Claim No. BL-2020-001343

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

B E T W E E N:

(1) LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION)
(2) FINBARR O'CONNELL, ADAM STEPHENS, HENRY SHINNERS, COLIN HARDMAN AND GEOFFREY ROWLEY (JOINT ADMINISTRATORS OF LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION))
(3) LONDON OIL & GAS LIMITED (IN ADMINISTRATION)
(4) FINBARR O'CONNELL, ADAM STEPHENS, COLIN HARDMAN AND LANE BEDNASH (JOINT ADMINISTRATORS OF LONDON OIL & GAS LIMITED (IN ADMINISTRATION))

Claimants

-and-

(1) MICHAEL ANDREW THOMSON
(2) SIMON HUME-KENDALL
(3) ELTEN BARKER
(4) SPENCER GOLDING
(5) PAUL CARELESS
(6) SURGE FINANCIAL LIMITED
(7) JOHN RUSSELL-MURPHY
(8) ROBERT SEDGWICK
(9) GROSVENOR PARK INTELLIGENT INVESTMENTS LIMITED
(10) HELEN HUME-KENDALL

Defendants

FIRST DEFENDANT'S WRITTEN SUBMISSIONS

For the trial listed for 22 weeks, commencing on 29 January 2024

Section A. Introductory Matters

i) Introduction

1. This Skeleton Argument is produced on behalf of the First Defendant (**"D1"**). It is prepared for the trial listed for 22 weeks, starting on 29 January 2024. This skeleton argument is prepared in response to the Claimants' claims against D1. The Claimants are also pursuing claims against the Second and Fourth to Tenth Defendants.

2. The parties have agreed a trial timetable (which was approved by the court at the PTR on 20 November 2023) setting out how they intend to use the allocated court time (**"the Trial Timetable"**). This Trial Timetable includes a two-week reading period to enable the Court to "read in" to this matter **[A1/11]**. ¶8 of this Skeleton Argument sets out the documents that D1 would invite the court to read during this period under the heading "*Reading List"*.

3. The final arrangement of bundles is not yet complete but what is clear is that the scale of (i) the pleadings, (ii) the witness evidence and (iii) the documentation in this matter is extensive. According to the Trial Timetable, as well as 4 weeks set aside for opening arguments, the court will hear 9 weeks of witness evidence. The court is reminded that the administrators have already spent over £60 million on the administrations of LCF and LOG.[1]

4. In those circumstances it has not been possible to produce an exhaustive and comprehensive summary of D1's position in this Skeleton Argument. D1's position has already been set out in detail in the Amended Defence filed on 17 April 2022 **[B2/1]**.

5. Rather, this skeleton argument is intended only as a "skeletal" summary of D1's position generally in order to assist the court in finding a way through the material before it. In order to do this, this skeleton refers to salient documents and makes submissions on key legal principles which, it is submitted, the court should have in mind during the process of "reading in" to this matter, as well as during the opening submissions, which are due

[1] Cs' Written Opening Submissions, ¶P2.3, P2.20

to be heard between 29 January 2024 and 22 February 2024 according to the Trial Timetable.

6. The Claimants' claims arise following the collapse into administration of London Capital & Finance Plc ("**LCF**") on 30 January 2019. At all material times D1 was a director of LCF. In very short summary:-

(1) The Claimants who bring claims against D1 are LCF, and the administrators of LCF. They now bring claims against D1 for:-

(i) Fraudulent Trading, pursuant to s.246Z of the Insolvency Act 1986 (the **"IA 1986"**);

(ii) Breach of statutory and/or fiduciary duties, as a Director of LCF;

(iii) A claim for Knowing Receipt of certain sums, which are said to be the traceable proceeds of sums belonging to LCF; and

(iv) Dishonest assistance.

(2) D1 denies each and every claim against him. This is set out in detail in the ADefence. However, in summary D1's position is, as set out at ¶3 of the ADefence:-

(i) D1 denies all allegations of wrongdoing, including all allegations of dishonesty, fraudulent conduct, breach of duty, and knowing receipt.

(ii) LCF did not engage in any illegitimate business activities, as alleged or at all. It carried on a legitimate business which involved raising money through the issuance of Bonds and the lending of those monies in *bona fide* transactions on commercial terms;

(iii) At all material times LCF's lending was adequately secured. By way of example, LCF's loans to London Oil and Gas (**"LOG"**) were adequately

secured by an all-assets charge over LOG. LOG's loan to IOG (which is accepted by the Claimants to be a genuine loan) was convertible to a share of about 50% in IOG). IOG was a listed company with substantial assets in the form of oil and gas reserves under the North Sea;

(iv) Save for LCF's parent company, London Financial Group Limited, none of LCF's borrowers were connected with or controlled by LCF. Indeed, to the extent that the Claimants seek to claim such a connection by virtue of the fact that D1 held shares in some of the companies that borrowed sums from LCF, it is important to remember that any such interest held by D1 was limited to a 5% beneficial interest and D1 had no control of those companies whatsoever. Indeed, D1's interest in these companies was recorded in LCF's conflicts of interest register and disclosed to all directors of LCF;

(v) LCF's board of directors included several directors in addition to D1. However, none of them have been made defendants to this claim;

(vi) Relevant documentation, including loan documentation and security documentation, was drafted by LCF's external lawyers, Buss Murton Law LLP ("**Buss Murton**"), who were also in charge of the execution of the same;

(vii) LCF's affairs, including its bank accounts, were subject to monthly scrutiny by its external accountants, Oliver Clive and Co ("**Oliver Clive**");

(viii) LCF's accounts were audited by reputable auditors: (a) Oliver Clive on 6 November 2015, (b) PwC on 10 October 2016 and (c) EY on 14 February 2018. Each of them had access to LCF's conflicts of interest register, the loan documentation, the security documentation, asset valuations register and all other relevant documentation. Those accounts were unqualified;

(ix) To the extent that certain companies which had borrowed monies from LCF have gone into administration or liquidation, this is a direct result of LCF, their lender, having been intervened in by the FCA and having subsequently gone in to administration. None of LCF's borrowers had defaulted prior to

the FCA's intervention nor had LCF defaulted as regards any of the Bondholders;

(x) LCF was regulated by the Financial Conduct Authority (the "**FCA**"), albeit the Bonds themselves were not regulated investments; and

(xi) To the extent that D1 received monies which had originated from LCF, such monies were legitimately paid and received, either by way of remuneration from LCF, or pursuant to an entitlement under a 2015 Share Purchase Agreement (details of which are set out below).

ii) Pre-Reading

7. As set out above, the court has a two-week period in which to pre-read in advance of the start of the hearing. The court is invited to read the documents set out below. This is not an exhaustive list of the documents on which D1 will rely at Trial, and D1's right to provide a further "road map" to the location and content of key documents in the Trial Bundles is reserved. If such a document is to be produced it will be provided at the time of D1's opening submissions, as provided for in the Trial Timetable in the week commencing 19 February 2024.

8. That being said, time permitting the Court is invited to read the following documents in the following order during the two week period allocated for Judicial Pre-Reading:-

(1) This Skeleton Argument.

(2) The pleadings, and in particular:-

(i) The Re-Re- Amended Particulars of Claim dated 20 May 2022 (**"the RRAPoC"**);

(ii) The Re-Amended Defence of the First Defendant dated 17 April 2022 **("D1's ADefence"**); and

(iii) The Claimants' Amended Reply to D1's ADefence dated 4 May 2022 (**"the Reply"**).

(3) The Cs' opening Submissions. These run to some 300 pages of prolix pages and appear to be an attempt to further re-amend and recast the Claimants' *already* Re-Re-Amended claim a yet further time so as to try skirt around the flaws in the claims against D1.

(4) The Third Witness Statement of Michael Andrew Thomson dated 24 November 2023 ("**D1's WS**").

iii) D1's Health

9. The court has already been alerted to D1's mental health issues, and in particular the Court is reminded of D1's ongoing mental health issues (which have already been the subject of confidential exhibit to the First Witness Statement of Richard John Slade dated 22 August 2023).

10. Further, on Friday 29 December 2023, D1 underwent an emergency operation on his spine which lasted for around 5 hours. The operation could not wait until after this trial because D1 was warned that if he did so he was at risk of spending the rest of his life in a wheelchair.

11. The Trial Timetable provides for D1 to give his evidence on 29 February 2024 to 11 March 2024. It is hoped that these health issues will not impact on the smooth running of the Trial and that D1 will be able to give evidence in accordance with the Trial Timetable. We will, of course, keep the court appraised of any change in D1's condition which might require us to ask for his evidence to be given at a later stage in the trial than that envisaged by the current timetable.

Section B. Background

12. D1 was a successful relationship director for RBS bank working at its Tunbridge Wells Branch having held the same position at its Charing Cross Branch following an earlier career at Nat West Private Banking before moving to Bristol and West and HBOS.

13. LCF was incorporated on 12 July 2012. At the time, it was named South Eastern Counties Finance Ltd. In his evidence, D1 explained that the company had been incorporated as a vehicle for a local bank that would focus on lending to businesses in Kent, Essex and East Sussex. After resigning from his position at RBS, the project fell through when in January 2013 Kent and Essex pulled out of the project.[2]

14. After the county bank project had fallen through D1 was introduced to Spencer Golding (D4) through Simon Hume-Kendall (D2). Mr Hume-Kendall and Mr Golding had set up a company, London Country Club Limited ("**LCCL**") to purchase a holiday resort in Cornwall. D1 was allotted 5% of the shares in LCCL and became a director.[3]

15. LCCL issued, through HYPA Asset Management, a minibond to fund the project. However, this was not as successful as had been hoped. Consequently, the LCCL project remained underfinanced.[4]

16. At around the same time, another company, Sanctuary International PCC ("**Sanctuary**") also purchased rights in two properties in the Dominican Republic known as 'The Hill' and 'The Beach'. Mr Hume-Kendall and Mr Golding also made a deal in relation to a site in the Cape Verde Islands known as Paradise Beach.[5]

17. To finance each of these property investments LCCL decided to issue minibonds. To help with this, Mr Golding introduced John Russell-Murphy. Mr Russell-Murphy wrote a bond that was issued by Sales Aid (Finance) England Ltd ("**SAFE**") (the new name for South Eastern Counties Finance Ltd). SAFE started to lend to Sanctuary (or its parent)

[2] D1's WS, ¶11
[3] D1'S WS, ¶14-16
[4] D1's WS, ¶17
[5] D1's WS, ¶18-19

towards the end of 2013 and this continued through to July 2015. D1's evidence is that so far as he is aware those loans have been fully repaid.[6]

18. In around July 2015 D1 came up with the idea for LCF and he decided to leave LCCL. On 15 July 2015 a memorandum of understanding and a share purchase agreement were signed (the "**Lakeview SPA**"). By the memorandum of understanding it was agreed that D1 would continue to hold his 5% but he would take no part in the running of the business and, if necessary, would vote his shares as directed by the others. By the Lakeview SPA, D1 agreed to sell his shares to Mr Hume-Kendall and Elten Barker for a price that reflected the realised valued of the business over the next 5 years capped at £5 million.[7]

