. The claims have additional difficulties highlighted above following the discontinuance of the claim against the Company.

170. When considering an application for summary judgment the court must consider all the circumstances including the overriding objective and the need to deal with cases justly, efficiently and at proportionate cost. This includes considering the impact on the unrepresented Claimants and balancing that against the prejudice to the Defendant if the claim were to continue.

171. I remind myself that whilst the Claimants are unrepresented, the claim and particulars of claim were drafted by Mr Hodgkin and the Claimants relied upon the advice of Mr Boyd from 2005.

172. Mr Udeshi had carefully researched the limitation issues and Mr and Mrs Udeshi had prepared their own bundle of authorities and set out the legal principles and authorities they relied on in opposition to the Defendant's applications. They brought copies of the authorities to court and identified specific passages they wanted the court to consider.

173. However, I accept that there is a difference between being able to articulate the legal principles on which you intend to rely and applying it to the facts of your own case.

On this occasion, Mr and Mrs Udeshi have not succeeded in persuading me that the Claimants' claim has a real as opposed to fanciful prospect of success.

174. I am satisfied that the limitation arguments and the standing arguments are so clearly against the Claimants that even though Mr and Mrs Udeshi make serious allegations, which they hold firmly, for the reasons set out in this judgment there cannot be any reasonable expectation that further documents will emerge at trial or that a fuller investigation of the facts would add to or alter the evidence available on the issue of limitation that would alter the position as a matter of law. I am not persuaded that there is any prospect of the Claimants being able to resolve the difficulties they face in relation to standing.

175. To allow the claim to continue serves no useful purpose where it is plain that the limitation periods have expired on any analysis and the Claimants have no standing, it will simply cause all the parties to incur further unnecessary costs and waste court resources in circumstances where the outcome is inevitable.

176. For the reasons set out in this judgment I do not consider that the Claimants' claims against the Defendant have any prospect of succeeding at trial let alone a real one. They do not appear to have any substance to them and are bad at law and entirely fanciful. There is no other compelling reason why the claim should be allowed to continue, and it is therefore neither inappropriate nor unjust to make an order for summary judgment.

177. I find therefore that the Defendant is entitled to summary judgment on the claim.