19. Aside from a brief overlap of a few weeks, from the summer of 2015 D1's involvement in LCCL was terminated and he ceased to be involved in that companies and the other property companies that had been set up by Mr Hume-Kendall and Mr Golding.[8]

20. D1's idea for LCF (the new name for SAFE) was that it would be an asset based lender. During his career working for various banks, D1 realised that there was a gap in the lending market whereby companies would fail or be let down by banks as a result of no funding being available, inadequate facilities being advanced or due to restrictions on the facilities that were being advanced.[9] To get this business off the ground, Mr Hume-Kendall agreed to support D1 through, for example, payments on account of the money owed under the Lakeview SPA.[10]

21. D1, therefore, wanted to lend to businesses based on the security of their assets and to take a commercial view about the funds that those companies needed to survive and grow. D1 decided that LCF could fill this gap in the market by lending to businesses on competitive commercial terms.[11]

[6] D1's WS, ¶21
[7] D1's WS, ¶24
[8] D1's WS, ¶26
[9] D1's WS, ¶27
[10] D1's WS, ¶28
[11] D1's WS, ¶32(2)

22. It is said against D1 that LCF was a Ponzi Scheme from the outset. D1 strongly refutes this. He says that he would "*never set up a business for the purpose of defrauding other people*".[12]

23. LCF was a legitimate business from its inception and throughout. LCF relied on reputable advisors including:[13]

    (a) Lewis Silkin, who advised on regulatory matters and wrote investment documents;

    (b) Buss Murton prepared and oversaw the execution of lending documents;

    (c) Sentient Capital who were LCF's authorised firm under the Financial Services and Markets Act 2000;

    (d) Surge Financial Limited, D6, to who LCF outsourced its distribution and compliance. Surge charged a fee representing 25% of all funds raised. D1 interviewed 2 other companies who charged similar amounts so believed that this was the industry norm.

    (e) Global Currency Exchange Network ("**GCEN**") who provided an escrow service and held bondholder money for the period between its receipt and completion and issuance of the bond. GCEN charged 0.5% of the funds processed.

24. It is a central tenet of Cs' case against D1 that the loans that were made by LCF were essentially a façade for the alleged 'misappropriations' by the defendants. It is notable that Cs do not go so far as to positively assert that the loans were shams, this issue is considered in ¶157 to 167 below.

25. D1 explains that the money loaned by LCF and the loan documentation is genuine and reflects the transactions entered into by the parties.

[12] D1's WS, ¶30
[13] D1's WS, ¶33

26. D1's evidence about the payments he has received is clear. He has provided detailed evidence of the payments he has received from LCF, as well as from other sources (assisting the court by providing a breakdown of these payments in Schedule form). In each case he has provided a straightforward explanation about the source of these funds and the reason for the payments. He addresses these payments at ¶156 to 171 of D1's WS. The court is invited to read those paragraphs of the witness statement for a full explanation of the sums that D1 has received. The breakdown is addressed in ¶131 below.

27. Cs' pleaded case places D1 at the centre of this alleged fraud. However, taken to its logical conclusion, Cs' pleaded case is that D1 risked his professional reputation and comfortable middle-class life only to benefit to a much lesser extent than the D2 and D4. To cure that issue, it is now Cs case (or at least appears to be) that D1 was acting as a nominee for D2 and D4. Indeed, Cs allege that '*D4 was in charge'*,[14] '*D2 […] took charge when D4 was unavailable*'[15] and '*D1 was subservient to D4, who had the power to overrule him*'.[16]

28. The FCA raid on LCF's offices on 10 December 2018 was concerned with ISAs and bonds although the information and document request also included matters relating to the Company's loan book.[17] The collapse of the Company that followed was swift and inevitable despite the fact that successive audits had looked at the security LCF had taken for its loan book and signed off clean audit reports.[18]

[14] Cs' Written Opening Submissions, ¶C4.5
[15] Cs' Written Opening Submissions, ¶C4.5
[16] Cs' Written Opening Submissions, ¶C4.15
[17] D1's WS, ¶142
[18] D1's WS, ¶129, 136

Section C. The Claimants' Attempt to Depart from their Pleaded Case

29. Cs' pleaded case is set out in the RRAPoC and in the Reply. In those documents, Cs allege that D1 is liable pursuant to a number of different causes of action, namely:-

(1) Fraudulent Trading, pursuant to s.246ZA of the IA 1986. These allegations are pleaded as follows:-

(i) Section B alleges that LCF made a series of representations which were made in order to "*induce members of the public to become Bondholders"*. These representations are pleaded at ¶7 of the RRAPoC and the subparagraphs thereto;

(ii) Section E of the RRAPoC sets out the allegations around Fraudulent Trading and in particular the allegation that the representations made by LCF were false, see especially ¶21 and 22 and the subparagraphs thereto;

(iii) Section F of the RRAPoC sets out the alleged participation of the First to Eight Defendants, see especially ¶23 to 31;

(iv) Section G (the first section referred to as "G", as the RRAPoC contains two sections referred to as "G") sets out the alleged knowledge of the First to Eight Defendants, see ¶32 to 48;

(v) Section G (the second section referred to as "G") sets out a summary of the claim in fraudulent trading, see especially ¶49 to 54;

(2) Breaches of Directors' Duties. These allegations are made in short (and unparticularised) form in ¶56 of the RRAPoC. As set out below, this pleading is poor;

(3) Constructive Trustee/Knowing Receipt. This allegation is pleaded in Section J of the RRAPoC between ¶64 to 89. The allegations against D1 are pleaded at ¶66 and

67 only. This claim is not only insufficiently particularised, but also (even when taken at its highest) is bound to fail, as set out in detail at ¶126 to 167 below;

(4) Dishonest Assistance. These allegations are pleaded at ¶90 and 91. To the extent that these claims relate to D1 the full extent of the pleading is that "*Mr Thomson… dishonestly assisted Mr Golding to breach his duties to LCF…"* and this caused loss and damage to LCF and as such he "*should be ordered to pay equitable compensation…"*. This pleading is patently insufficient.

30. D1's responses to each of these claims are set out in detail below in Section D of this Skeleton Argument.

31. However, at the outset D1 wants to draw the court's attention to the fact that the case against D1, as presented in Cs' written opening submissions dated 15 December 2023, has departed from Cs' pleaded case in a number of key respects:-

(1) First, it raises for the first time the possibility that D1 was acting as a nominee for D2 and D4;[19]

(2) Second, it substantially recasts some of the pleaded representations; and

(3) Third, it appears to desert (or pursue with substantially less vigour) other pleaded representations.[20]

32. It is submitted that such changes in Cs' case against D1 are not merely cosmetic nor are they insubstantial. Rather, this is a blatant attempt to depart from Cs' pleaded case and fundamentally alter the issues between Cs and D1.

[19] Cs' Written Opening Submissions, §C4 – in particular ¶C4.14 et. Seq.
[20] Cs' Written Opening Submissions, §K3

The Law

33. The court has provided significant guidance to parties in relation to the circumstances where one party has sought to develop its case during the course of submissions (often written opening submissions, as in this case) without amending its statement of case.

34. The starting point is to consider the purpose of a parties' statement of case. This was considered in *King v Stiefel* [2021] EWHC 1045 (Comm), by Mrs Justice Cockerill at [145]-[148]. It is notable that this part of the Judgment has been repeated in the Chancery Guide at ¶4.7. In those paragraphs Mrs Justice Cockerill identified three purposes which are served by a statement of case, namely:-

    (1) It enables the other side to know the case it has to meet;

    (2) It ensures that the parties can properly prepare for trial, and that unnecessary costs are not expended and court time required chasing points which are not in issue or which lead nowhere; and

    (3) The process of preparing the statement of case operates (or should operate) as a critical audit for the claimant and its legal team that it has a complete cause of action.

35. In *King* Mrs Justice Cockerill cited from the judgment of Lord Justice Christopher Clarke (with whom Lady Justice Sharp agreed) in *Hague Plant v Hague* [2014] EWCA Civ 1609 which set out at [78] that:-

> *"Pleadings are intended to help the Court and the parties. In recent years practitioners have, on occasion, lost sight of that aim. Documents are drafted of interminable length and diffuseness and conspicuous lack of precision, which are often destined never to be referred to at the trial, absent some dispute as to whether a claim or defence is open to a party, being overtaken by the opening submissions. It is time, in this field, to get back to basics."*

36. The issue of unpleaded allegations being raised in written opening submissions (as in the instant case) was considered by the Court of Appeal in *Smith v Bottomley* [2013] EWCA Civ 953. In that case the Claimant had not pleaded a claim for an account following the sale of a property. The Claimant was successful at trial and the Defendant appealed on the basis that, *inter alia*, the Judge was wrong to make an order concerning the proceeds of sale of that property in circumstances where the issue was not pleaded. The appeal was allowed.

37. Lord Justice Lloyd (as he then was) gave a short concurring judgment in which he rejected, as being unacceptable, the idea that setting out the claim in a witness statement was a sufficient substitute for a pleaded case, and went on to set out at ¶70 that:-

> "[The Claimant's] *claim having been set out reasonably clearly in the Particulars of Claim, any additional claim should have been brought into line, in terms of procedure, by amending the Particulars of Claim so as to make all relevant allegations, thereby putting the matter firmly and clearly in issue, with the consequences as regards evidence and disclosure that this would have."*

38. Further, Lord Justice Lloyd rejected, at ¶71, a submission based on ¶79 of the Judgment in *Lombard North Central plc v Automobile World (UK) Ltd* [2010] EWCA Civ 20, where Rix LJ suggested that the court should not adopt an inflexible approach to the question of whether or not a particular unpleaded issue may or may not be the subject of investigation at trial. Whether this was appropriate, it was said, depended on whether both sides turned up at court ready to deal with the issue despite its omission from the pleadings.

39. Finally, Lord Justice Lloyd held, at ¶72, that the procedural irregularity may not have mattered if it could be shown that the Defendant suffered no prejudice from the failure to properly plead the issue.

Analysis

40. It is apparent from Cs' written opening submissions that they need to try to depart from their pleaded case. They have sought to do this without seeking the court's permission and without making any application to amend.

41. To allow Cs to rely on their case as put forward in their written opening submissions would render Cs' pleadings (as they currently stand) largely defunct. Cs are attempting to alter their case at the eleventh hour, such that their pleadings would no longer conform to the three purposes identified by Cockerill J in *King*:-

    (1) Cs' RRAPoC does not set out the case that C *now* wants D1 to meet. As such, based on the RRAPoC alone D1 is unable to know the case he has to meet; and

    (2) D1's ability to prepare for trial has been seriously affected by these late departures from Cs' pleaded case. Those departures have caused the issues between Cs and D1 to develop far beyond those which D1 has addressed and covered in his disclosure and witness evidence.

42. This substantial alteration in Cs' case is all the more grievous in circumstances where not only have Cs had ample opportunities to amend their pleadings to reflect any changes to their case against D1, but Cs have actually availed themselves of just such opportunities: Cs have amended their particulars of claim on three occasions yet have not pleaded the issues on which they now seek to rely (or at the very least not pleaded them in the way they are presented in the Cs' written opening submissions).

43. As a result, D1 has been substantially prejudiced by Cs' failure to properly particularise its case in the RRAPoC. If Cs had done so, D1 would have had the opportunity to consider these new issues and prepare written evidence responding to the new claims advanced against him.

44. Furthermore, the suggestion that D1 was acting as D2 and/or D4's nominee is entirely novel; it appears to have come about in response to a point raised by D1's solicitor, Mr Slade, during a hearing on 19 September 2023 and referred to in Mr Slade's First Witness

Statement dated 22 August 2023. At that hearing, Mr Slade set out the logical improbability that D1, having had a successful career at reputable banks (as set out above) and benefitting from a good professional reputation and a comfortable middle-class life would risk throwing that away, risking not only civil sanctions but also criminal sanctions in order to allegedly facilitate other individuals, in this case D2 and D4, to misappropriate the lion's share of LCF's money. Therefore, and in attempt to plug the gap in their case, Cs have come up with the suggestion that D1 was acting as a nominee. Plainly, D1 has not had the opportunity to properly consider this allegation and it is not part of Cs' pleaded case against him.

45. For the reasons highlighted above, it is submitted that D1 is clearly prejudiced by the very late departure from Cs' pleaded case. These alterations, advanced by way of written submissions alone, should not be permitted. The Court of Appeal has made it clear (as set out above) that it is inappropriate for a party to introduce new issues by way of submissions which go beyond their pleaded case at such a late juncture and in circumstances where there is clear prejudice to the relevant defendant.

46. Therefore, it is submitted that either:-

(1) Cs should only be entitled to advance the case as pleaded in their RRAPOC; or

(2) Alternatively, if Cs are no longer content to proceed with the case pleaded in their RRAPOC, then they must apply to amend to plead these new issues and allegations which they now seek to advance in their written opening submissions. Of course, this would likely result in an adjournment and a delay the Trial Timetable as D1 will need to re-amend his defence. If Cs proceed with this option, then Cs will bear the costs of such an adjournment (as it would be their late amendment application which will have necessitated such an adjournment). The blame for such an unfortunate situation would plainly rest at Cs' door.

Section D. D1's Responses to the claims brought against him

i) Fraudulent Trading

47. The main claim brought against D1 is one of fraudulent trading.

The Law

48. Fraudulent trading is a tort created by section 246ZA of the IA 1986. That section provides that:-

> *"If while a company is in administration it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.*
>
> *"The court, on the application of the administrator, may declare that any persons who were knowingly parties to the carrying on of the business in the manner mentioned in subsection (1) are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."*

49. The elements of a claim of fraudulent trading are set out in *Morris v State Bank of India* [2003] BCC 735 as:-

(1) The business of the company has been carried on with the intent to defraud creditors;
(2) The participation in that by the particular Defendant; and
(3) Knowledge of the fraud by that particular Defendant.

Analysis

50. As set out above, LCF issued a series of Minibonds to the public. These bonds were purchased by Bondholders who paid sums to LCF in return. LCF then used the revenue raised from the sale of these bonds to make loans to a number of businesses.

51. Cs now allege that this activity was fraudulent on the basis that:-

(1) Bondholders were induced to purchase the Minibonds from LCF in reliance on a series of misrepresentations, which were (so the Claimant alleges) (i) untrue; (ii) were known to be untrue by the Defendants, and (iii) made solely for the purpose inducing the Bondholders to purchase the Minibonds and so pay cash to LCF; and

(2) Upon receipt of this money from Bondholders, LCF would then divert this money from LCF and into the hands of the Defendants; and

(3) D1, as well as the other Defendants, knew and participated in this fraud.

52. Cs allege at ¶11 of the RRAPOC that £136,189,713.76 of Bondholder Monies were received by the First to Tenth Defendants.

53. As such, the crux of Cs' claim is that LCF's business was set up for the purpose of defrauding Bondholders by diverting Bondholder money into the hands of the Defendants, as pleaded at ¶10 of the RRAPOC. D1 denies this allegation in clear and unequivocal terms at ¶19 of the ADefence, which provides:-

(1) At ¶19.1 that "*LCF's business was carried on legitimately and in good faith at all times"*; and

(2) At ¶19.2 that "*It is denied that any monies paid to LCF by Bondholders have been misappropriated…"*

54. Further, Cs' case is that this allegedly fraudulent scheme was concealed behind a series of loan agreements, which Cs now contend were put in place merely to provide a façade of legitimate business activity. They set out:-

(1) At ¶14 of the RRAPOC that "*the fact LCF's business was carried on with the intent to defraud Bondholders was concealed through the making of loans by LCF to various companies purportedly in bona fide arm's length transactions [per] the*

business model that LCF had described to bond-holders"' where 'in reality, those borrowers were connected with and/or controlled by certain of Ds"[21]; and

(2) At ¶17 of the RRAPOC that *"the loans were put in place to create a façade of legitimate business activities in order to conceal the fact that LCF's business was carried on with the intent to defraud bondholders"*[22]

55. Cs allege that loans totalling £234,038,444.09 were made to borrower companies that were connected with and/or controlled by the Defendants.[23] Further, Cs' say that '*LOG made loans to various companies purportedly in bona fide arm's length transactions*'[24]

56. D1 denies these allegations. At ¶21.1 of the ADefence D1 sets out:-

"*...LCF intended to carry on, and did carry on, legitimate business through the making of loans in bona fide transactions on commercial terms, in accordance with the business model described to the Bondholders. The loans by LCF were not intended to conceal anything and did not conceal anything; there was nothing to conceal."*

a) LCF's Lending Activity

57. Notably, Cs do not challenge the legitimacy of the loans made by LCF or LOG. However, Cs seek to suggest that these legitimate loans were intended to disguise LCF's alleged Fraudulent Trading. Certainly, Cs do not plead a positive allegation that (contrary to the terms of the loan agreements) there was no real intention that they would ever be repaid.

58. Therefore, a central question in determining whether Cs' allegation of Fraudulent Trading is made out will be for the court to ascertain whether the loans made by LCF and LOG were (i) merely a "*façade…to conceal the fact that LCF's business was carried on with the intent to defraud bondholders"*[25] or (ii) whether, more realistically, "*LCF [carried*

[21] RRAPoC, ¶14
[22] RRAPoC, ¶17
[23] RRAPoC, ¶14
[24] RRAPoC, ¶16
[25] RRAPoC, ¶17

on] legitimate business through the making of loans in bona fide transactions on commercial terms, in accordance with the business model described to the Bondholders".[26] It is significant that Cs characterise the transactions as loans rather than misappropriations.

59. It is submitted that Cs' case that the loans (pleaded at ¶14 and 16 of the RRAPoC) were a "*façade"* is built on speculation and inference. This is abundantly clear at ¶17 of the RRAPoC, where Cs seek to set out their "*particulars*" of that allegation. Bluntly, the 16 subparagraphs purporting to be particulars, are little more than a list of circumstances which Cs now say the court should (i) treat as suspicious, and (ii) use such suspicion as the basis to infer that the loans were only made to create a "*façade"*.

60. Conversely, D1's case is straightforward and clear. It is supported by a weight of evidence, not only from within LCF but also from external auditors. The simple point is that these loans were legitimate business loans made by D1 for good commercial reasons and for the benefit of LCF:-

(1) First, this is set out in detail in the ADefence:-

(i) D1 has pleaded to each and every loan made by LCF which has been impugned by Cs at ¶14 of the RRAPoC. The explanations and commercial justifications for these loans are pleaded at ¶23 to 35;

(ii) D1 is unable to plead to the allegations around the LOG loans, as he had nothing to do with that company and its loan book; and

(iii) D1 has pleaded in detail to each of the so-called "*particulars*" relating to the allegation that the loans were a "*façade"* at ¶38 to 53B. Notably:-

a. As pleaded at ¶38.1 of the ADefence, D1 asserts that "*All loans made by LCF were made in good faith and in pursuit of LCF's legitimate business activities"*;

[26] ADefence, ¶21.1

b. As pleaded at ¶38.2 of the ADefence D1 denies that "*the matters alleged in the sub-paragraphs [being the so-called "particulars"], to the extent admitted or proved, support the inference which is sought to be drawn"*; and

c. All allegations that the loans were entered into to create a façade are denied across 10 pages of detailed pleading.

(2) Second, D1's witness statement explains the genesis of LCF, the development of LCF as a business, and notably provides a detailed explanation about LCF's business model, and the fact that D1 had intended to use LCF to make a series of loans to companies which had strong asset positions. The loans now complained of are loans to companies with just such strong asset positions. The court is invited to read ¶59 to 71 of that witness statement, which relates to the loans granted by LCF;

(3) Third, D1's witness statement sets out detailed explanations for each of the loans that LCF made in the period between July 2015 and 10 December 2018 **[D1/WS para 100]**. In particular:-

(i) At ¶100 D1 sets out the 15 entities which D1 advanced sums to under the terms of loan agreements;

(ii) At ¶101 D1 goes on to explain that:-

> "*Each loan was to a separate business backed by security, independently valued and to an LTV not exceeding 75% per the terms of the documentation issued to the public. No complaint is made, as far as I understand it, as to the quality of the loan and security documentation. The Complainant's complaint in these proceedings, as I understand it, arises from the fact that I knew the people concerned with the borrowers and had my 5% carried interest in them (though, as I have explained, I paid no part in their affairs whatsoever). But as I have explained above, and will explain in more detail below, it was*

explained in the information memoranda that sources of borrowers would include the directors' personal contacts. Moreover, any possible conflict was appropriately handled by my declaring my interest and stepping back from LCF's internal risk committee processes…"

(iii) At ¶110 to 114 D1 explains the LCF loan to L&TD of £25 million in August 2015, and in particular that the loan was advanced secured against assets that more than comfortably covered the lending;

(iv) At ¶115 D1 explains the LCF loan to Spencer Golding of £2 million in November 2015, and in particular that the loan was advanced as a stocking loan secured against all of his assets;

(v) At ¶116 to 119 D1 explains the LCF loan to LOG of £20/25 million in March 2016, and in particular that that loan was secured against LOG's share of IOG's valuable assets;

(vi) At ¶120 D1 explains the aborted loan that LCF had intended to make to Express Charters Limited;

(vii) At ¶121 to 123 D1 provides explanations as to the loans that LCF made to (i) Colina Support Limited in the sum of £5.5/7.5 million; (ii) Cape Verde Support Limited in the sum of £7 million; (iii) Costa Support Limited in the sum of £7 million; (iv) Atlantic Petroleum Support Limited in the sum of £16.4 million and (v) Waterside Support Limited in the sum of £5 million. These were not new loans but simply restructuring of existing debt. No new money passed;

(viii) At ¶124 to 126 D1 provides explanations as to the loans that LCF made to (i) CV Resorts Limited in the sum of £20 million; (ii) Colina Property Holdings Limited; (iii) Costa Property Holdings Limited in the sum of £20 million and (iv) Waterside Villages Plc in the sum of £20 million;

(ix) At ¶127 to 128 D1 provides an explanation of the loan to River Lodge Equestrian centre of £10/20 million in 2017. This loan was secured by way of an all asset charge;

(4) Fourth, D1's witness statement makes clear that LCF's auditors considered these loans and provided LCF with a "*clean audit report*".[27] Details of the audit process and how the auditors reached their conclusion is set out in ¶129 to 138 of D1's witness statement. In particular at ¶131 and 132, D1 notes that:-

> "*[the auditors] had unfettered access to our bond book, our loan book, all security and valuation documents, our bank statements and the spreadsheet and software we used to monitor loan performance and to ensure that we had enough money coming in from borrowers to ensure that we could meet our obligations to bond-holders. In particular they checked the valuations of security assets which we had obtained… Indeed they were apparently so confident with the valuation documentation provided they included their own estimate of the values of the assets LCF held as security against its loans in their audit report…"*
>
> *"Moreover they [PwC and EY] each built their own model to ensure that he business was apparently viable so that they could sign off on the "going concern" basis, which they did…"*

61. The audit reports can be found at [**L1/6-8**].

62. It is submitted that the weight of evidence in this case plainly supports D1's assertion that the loans made by LCF were part of LCF's legitimate business, which was conducted in line with the business model explained to the Bondholders. Accordingly, if the court is with D1 on this, then that part of Cs' claim must fail.

[27] D1's WS, ¶129

b) Alleged Misrepresentations – Generally

63. As set out above, Cs' case is that LCF (and LOG) carried on business with the intent to defraud Bondholders and/or for the fraudulent purpose of facilitating the misappropriation of bondholder monies, and that in order to induce the Bondholders to transfer money to LCF, LCF made a series of actionable misrepresentations.

64. Cs' pleaded case regarding the alleged misrepresentations is unclear and inadequately pleaded.

65. Doing the best that D1 can in the face of Cs' inadequate pleading, it appears that the alleged misrepresentations can be broken into two categories: (i) those which are pleaded in Cs' RRAPoC and (ii) those which are pleaded in Cs' ARep to D1's Defence. These submissions will now address each of these categories in turn.

c) Representations Pleaded in the RRAPoC

66. The representations which appear at ¶7 of the RRAPoC (and which are defined in the RRAPoC as '*the Representations*' in ¶8) concern representations allegedly made expressly or by implication in information memoranda ("**IM**") and brochures provided to potential bondholders. Cs also allege these representations were made in telephone conversations, meetings with potential bondholders and/or via LCF's website.

67. First, the Representations (as defined in the RRAPoC) are poorly pleaded and the RRAPoC fails to articulate:

(1) How or when the alleged representations were said to have been made to prospective Bondholders;

(2) Whether the alleged representations are express or implied and, either the precise words relied on to constitute the express representation and where those words appeared or, in the case of implied representations, the words, facts or other matters relied on by Cs;

(3) As to each representation allegedly made in telephone conversations and/or meetings with potential Bondholders the words that were used and by who and who attended or was present on said telephone conversations and meetings and whether the representation is said to be express or implied and, if implied, the words facts or other matters said to give rise to the alleged implied representation.

68. CPR Practice Direction 16, ¶8.2(3) requires a Claimant to give "*details*" of any misrepresentation. For the reasons given above, Cs have plainly failed to comply with this requirement.

69. These are basic flaws in Cs' pleaded case. They leave D1 in the unacceptable position of not knowing the case he must answer. Cs have amended their Particulars of Claim on three occasions. Despite this Cs have failed to address these crucial issues in any of the multiple versions of their Particulars of Claim.

70. These objections were raised in ¶8 of D1's Defence. The Cs' response has been unsatisfactory: rather than amend their claim, Cs have chosen instead to compound the problems with their pleading by producing a detailed Reply which actually advances a different case on misrepresentation. This is considered below.

71. Second, in relation to the specific allegations of misrepresentation D1's case is set out as follows:-

(1) At ¶7(1), Cs made sweeping allegations using words which they now accept were not used by LCF[28] – this is considered in ¶73 to 78 below.

(2) At ¶7(2), Cs allege that LCF represented it conducted due diligence to satisfy itself that the borrower would be able to meet their obligations under the loan agreement. It is submitted that this due diligence was carried out by LCF and that an aspect of this was the valuation of the security offered by each of the borrowers which according to the valuation reports relied on by LCF was worth more than the sums available under the facility agreements.

[28] AReply to ADefence ¶14

(3) The allegations at ¶7(3) concern representations made by LCF about the charges and interest pursuant to the loan agreements. This is dealt with in D1's ADefence at ¶12 and in particular at subparagraphs 12.1 to 12.6.

(4) At ¶7(4), Cs allege that LCF made various representations about the companies to which it would lend the money received from Bondholders and that those companies had a strong payment covenant. D1 responds to this allegation in the ADefence at ¶13, and notes in particular that the IM's and Brochures were professionally drafted.

(5) At ¶7(5), Cs allege that LCF misrepresented that there was existing loan documentation prior to funds being advanced. D1 explains in his witness statement that all the parties involved in the loan transactions (LCF and the relevant borrower) knew the terms on which the loan was being advanced.[29]

(6) At ¶7(6), there is an allegation that LCF represented that the loans were fully secured and that the value of the security was materially in excess of the amount of the loan. This is very poorly particularised. At ¶15.2-3 of D1's ADefence D1 admits that some IMs referred to the loans being fully secured with the loan to value ratio not exceeding 75%. The reasons for this are explained in D1's trial witness statement.[30]

(7) At ¶7(7), it is alleged that it was represented that the Bondholders' interest would be protected by an independent security trustee. D1 admits that one of the Brochures referred to '*an independent Security Trustee*' and some of the IMs and Brochures referred to a '*security trustee*' holding a charge over LCF's assets but denies making any representation, to the extent it is alleged, that the security trustee would oversee and/or monitor LCF's business and/or lending.[31] Indeed, a security trustee, Global Security Trustees Limited, held a charge over LCF's assets until its removal by an order of Chief Master Marsh: see [2019] EWHC 3339 (Ch).

[29] D1 WS ¶63-65
[30] D1 WS ¶32(2)
[31] ADefence, ¶16

(8) ¶7(8) contains an allegation that investment in the bonds '*was a secure investment which was capable of generating high returns, often in the region of 8% per annum or higher*.' D1 contends that there were numerous warnings that the investment may expose the Bondholder to a significant risk of losing their investment.[32] With regards to the interest rates, these depended on the product and ranged between 3.9% and 8.95%.[33]

72. Cs have attempted to cure the patent pleading failings in their lengthy written opening submissions where they finally give particulars of the alleged misrepresentations. The fact that D1 has been forced to wait for delivery of these particulars until Cs' written opening submissions is unsatisfactory. This has hampered D1's ability to prepare for trial. This is an even more egregious failing in circumstances where Cs are at a clear advantage in terms of the resources available to them as Administrators.

d) Representations Pleaded in Cs' Amended Reply to D1's Defence

73. In ¶14 of the Reply Cs re-plead large portions of their claim in respect of the representations. Further, Cs use the Reply to go on to advance a different case based on either express (or implied) representations which are contained in unidentified IMs and brochures. Three points are made in this regard.

74. First, at ¶14, Cs are forced to resile from a number of the alleged misrepresentations, namely those at ¶7(1) which was a repetition of the very first sentence of the Claim Form in this action issued on 27 August 2020. Instead, Cs' admit that LCF did not use the words '*numerous*', '*unconnected*' or the phrase '*arms's length transactions*' and that this was Cs' (obviously flawed attempt at) paraphrasing LCF's description of its business model. This must be considered in the light of ¶4.2(n) of the Chancery Guide 2022 which provides that contentious paraphrasing should be avoided. The paraphrasing adopted by Cs was plainly contentious in circumstances where they ought to have known that the

[32] ADefence, ¶17.2
[33] ADefence, ¶17.3

IMs and brochures did not use the words or phrases which Cs pleaded and where Cs did not advance the positive case which is now advanced by the Reply. This gives a clear flavour of Cs unsatisfactory approach to this claim.

75. Second, Cs now advance a different positive case in respect of each of these alleged representations. This is simply unacceptable and wrong as a matter of law. ¶9.2 of Practice Direction 16 provides that:-

> *"A subsequent statement of case must not contradict or be inconsistent with an earlier one; for example, a reply to a defence must not bring a new case."*

76. This proposition was underscored by the Court in *Martlet Homes Ltd v Mullaley & Co Ltd* [2021] EWHC 296 (TCC), in which Mr Justice Pepperall held at [21] that:

> *"Not only is the proposition that one can advance a new claim in a Reply contrary to the clear terms of the Practice Direction, but it is also inherently undesirable and contrary to the overriding objective of dealing with cases justly and at proportionate cost. If such practice were to be condoned, claimants would not need to be precise in their formulation of the Particulars of Claim since they could always have a second bite of the cherry when pleading the Reply. Defendants would have to seek permission from the court in order to answer by way of Rejoinder any new claims pleaded in the Reply, which might in turn call for a Surrejoinder from the claimant."*

77. This statement applies with equal force to this claim. Cs' case is that LCF made the representations to bondholders in various forms and that those representations induced prospective bondholders to pay money to LCF. As such Cs are required to formulate with precision the representations which they say induced prospective bondholders to pay money to LCF. Failing to do so means that D1 cannot properly respond to the case against him. He simply does not know what that case is.

78. Finally, Cs do not state where and/or how each alleged representation was made. This is a crucial detail and the criticisms made in ¶67-70 apply with equal force to these allegations.

e) Conclusion on Representations

79. In conclusion, the allegations of misrepresentation are poorly pleaded. As set out above, Cs have failed to provide full particulars of the representations, despite numerous amendments. This is not merely a technical point, but importantly D1 is unable to fully understand the case that is now brought against him and as a consequence D1's ability to prepare for the trial has been impeded.

80. Further, Cs' latest attempt to replead the case on misrepresentation in their written opening submissions only serves to highlight (i) the failure of Cs pleadings and (ii) the fact that C is now seeking to fundamentally alter the case it is bringing. As set out above, it is wholly unacceptable to do so in written submissions.

81. In any event, it is submitted that D1's case is straightforward. There were simply no misrepresentations as per ¶56 of the ADefence: "*it is denied that LCF made any false representations, as alleged or at all."* As to this, the court is invited to read the following paragraphs of D1's ADefence, which sets out D1's response to each pleaded allegation of misrepresentation:-

(1) ¶8 to 17 of the ADefence set out D1's detailed response to each and every alleged representation; and

(2) ¶56 of the ADefence sets out, in the subparagraphs thereto, D1's detailed response to each allegation of misrepresentation. Notably, each and every allegation is denied.

f) Ponzi Scheme

82. Cs have amended their pleading to plead at ¶21A of the RRAPoC that "…*alternatively, LCF operated a Ponzi scheme by which interest and redemption payments made to Bondholders were paid with monies received from new Bondholders."* Cs expand on this and assert essentially that LCF operated this alleged scheme in a number of ways:-

(1) First, Cs allege that "*monies received from new Bondholders were paid via LCF to borrowers, which transferred those monies back to LCF, either or directly or via other entities, and those monies were then used by LCF to pay interest and redemption payments to existing Bondholders…"*

(2) Second, Cs allege that in "*other instances*", which are not defined, "*sums received by LCF from new Bondholders were used directly to pay interest and redemption payments of existing Bondholders…"; and*

(3) Third, Cs allege that this was "*an inherently unstable and unsustainable model that was inevitably going to collapse…"*

83. It appears from ¶22 of the RRAPoC that Cs now seek to rely on the allegation of a "*Ponzi scheme"* to suggest that LCF carried on business for the purpose of defrauding Bondholders. It is submitted that this allegation is not properly developed in Cs' pleading.

84. D1's response to Cs' allegations is as follows. First, a Ponzi scheme is not a cause of action and simply asserting the existence of a Ponzi scheme does not (without more) form the basis of any claim.

85. Second, D1's responses to this allegation are set out in clear and unequivocal terms at ¶56A of the ADefence and the subparagraphs thereto:-

(1) "*It is denied that LCF operated as a Ponzi scheme, as alleged or at all."*

(2) At ¶56A.1.1 D1 denies that "*any sums received by LCF from new Bondholders were used directly by LCF to pay interest and/or redemptions to existing Bondholders, as alleged or at all…"*

(3) At ¶56A.1.1. D1 positively asserts that "*LCF made no such payments. Funds received from Bondholders were lent to borrowers"*. This statement is uncontroversial and is, in fact, in keeping not only with D1's pleaded case **but also with Cs' own pleaded case**: Cs repeatedly assert (*inter alia* at ¶14 and 17 of the RRAPOC) that LCF used Bondholder monies to lend to other entities;

(4) D1 goes on to note that a borrower was entitled to use sums that they had borrowed for any purpose consistent with the terms of the loan agreement. This included using those funds to pay the interest on the loan. There is nothing inherent in such use of funds to suggest that LCF was running a Ponzi scheme, as Cs now allege. This is set out in the following terms at ¶56A.1.2:-

> "*LCF's borrowers who had a revolving credit facility incorporated inside a flexible loan arrangement were entitled to use the borrowed funds for any purpose consistent with the terms of the relevant facility agreement including, for example, to pay interest on the loan. It is denied that such use of borrowed funds* [by a borrower and not by LCF]*, as alleged or at all, is indicative of fraud on the part of LCF or at all."*

(5) Further, D1 explains at ¶56A.1.2 that:-

> "*No admissions are made as to the extent of such use of the borrowed funds by LCF's borrowers… LCF was under no obligation to investigate how any amount borrowed under the agreement was used."*

86. Third, D1's evidence clearly sets out the LCF business model in relation to lending. This explanation undermines the suggestion that LCF was set up to operate as a "*Ponzi scheme"* as Cs now allege. The court is invited to read certain important paragraphs in D1's witness statement. In particular:-

(1) **¶59 to 71**. These paragraphs explain in detail the LCF lending model. It is clear from these paragraphs that LCF was not set up as a Ponzi Scheme, as is now alleged, but instead was a trading entity operating a legitimate loan business, where each loan was secured against valuable assets. In particular:-

(i) At **¶66** D1 notes that "*it is said against me that the loans made by LCF were not only uncommercial but so uncommercial as to render the business of LCF unviable, which feeds into the Claimants' allegation that the business was set*

up as a Ponzi scheme in the first place. ***I both reject that suggestion and regard it as unsustainable and will explain why****"*;

(ii) At **¶67** D1 explains not only the structure of LCF's loans but also the cost of borrowing, which comprised (i) the coupon paid to the Bondholders, (ii) the Surge commission fee of 25% and (iii) a commission of 0.5% paid to GCEN. These sums were recouped from the gross loan drawdown. D1 goes on to note that the total deductions were "*in the region of 32-33.5%"* which (whilst high) is "*well within the range of what non-status commercial lenders normally charge"*.

(iii) At **¶68** D1 explains the context of this lending model, including Lewis Silkin's advice that the loan terms should be short (and certainly no longer than the longest bond maturity period). The effect of this was that when the cost of the borrowing was amortised across the term of the loan including renewals the range of 32-33.5% reduced significantly; and

(iv) At **¶69** D1 explains the Bond renewal process, and that such renewals were handled by LCF itself (rather than Surge and GCEN). The effect of this was that when a Bond was renewed, LCF did not incur substantial charges and so could generate greater profits. As D1 notes at ¶70, the effect of this was that "*the general tendency was for the cost of borrowing to come down…"*. In that paragraph D1 goes on to give examples of a hypothetical LCF loan, and explains the APR would reduce over time; and

(v) It is submitted that the explanations in these paragraphs, including those highlighted above, entirely undermine Cs' suggestion that LCF's business model was unsustainable or could only have been set up as a means of defrauding creditors. On the contrary, this evidence explains that LCF's business model was sustainable and commercial;

(2) **¶73 and 74**. In these paragraphs D1 explains the safeguards put in place to ensure that LCF maintained good cashflow in order to ensure that it would not fail to repay Bondholders. In particular, D1 explains that:-

(i) "*To prevent defaults I had Buss Murton write into the loan documentation that if LCF as a lender needed to recover money early from a borrower to pay a bond holder whose money had been used to seed that particular loan, it had the contractual right to do so… we did not expect the borrower to produce the money at the drop of a hat but it gave us a contractual right to substitute a new bond for the existing bond in relation to the loan to avoid default. This was simply cashflow management as LCF had a commitment top its borrowers provide funds for a specific length of time but it also had a commitment to its bond holders to repay funds… The clause in the loan agreement allowed LCF the flexibility to manage the situation. It is suggested that this is "Ponzi" like activity but it is not… Rather than anything sinister, LCF simply allowed its borrowers to use their facilities to meet their obligations within the terms of the facility…"*

(ii) However, all such new lending was only made available "*provided that the security was available at no more than 75% LTV"*.

87. In the light of these clear explanations D1 has provided, including the commercial justification for the practices that Cs are seeking to impugn, it is submitted that Cs case that LCF was set up for the purpose of operating as a Ponzi scheme must be rejected.

g) D1 as nominee for D2 or D4

88. Cs seek to introduce a new claim which casts D1 as a nominee for D2 or D4. It is submitted that this is a late attempt to cure a clear issue with Cs' case against D1: namely that D1 stood to lose the most from a fraud involving LCF but other Defendants were paid considerably more by LCF.

89. It is submitted that this allegation was not pleaded against D1 and that, therefore, Cs should not now be able to amend their case by way of their written opening in order to cure its logical improbabilities.

h) D1's Knowledge

90. In order to succeed in establishing liability against D1, Cs must show that D1 had knowledge of the fraudulent trading of LCF. Notwithstanding that LCF's business was not conducted fraudulently, it is submitted that even if it was (which is denied) then D1 had no knowledge of any of the facts and matters which Cs allege.

91. It is submitted, as an initial and overarching point, that Cs' pleaded case fails to set out any particulars of Cs knowledge (whether actual or constructive), or the basis of that knowledge, at all. Cs' pleaded case is deficient in this regard.

92. In any event, D1 addresses each of Cs (largely unparticularised) allegations in this regard below.

Knowledge of the alleged misrepresentations

93. Cs' allege at ¶34 and 35 of the RRAPoC that D1 either had "*actual knowledge"* or "*knowledge of facts that would have caused a reasonable and honest person to make enquiries"* that (i) LCF was making the Representations (as defined by the RRAPoC) and (ii) that the Representations were false.[34]

94. D1 denies these allegations in his ADefence:-

(1) At ¶61.1 D1 denies this allegation in the following terms:-

> "*…it is denied that LCF made any false representations, as alleged or at all. Without prejudice to the aforesaid, it is denied that Mr Thomson knew that LCF made any false representations…"*

(2) At ¶62 D1 asserts that "*At all material times, [D1] reasonably and honestly believed (and believes) that LCF and LOG traded in good faith."*

[34] RRAPoC, ¶34(1)-(2)

95. Further, D1's evidence is clear in this regard: The marketing of the bonds and the handling of applications was handled by Surge and overseen by Kobus Huisamen who issued a compliance manual. This is set out in detail at ¶33 and 37 of D1's witness statement. In particular:-

(1) At ¶33(4) D1 asserts that he "*decided to outsource the distribution and related compliance function… I decided to appoint surge, both because I was impressed by their MD, Paul Careless and because they were local…"*

(2) At ¶37 D1 sets out that he "*appointed Surge… to handle all aspects of distribution, including building the website and handling all aspects of marketing and publicity… handling applications to subscribe for bonds made by members of the public…"*

96. Accordingly, ADefence to these allegations is:-

(1) First, LCF has not made any false representations, whether as alleged or at all. This has been addressed above (and is not repeated here).

(2) Second, even if there were such misrepresentations (which is denied), D1 had no knowledge that any of the representations made were false. Notably Cs do not plead any basis for D1's knowledge. As such, D1 has been unable to respond to any specific allegations or instances which are said to demonstrate that he had such knowledge.

97. It is submitted that for these reasons Cs case that D1 had actual or constructive knowledge of the alleged "*misrepresentations"* must fail.

Knowledge of alleged backdating

98. Cs allege that D1 had actual knowledge of the dishonest backdating of written agreements at ¶34(3) of the RRAPOC.[35]

99. D1 denies this allegation at ¶61.2 and ¶48 of the ADefence. At ¶48.2 D1 asserts that:-

> "*…to the extent that it is alleged that Mr Thomson dishonestly backdated the said agreements, this is denied. Mr Alex Lee of Buss Murton was in charge of preparing the relevant documentation and the process of execution. Mr Thomson would sign documents as and when requested…"*

100. D1 expands upon this in his evidence at ¶63. In that evidence D1 explains the process in place at LCF for signing documents, in short: his practice was that he signed but did not date documents and all written agreements were dated at completion by Alex Lee of Buss Murton (LCF's lawyers at that stage). This is set out clearly in D1's evidence:-

> "*My usual practice was that I would meet Alex face to face to sign the documentation for each loan. That meeting would either be at his office in Tunbridge Wells or, if it was more convenient, at some other location, possibly the borrower's office. I would sign the documents but not date them. That had been my practice since my days in the bank (as the bank's back office team would date the documents prior to drawing down funds) and I saw no reason to depart from it. The documents would be dated at completion but I would not normally be present at completion or involved in the process of dating the documents in any way."*

101. Further, D1's evidence tackles Cs' allegations that he knew that loans were being back-dated. D1 addresses these allegations head-on at ¶64:-

> "*I am aware that there are allegations that loan documents were back-dated. I have no knowledge of this whatsoever (for the reasons set out in [¶63]) and no reason*

[35] RRAPoC, ¶34(3)

to believe it could be true save, potentially, in relation to one or, possibly two documents, which I will now mention…"

102. D1's evidence deals with this specific loan, being the second loan to LOG, at ¶118. In that paragraph D1 explains that that document was back-dated (with the knowledge of all parties) to reflect the date that the lending had been provided (albeit at that earlier stage it had only been governed by a side-letter). There is nothing untoward in this and D1's evidence in this regard explains precisely how this lending developed, including the basis for the fact that the loan documentation was back-dated, to reflect the date which the lending was advanced.

103. Therefore, it is submitted that D1's evidence on this point is clear and compelling. Simply put D1 had no knowledge of any of the matters Cs are now alleging. As such, Cs case that D1 knew of these matters must fail.

Knowledge of misappropriation of Bondholder monies

104. Cs allege that D1 knew that (i) bondholder monies were "*being misappropriated*"[36] and (ii) that the transactions in which he had participated in had "*no genuine commercial rational*". This is pleaded in the RRAPoC at ¶34(4) and (5).

105. D1's response to these allegations is set out at ¶61.3 and 61.4 of the ADefence. The court is invited to read those paragraphs (and their subparagraphs) in full. In short summary, D1's case is simply that:-

(1) No Bondholder monies were being misappropriated, whether as alleged or at all, as per ¶61.3 of the ADefence;

(2) The payments to D1 were not misappropriations of Bondholder monies, and in fact all of these payments were legitimately paid and received, as per ¶61.3.1. These legitimate payments have been set out in detail at ¶130;

[36] RRAPoC, ¶34(4)

(3) The payments which Cs now seek to impugn, being payments by GCEN to Mr Hume-Kendall, Mr Barker and Mr Golding were monies duly drawn down by LOG, in accordance with its facility agreement, and transferred to them on LOG's written request as pleaded at ¶49.2.2 of the ADefence.

(4) All of D1's dealings were made with a proper commercial rationale, and as set out at ¶61.4 "*Mr Thomson believed (and believes) that LCF and LOG traded in good faith and that all transactions in which he was involved were genuine.*"

106. The court is further invited to read the paragraphs of D1's witness statement which set out the loan agreements which Cs are now seeking to suggest were not made as legitimate commercial transactions. These passages are at ¶100 to 128. It is submitted that on any view D1's evidence in relation to these loans is detailed and clear. It sets out each of the challenged loans and explains that lending, and importantly D1's knowledge in relation to that lending.

107. It is submitted that D1's evidence is to be believed, and this part of Cs case must, therefore, fail.

Knowledge of misappropriation of Bondholder Monies and the alleged Ponzi scheme

108. At ¶34(6) of the RRAPOC Cs allege that D1 knew that (i) a proportion of the monies raised from new bondholders was being misappropriated by D1-10s and that (ii) a further proportion was being applied to discharge LCF's obligations to existing bondholders.

109. First, it is noted that this pleading is extremely vague and lacks any particulars. The reference to "*a proportion*" is not at all clear.

110. Second, D1 denies that (i) there were any such misappropriations in favour of D1 to D9, as alleged and (ii) further denies that sums provided from new bondholders were being used to discharge LCF's obligations. This is pleaded at ¶61.5.

111. In that paragraph D1 again asserts (as mentioned above at ¶82 to 89) that:-

"*some of the borrowed funds [ie funds borrowed from LCF by borrowers] were used to discharge liabilities to LCF by LCF's borrowers… [D1] believed (and believes) that LCF's borrowers were entitled to do so and that LCF acted reasonably and properly in providing a revolving credit facility which allowed borrowers to do so…"*

112. The court is reminded of D1's evidence in this regard, which is set out at ¶59 to 74 and summarised above at ¶82 to 89.

Knowledge that the so-called "Connected Borrowers" could not repay their loans

113. Cs also allege that the D1 knew that the LCF Borrowers were incapable of repaying their debts to LCF and that, consequently, LCF would inevitably become unable to meet its obligations to bondholders. This is pleaded at ¶34(7) of the RRAPOC[37]

114. D1 denies this at ¶61.6 of the ADefence. It is submitted that to the best of D1's knowledge and belief:-

(1) The LCF Borrowers were capable of repaying their debts. As far as D1 is concerned the reason why some of those borrowers have now defaulted is as a result of the FCA intervention and the suspension of LCF's business, as set out in detail at ¶148 of D1's witness statement;

(2) In all cases the loans were properly secured. The security given by the borrowers in all cases exceeded (or was believed to exceed) the outstanding loan liabilities. At ¶101 D1 has set out that "*each loan was to a separate business backed by security, independently valued to an LTV ratio not exceeding 75%...".* Thus, at all times all loans were secured such that upon a default LCF would have been able to obtain repayment by enforcing their security.

[37] RRAPoC, ¶34(7)

i) Remedy

115. D1 submits that for all of the reasons set out above the court should not find D1 liable for Fraudulent Trading, whether as alleged by Cs or at all. However, if the court is not with D1 on that then it will have to consider what remedy to award against D1.

116. Cs' pleadings and Cs' written opening submissions lack any detail concerning the remedy they now claim for Fraudulent Trading. The extent of Cs pleading is that:-

> *"the Court should order each of the First to Eight Defendants to pay such sums as it thinks fit by way of contributions to the assets of LCF, further or alternatively LOG."*[38]

117. The court is reminded that no order has been made for a split liability and quantum trial. It is unfortunate that Cs have chosen not to provide any details of what contribution it invites the court to order each defendant to make. In the circumstances, it is submitted that the Court's task and that of D1 and the other Defendants is significantly more difficult as the Defendants do not know the claim that is advanced against them in respect of quantum.

118. That being said, it is submitted that this is a case where the court should consider each defendant separately as opposed to making a global assessment and holding the defendants liable on a joint and several basis: see *Re Overnight Ltd* [2010] BCC 796, [30]-[32]. In that case, Mr Justice Roth ordered one defendant to contribute to the company's assets the full loss but the second defendant was liable to contribute 50% of such loss on a joint and several basis. This was to reflect the difference between the Defendants in terms of culpability and the extent to which they benefitted from the fraudulent trading.

119. In this regard, the following points are made:

[38] RRAPoC, ¶54

(1) First, D1 benefitted from the alleged fraudulent trading to a much lesser extent than D2 and D4.

(2) Second, it is now Cs case (or at least appears to be) that D1 was acting as a nominee for D2 and D4. Indeed, Cs allege that '*D4 was in charge'*,[39] '*D2 […] took charge when D4 was unavailable*'[40] and '*D1 was subservient to D4, who had the power to overrule him*'.[41]

120. It is submitted that any order against D1 for a contribution to the Company's assets should reflect this.

121. To the extent that Cs invite the court to make an order that the Defendants make a contribution in the sum of the entire shortfall to creditors then this should be dismissed. It is submitted that Cs have failed to show that there is a nexus between the loss to creditors and the alleged acts of D1 (or the other defendants). In this regard, the submissions regarding the value of security are repeated.[42]

ii) Breach of Directors Duties

122. Cs allege that D1 (and D4) breached the duties that they owed to LCF as directors of that company. This is dealt with very briefly in ¶55-57 RRAPoC. These allegations are, in essence:-

(1) That D1(along with Mr Golding and Mr Hume-Kendall) was a director of LCF and so owed duties to that company under s. 171 to 177 of the Companies Act 2006;

(2) That D1 (along with Mr Golding and Mr Hume-Kendall) "*wrongfully"* breached those duties in a number of ways (which appear as subparagraphs to ¶56 of the RRAPoC); and

[39] Cs' Written Opening Submissions, ¶C4.5
[40] Cs' Written Opening Submissions, ¶C4.5
[41] Cs' Written Opening Submissions, ¶C4.15
[42] See **¶Error! Reference source not found.** to **Error! Reference source not found.**, above

(3) By reason of these breaches LCF has suffered loss and damage.

123. D1's response to these paragraphs is pleaded at ¶67 to 69 of the ADefence.

124. In short D1's position is:-

(1) Of course, as a director of LCF D1 owed that company the statutory duties pleaded by Cs. At all times D1 acted in line with those duties and conducted LCF's business for proper purposes and for the benefit of that company (as pleaded at ¶68.1.1 of the ADefence);

(2) D1 does not accept that Mr Golding or Mr Hume-Kendall were *de facto* or shadow directors of LCF (as pleaded at ¶67.2 and 67.3 of the ADefence); and

(3) Notably, this part of Cs claim takes matters no further than the claim in Fraudulent Trading. There are no new allegations raised, and the allegations of breach of duty are simply paraphrased iterations of the allegations that Cs have made as part of the Fraudulent Trading claim. Accordingly, these claims are denied for all of the reasons that D1 has already set out in response to those claims. This is particularised at ¶68 (and the subparagraphs thereto) of the ADefence.

125. In those circumstances, D1 denies that he has breached his duties to LCF whether as alleged or at all. However, it is accepted that if the court finds against D1 on the claim in Fraudulent Trading (i.e. that he knew of and participated in lending for the purpose of defrauding Bondholders), then it would follow that he has also acted in breach of his duty to LCF.

iii) Constructive Trust/Knowing Receipt

126. It is submitted that Cs' claim against D1 for knowing receipt is fundamentally flawed and, as such, is bound to fail.

127. As set out above, Cs plead the claim in knowing receipt at ¶64 to 89 of the RRAPoC. The claim against D1 is limited to:-

(1) Two general paragraphs, at ¶64 and 65, which allege that:-

(i) "*[D1] … received monies belonging to LCF or the traceable proceeds thereof*…" and

(ii) "*Some of the said monies were paid directly to the following Defendants… when those intermediate Defendants [being the companies that received monies pursuant to the loans from LCF] the said Defendants [being D1 to D8] provided no consideration and/or received such monies with such knowledge as to make it unconscionable for them to gain or retain any beneficial interest therein… Accordingly, the following Defendants [including D1] received and hold the same on constructive trust for LCF and/or subject to LCF's equitable interest therein…"*

(2) Two specific ¶at 66 and 67. As to these:-

(i) ¶66 set out the payments which Cs allege D1 received. However, notably **none** of the payments D1 received were **from LCF**, but rather were all sums paid from **third-party companies.** Even on Cs case these were companies that had received loans from LCF; and

(ii) ¶67 asserted the only reference to D1 having knowingly received any of the said sums. Such claim was pleaded as being to the "*extent that [D1] no longer holds the same or the traceable proceeds thereof, LCF seeks equitable compensation against him for knowing receipt."*

128. D1's response to this claim is twofold. First, D1 denies that claim on a simple factual level, as pleaded at ¶71 of the ADefence. Second, in any event, D1 avers that Cs' claim against D1 fails as a matter of law.

The Factual Defence

129. The factual defence is set out at ¶71 to 73 of the ADefence. In particular:-

(1) As set out above, D1 denies any breach of duty. That in and of itself would be an end of the claim in Constructive Trust/Knowing Receipt;

(2) Further, D1 does not deny receiving **some** monies, although he does not admit to receiving all sums that Cs now allege;

(3) Rather, D1 is clear that any sums he received were paid to him either by way of remuneration or pursuant to the terms of the 2015 SPA. In either case D1 was entitled to receive those sums beneficially.

130. D1 has provided detailed evidence in relation to the breakdown of the sum of £5,278,727.95 that he is alleged to have "misappropriated" from LCF. This evidence is provided at ¶172 to 181 of his witness statement. D1's evidence makes a number of important points in relation to these sums:-

(1) First, he notes at ¶172 that "*none of the money is said to be taken from LCF itself*". This is an important point, and one which is borne out by the way in which Cs have put their case in relation to the misappropriated sums. In each case it is said that that money was paid to D1 by a third-party;

(2) Second, D1 notes that the Cs do not claim that any of the sums he had received directly from LCF by way of payment for his services were misappropriations. This is, essentially, a tacit acceptance that LCF was operating as a legitimate business in relation to which D1 was entitled to receive sums for his work (these payments are set out below);

(3) Third D1 addresses the payments which Cs now allege were misappropriations at ¶174 to 181. In particular, D1 sets out in clear and simple terms that:-

(i) The sum of £1,698,596 was paid to D1 **from GCEN**. In short, D1's case is that this sum represented income that he was entitled to receive pursuant to the 2015 exit documentation, as per ¶174. That being the case, these are sums that D1 is entitled to receive under the 2015 agreements and do not represent either the property of LCF or the traceable proceeds thereof. D1 is entitled to, and did, receive this sum beneficially. Cs claim in respect of this sum must fail;

(ii) The sum of £30,000 to D1 **from LCM**. This was a sum paid to D1 as remuneration for his work at LCM. D1 has provided details of his work at LCM at ¶145 of his witness statement, in short he worked setting up the company and developing that company's network of regulated distributors. He was entitled to receive remuneration for this work. As long as the court finds in D1's favour on this point, then Cs claim against D1 in respect of this sum must fail;

(iii) The sum of £991,361.11 to D1 **from L&TD**. This sum represented payments that D1 was entitled to receive pursuant to the 2015 exit documentation, as per ¶175 of the witness statement. This payment is also recorded on Schedule E to D1's witness statement. That being the case, these are sums that D1 is entitled to receive under the 2015 agreements and do not represent either the property of LCF or the traceable proceeds thereof. D1 is entitled to, and did, receive this sum beneficially. Cs claim in respect of this sum must fail;

(iv) The sum of £195,000 to D1 **from LP Consultants**. D1 is quite clear that he has never received any sums in from LP Consultants, as per ¶178 of the witness statement. In those circumstances, in the absence of any receipt there can be no liability for these sums either as a constructive trustee or knowing recipient. Cs claim against D1 in respect of this sum must fail;

(v) The sum of £882,000 **from LG LLP**. This sum represented payments that D1 was entitled to receive pursuant to the 2015 exit documentation, as per ¶177 of the witness statement. This payment is also recorded on Schedule E to D1's witness statement. That being the case, these are sums that D1 is

entitled to receive under the 2015 agreements and do not represent either the property of LCF or the traceable proceeds thereof. D1 is entitled to, and did, receive this sum beneficially. Cs claim in respect of this sum must fail;

(vi) The sum of £315,000 **from LPC**. This sum represented payments that D1 was entitled to receive pursuant to the 2015 exit documentation, as set out at ¶179 of the witness statement. This payment is also recorded on Schedule E to D1's witness statement. In those circumstances, these were sums that D1 was entitled to receive under the 2015 agreements and did not represent either the property of LCF or the traceable proceeds thereof. D1 is entitled to, and did, receive this sum beneficially. Cs claim in respect of this sum must fail;

(vii) The sum of £573,020.84 **from Media GPS**. These payments are a combination of Christmas bonuses from LCF (which were paid via Media GPS) and sums that D1 has earned by providing consultancy services to Surge. These payments are explained at ¶160 to 163, and at ¶180 of the witness statement. These remuneration payments are addressed at ¶131 of this skeleton below. On either footing, as long as the court is with D1 on this, then these are legitimate payments which he was entitled to receive. Cs claim in respect of these sums must fail; and

(viii) The sum of £593,750 **from Sands Equity**. This sum represented payments that D1 was entitled to receive pursuant to the 2015 exit documentation, as set out at ¶181 of the witness statement. This payment is also recorded on Schedule E to D1's witness statement. In those circumstances, these were sums that D1 was entitled to receive under the 2015 agreements and did not represent either the property of LCF or the traceable proceeds thereof. D1 is entitled to, and did, receive this sum beneficially. Cs' claim in respect of this sum must fail.

131. D1's evidence about the payments he has received is clear. He has provided detailed evidence of the payments he has received from LCF (which are not in issue in these proceedings), as well as from other sources (assisting the court by providing a breakdown of these payments in Schedule form). In each case he has provided a clear and simple

explanation about the source of these funds and the reason for the payments. He addresses these payments at ¶156 to 171 of his witness statement. The court is invited to read those paragraphs of the witness statement for a full explanation of the sums that D1 has received. In particular:-

(1) D1 has provided a full breakdown of the sums that he has received as remuneration from LCF during the period of LCF's operation. These are set out at Schedule B, and include D1's remuneration under a consultancy agreement with LCF pursuant to which he was paid (a) £10,000 between 15 July 2015 and 31 December 2015; (b) £242,700 in the calendar year for 2016; (c) £200,000 for the calendar year for 2017; and (d) £275,000 for the Calendar year for 2018, as per ¶157 to 158;

(2) D1 has also received certain payments of his Christmas bonus from a company, Media GPS. Payments were made from LCF to Media GPS, and then from Media GPS to D1. The level of bonus was set by other directors in LCF, and the cumulative payments amounted to only £275,000 (although it seems only £272,000 was paid) , as per ¶160 and 161;

(3) D1 has also explained his consultancy earnings from both Surge and GCEN, as per ¶162 and 163; and

(4) D1 has also received payments from *"various of Simon & Elten's companies on account of my 5% carried interest under the 2015 exit documentation."* He records that these payments were "*£1,698,596 from GCEN on behalf of LOG and £2,820,731.90 from various companies direct to my account"*, as per paragraph 167 of D1's witness statement; and

(5) D1 also records certain loans, and a further payment of £30,000 from LCM, that he has received. These are set out at ¶168 to 171.

132. Cs face a number of difficulties in advancing this part of their case:-

(1) First, in each case the payments have been received from third parties and not from LCF directly. As such, Cs must establish that the sums paid by those third parties

were sums belonging beneficially to LCF, or were the traceable proceeds of such sums. (Cs have a fundamental problem on this part of their case, as addressed below);

(2) Second, Cs have failed to provide any, or any proper and convincing, explanation as to why these sums were paid to D1. Rather they seek to draw an inference (in the absence of any concrete evidence) that these were sums paid out as part of the alleged misappropriation. The basis for this inference is no more than Cs' assumption that LCF was operated as a vehicle for fraud (which is not correct, as set out above); and

(3) Third, Cs' attempt to draw an inference has been undermined in respect of each of these payments by the fact that D1 has provided a full and proper explanation not only of the sums received, but also of the reason for receiving each sum. In each case, it is submitted that the court should prefer D1's evidence to Cs' attempt to concoct a case based on speculation.

133. It is submitted that in those circumstances, D1 has provided clear explanations about these payments which fundamentally undermine Cs' contention that these were sums belonging to LCF or were the traceable proceeds of such sums: Cs' case must fail.

The Legal Defence

134. In any event, it is submitted that the facts pleaded by Cs simply do not comprise a claim capable of being successful. Taken at its highest, Cs' claim for constructive trust/knowing receipt is fundamentally flawed, and Cs will not be able to succeed on it even if each and every fact Cs allege was admitted or proved.

135. In short, the claim against D1 is that "*some of the said monies*", a phrase which is so vague as to be meaningless, were paid to the Defendants by third parties. This claim is bound to fail.

The Law

136. Cs put their case on two footings. Either D1 held the sums on a constructive trust for LCF or he received sums that belonged to LCF but were then paid away such that he should account in equity as a result of the fact that he had received those sums with the knowledge that they were sums that (Cs say) belonged to D1.

Constructive Trust

137. In order to hold such sums on constructive trust, it is clear and obvious that such sums must have belonged (and belong) beneficially to LCF, such that upon their receipt by a third party in unconscionable circumstances that recipient holds the sums as trustee for the beneficial owner.

138. In *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 Lord Browne-Wilkinson noted that:-

> ***"****Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity. Thus, an infant who has obtained property by fraud is bound in equity to restore it: Stocks v. Wilson [1913] 2 K.B. 235, 244; R. Leslie Ltd. v. Sheill [1914] 3 K.B. 607. Moneys stolen from a bank account can be traced in equity: Bankers D Trust Co. v. Shapiro [1980] 1 W.L.R. 1274, 1282C-E: see also McCormick v. Grogan (1869) L.R. 4 H.L. 82, 97."*

139. This decision was followed in *Armstrong DLW GmbH v Winnington Networks Ltd* [2013] Ch. 156 where Stephen Morris QC sitting as a Deputy High Court Judge. In that case the court considered whether there was a possibility of a claim for knowing receipt (a claim where a necessary element was trust property) by a third-party. He noted that:-

> *"the thief, B, who becomes the trustee of the property held on constructive trust for A, and when C receives the property he is receiving property from B which is already subject to a trust."*

140. Accordingly, in order for Cs to establish that D1 held any sums on constructive trust for LCF, they must establish that the sums that D1 received were sums in which LCF had a subsisting beneficial interest at the time they were received by D1.

Knowing Receipt

141. The same is true of the claim in knowing receipt. In *Civil Fraud, 1st Edition* at ¶12-003 the editors set out clearly the requirements to establish a claim in knowing receipt:-

> *"The essential requirements of a claim in knowing receipt can be derived from two Court of Appeal judgments, El Ajou v Dollar Land Holdings Plc and Bank of Credit and Commerce International (Overseas) Ltd v Akindele. A claimant must show:*
>
> > *(1) Receipt of the claimant's assets (or their traceable proceeds) by the defendant;*
> >
> > *(2) Such receipt arising from a breach of fiduciary duty or trust owed to the claimant by a third party; and*
> >
> > *(3) Knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty or trust, sufficient to make it unconscionable for him to retain the benefit of the receipt."*

142. At ¶12-013 under the heading "*The Claimant's Assets or their Traceable Proceeds"* the editors make clear that:-

> *"An asset is the claimant's in this context if* ***he has a subsisting equitable proprietary interest in it****. This will include assets which the claimant owns outright, assets which are held on trust on his behalf and (probably) assets over which the claimant has a charge or mortgage.[16] It will also include the traceable proceeds of such assets. Practitioners should note that, following the Supreme Court's decision in FHR European Ventures LLP v Cedar Capital Partners LLC,[17] bribes, secret commissions, and (potentially) any other profit earned by a fiduciary in breach of*

his fiduciary duties will be held on trust for his beneficiary and, therefore, transfer of such profits to third parties may well constitute a transfer of the claimant's property for the purposes of engaging the law in knowing receipt.

143. At ¶12-015 the editors have also set out that:-

"... if assets are transferred to the defendant under an ostensibly binding contract between the claimant and the defendant, they are no longer (from the point of transfer) the claimant's assets, and no action in knowing receipt will lie, even if the contract was entered into in an obvious breach of fiduciary duty, of which the defendant knew. So long as the contract subsists, the defendant is entitled to rely upon his contract with the claimant to justify his receipt of the assets. In order to pursue an action in knowing receipt in such circumstances it is necessary, first, to set aside the contract (which it will frequently be possible to do, though the claimant will lose the benefit thereof)."

144. At ¶12-016 the editors go on to note that:-

"It is often said that the property in question must have been, prior to the point of receipt, held on trust for the claimant. However, this is potentially misleading, and such statements tend to be followed by an assertion that "trust" in this context is given a broad meaning, which includes property held by "quasi-trustees". Hence a director of a company has traditionally been treated as a form of trustee so as to permit a claim in knowing receipt brought by the company against the recipient of company funds which have been transferred by the director in breach of his fiduciary duty. ***It is simpler, and more accurate, to say that the claim can arise wherever:***

(a) the claimant has a proprietary interest in transferred assets, whether or not the claimant's title is equitable only; and

(b) those assets are transferred in breach of a fiduciary duty (which includes a breach of trust) owed to him." (Emphasis added)

Analysis

145. In order to establish a claim against D1 that he holds the sums on constructive trust, or has been a knowing recipient of trust property, Cs must establish that:-

(1) LCF retained a beneficial proprietary interest in the sums that D1 received;

(2) D1 has received such sums to which LCF retain a beneficial proprietary interest; and

(3) Those assets were transferred to D1 in breach of a fiduciary duty.

146. Cs case falls down on one very simple point: **LCF does not (even on Cs best case) have any beneficial proprietary interest in any of the sums that D1 has received.** Accordingly, Cs are unable to succeed on this part of their case.

147. First, Cs pleadings do not demonstrate transfer of funds from LCF directly to any of the third parties who are said to have transferred sums to D1, save for a loan to L&TD.

148. Second, if Cs seek to establish that these sums were passed through a chain of hands before being passed to D1 (something which should have been properly pleaded, but hasn't been) that is an unhappy start to a claim where Cs must establish the transfer of beneficial ownership in monies. As to this:-

(1) Cs' case is that the sums that D1 holds as constructive trustee, or is liable as a knowing recipient, were paid to him by (i) GCEN, (ii) LCM, (iii) L&TD, (iv) LP Consultants, (v)LG LLP, (vi) LPC, (vii) Media GPS and (viii) Sands Equity.

(2) Cs do not plead how any of (i) GCEN, (ii) LCM, (iii) LP Consultants, (iv) Media GPS and (v) Sands Equity received monies that belonged beneficially to LCF. None of these third-parties are identified in the RRAPOC as either LCF Connected Borrowers or LOG Connected Borrowers; and

(3) It is accepted that Cs plead that L&TD **borrowed** sums in excess of £31 million from LCF. However, Cs do not plead expressly how LG LLP or LPC received sums from LCF. The best that Cs could say, is that these were parties who received sums from LOG (as per ¶16 of the RRAPOC) and so the court should assume that these were sums that had been **borrowed** by LOG from LCF.

149. Third, and most importantly, it is common ground between the parties that LCF loaned money to a number of companies pursuant to various loan agreements. No other payments out of LCF are pleaded. Of course, it is accepted that this included loaning sums to L&TD as well as LOG.

150. Those loan agreements are, importantly, **not challenged by Cs as being shams** (this is addressed in more detail below). In fact, the point goes further, Cs **(i) repeatedly assert that there was lending by LCF to a series of connected companies (this is a central tenet of their pleaded case) and (ii) positively rely on the legitimacy of these loan agreements throughout their pleadings**. Indeed, it is these legitimate loan agreements that are said by Cs to provide the legitimate "*façade"* to cover Cs fraudulent trading.

151. The importance of the fact that Cs do not dispute the authenticity of the loan agreements cannot be understated.

152. It is these loan agreements that cause Cs the fundamental problem in establishing any liability against D1 on the basis of a constructive trust, or as a knowing recipient.

153. It is submitted that when monies were transferred to the borrowers by LCF, the money that was lent became beneficially owned by the borrower companies. In its place LCF received contractual rights to receive repayment of a debt (plus interest and fees). It is notable that upon default a borrower must bring a claim in **debt**, and is not entitled to bring a proprietary claim in respect of sums loaned. A debt is a personal claim, and a creditor does not retain any proprietary or beneficial interest in the monies loaned.

154. Therefore, any proprietary interest which LCF had in the money was extinguished when it was loaned to the borrower. When sums were transferred by LCF to the borrowers, even if those borrowers were connected, each borrower became the beneficial owner of

the sums borrowed. At that stage LCF's proprietary equitable interest in those loaned sums was extinguished and replaced by (i) the contractual obligation on the borrower to repay those sums and (ii) the contractual right of the lender to require repayment under the terms of the contract (under Clause 6). The relationship is one of creditor and debtor, **not trustee and beneficiary**.

155. Cs simply assert that the monies received by D1 were subject to LCF's equitable interest.[43] However, as set out above Cs have failed to plead or explain:-

(1) How this is at all in the case of (i) GCEN, (ii) LCM, (iii) LP Consultants, (iv) Media GPS and (v) Sands Equity; and

(2) In the cases of L&TD, LG LLP or LPC how this is said to exist after the money had been loaned to the borrowers pursuant to the undisputed loan agreements.

156. Accordingly, as the money was neither trust property, nor was it received by the borrowers as constructive trustees, it cannot be said that upon the further transfer of these funds to D1 he should hold these sums as constructive trustee, or be liable for equitable compensation as a knowing recipient. This calls into question the basis of the proprietary freezing Order obtained against D1. It is that order which has hampered the preparation of his defence.

A note on "Shams"

157. Cs do not contend that the loans entered into by LCF and LOG are shams and Cs do not seek declarations to that effect. It is not open to Cs to seek to argue that these agreements are shams.

158. First, the courts have been clear there is a "*strong and natural presumption"* against holding a document a sham: *National Westminster Bank plc v Jones* [2000] BPIR 1092 [59]. Accordingly, the loan agreements must be presumed to be genuine loan agreements that were entered into by the parties to those agreements. If Cs had wished to establish

[43] RRAPoC, ¶66

that these agreements were not legitimate, they would have been required to raise this as a positive case and advance evidence on this point. They have done neither.

159. Cs pleaded case does not get close to asserting that these agreements are shams.

The Law

160. The starting point to determine whether a transaction is a sham is *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 where Diplock LJ said at 802:

> *"It is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities, that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived."*

161. In *Hitch v Stone (Inspector of Taxes)* [2001] EWCA Civ 63, [2001] STC 214 , Arden LJ laid down certain principles at para [64] et seq :

> *"[64] An inquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities.*
>
> *[65] First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.*

[66] Second, as the passage from Snook makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.

[67] Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.

[68] Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied: see for example Garnac Grain Co Inc v HMF Faure & Fairclough and Bunge Corp [1966] 1 QB 650 .

[69] Fifth, the intention must be a common intention […]"

162. As to the common intention necessary, that intention must be common to the parties to the agreement: see e.g. *Shalson v Russo* [2003] EWHC 1637 (Ch) per Rimer J at [190].

Analysis

163. First, it is submitted that there are no facts (whether pleaded or unpleaded) that would support any contention which might be advanced by Cs that the parties intended to create different rights and obligations from those which appear in the loan agreement or that the parties intended that they would be bound by some other arrangement that was not contained in the loan agreement.

164. Second, the validity of the loan agreement between LCF and LOG was not challenged but was affirmed by the administrators who relied on the loan agreement and the qualifying floating charge created by said agreement to seek an appointment as administrators under ¶12(1)(c) Schedule B1 IA 1986 (see *Re London Oil & Gas Limited (in Administration)* [2020] EWHC 35 (Ch)) [20]-[21]).

165. Third, on 3 February 2020 Cs appointed administrators of Prime Resort Development Ltd, Waterside Cornwall Group Ltd, International Resorts Management Limited, Waterside Villages Limited, and Waterside Cornwall Operations Limited pursuant to its debenture.

166. Notwithstanding the fact that Cs have failed to plead that the loan agreements were shams, having accepted that the loan agreements are binding for the purposes of seeking to appoint administrators Cs would now be unable to amend their pleaded case to allege that the agreements are shams. By analogy to the rule in *Ex parte James* (1874) LR 9 Ch App 609, it would be unfair for Cs to get the 'best of both worlds' and simultaneously dispute the validity of the loan agreements while relying on said agreements to appoint administrators over the borrower companies.

167. Finally, to the extent that Cs seek to allege that the criticisms (contained in the subparagraphs to ¶17 RRAPoC) which are made of the loan agreements that were entered into by LCF are, in fact, a pleading that the agreements were shams: that argument is hopeless. None of those arguments get close to establishing that the loan agreements were sham agreements as opposed to real loans. Three further points are made in relation to the criticisms at ¶17 of the RRAPOC:

    (1) First, LCF's lending to connected borrowers does not mean that D1 was engaged in fraudulent trading in respect of the lending by LCF. Cs do not explain how a director can make a genuine loan fraudulently or what is the effect of the loans being 'put in place to create a façade of legitimate business activities in order to conceal the fact that LCF's business was carried on with the intent to defraud

bondholders'[44]. The loans are either genuine or they are not. It is submitted, for the reasons given above, that Cs must accept they are genuine;

(2) Second, the criticism that the loans were not made pursuant to the representations presupposes that Cs are able to make good their assertion that those representations were made[45] and that the representations were false.[46]

(3) Third, in relation to the allegation that when loan agreements were signed they were '*dishonestly backdated*',[47] this is denied by D1 who contends that the written loan agreements were dated by Alex Lee who was acting on behalf of LCF after they were signed by D1.[48] In any event, all the parties to the loan agreements treated them as binding and as reflecting the oral agreement that had been concluded on an earlier date between the parties.[49]

iv) Dishonest Assistance

168. The claim that D1 "dishonestly assisted Mr Golding to breach his duties to LCF" is pleaded at ¶91 of the RRAPOC. That paragraph is devoid of any particulars of this alleged dishonest assistance (and the refence in that paragraph to matters "*more particularly pleaded above"* appears to be a reference to Mr Golding's alleged breaches of duty).

169. As such, Cs have not deigned to shed any light on what facts or matters are said to found D1's liability for dishonest assistance. The conclusion that Cs reach at ¶93, namely that "*in the premises, each of the First to Eight Defendants should be ordered to pay equitable compensation to LCF"* is entirely unjustified on the basis of the pleadings (which set out no basis at all for such a remedy).

[44] RRAPoC, ¶17
[45] See D1 ADefence, ¶10 - 17
[46] See D1 ADefence, ¶10 - 17
[47] RRAPoC, ¶17(10)
[48] D1's WS, ¶63-65
[49] D1's WS, ¶65

170. It is simply not good enough for Cs to level such a serious allegation and claim equitable compensation from D1 without providing any particulars at all of what he is said to have done (especially as he is said to have done it, whatever "it" may be, along with seven of the other co-defendants).

171. To the extent that D1 pleads to these hopeless allegations, he does so at ¶76 to 78. The crux of D1's position is that this allegation:-

> "*is wholly unparticularised, but is in any event denied. As set out above, it is denied that Mr Golding was a de facto director of LCF".*

172. It is submitted that this part of Cs claim must fail, for two reasons (i) Mr Golding was never a *de facto* director of LCF and so there can be no claim for assisting him to breach duties that he did not owe; and (ii) in any event Cs' pleading on this part of its claim is hopeless, and the court should not entertain a claim pleaded in this way.

173. These submissions will be amplified and developed orally after Cs have made their opening statement.

IAN MAYES KC
RICHARD BOWLES
HARRY BITHELL

Three Stone
3 Stone Buildings
Lincoln's Inn
WC2A 3XL

[redacted]