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Case No: HC-2017-001610
HC-2017-002043

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

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

Date: 19th March 2018

Before :

THE HON MR JUSTICE HENRY CARR

- -

Between :

PAUL BAXENDALE-WALKER	**Claimant**
-and-	
APL MANAGEMENT LIMITED	**Defendant**

-and-

APL MANAGEMENT LIMITED	**Claimant**
-and-	
PAUL BAXENDALE-WALKER	**Defendant**

- -

Jonathan Seitler QC, Stephen Hackett and Helen Pugh (instructed by **Mischon de Reya LLP**) for **Paul Baxendale-Walker**
Peter Crampin QC and Dov Ohrenstein (instructed by **Lattey & Dawe Solicitors**) for **APL Management Limited**

Hearing dates: 20,21 and 22 February 2018

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Approved Judgment

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

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MR JUSTICE HENRY CARR

Mr Justice Henry Carr :

1. This judgment concerns two applications to strike-out and/or obtain summary judgment: the first made by APL Management Limited ("APL") dated 17 July 2017 and the second by Mr Baxendale-Walker dated 12 January 2018. The Applications are in respect of two claims:

   i) a claim by Mr Baxendale-Walker that two loans made to him by APL are void or voidable; and

   ii) a claim for possession by APL of one of Mr Baxendale-Walker's properties, Burleigh House, on the basis of Mr Baxendale-Walker's arrears under one of the two loans.

2. Mr Baxendale-Walker, who is now retired, was a tax advisor. According to the first witness statement of David Wood, a Chartered Legal Executive employed by Lattey & Dawe, solicitors for APL, Mr Baxendale-Walker had been a barrister, until voluntarily disbarred on 5 October 1989, and a solicitor, until being struck off the Roll of Solicitors in 2007.

3. At paragraph [5] of his first witness statement sworn in response to APL's application, Mr Baxendale-Walker states that he has suffered from increasingly serious ill-health, which is affecting his mental capacity, including his powers of recollection. However, he asserts that his evidence does not depend upon his recollection of events in 2011 or 2013. His witness statements in respect of these applications set out details of the allegedly tax efficient schemes that he set up, and how he considers that he would have reacted, had he been aware of certain facts.

4. In his role as a tax advisor, Mr Baxendale-Walker provided a Mr Paul Levack with tax planning arrangements ("the Arrangements"), the object of which was to attempt to protect certain of Mr Levack's assets, and the profits of certain companies he operated, from tax. As part of the Arrangements APL was incorporated on 16 March 2010. APL was owned and controlled by Mr. Levack, also as part of the Arrangements. I was informed that APL and Mr Levack are currently under investigation by HMRC.

5. Pursuant to the Arrangements three offshore trusts were set up: the Riverside Healthcare Limited Remuneration Trust ("the Riverside Trust"), the Dukeries Healthcare Limited Remuneration Trust ("the Dukeries Trust") and the Allen Paul Levack Remuneration Trust ("the Levack Trust") (collectively "the Trusts"). It appears that some or all of the Trusts are also being investigated by HMRC. The trustee of the Trusts is a Belizean company known as Bay Trust International Ltd ("Bay"). The Trusts consist of shares in offshore companies. APL's role in the Arrangements was to act as a fiduciary agent of those offshore companies.

6. It is alleged by Mr Baxendale-Walker that he was and remains a beneficiary of the Trusts as he comes within the definition of "Provider" in the Trust deeds. APL contends that deeds of amendment completed in 2012 narrowed the definition of Provider and so removed Mr Baxendale-Walker as a beneficiary; and that he was expressly excluded by deeds of amendment made in 2017. Mr Baxendale-Walker challenges the validity of those deeds of amendment.

7. In about late 2011 a Mr Andrew Liyanage, who introduced clients to Mr Baxendale-Walker's allegedly tax efficient arrangements, proposed to Mr Levack that a loan should be made to Mr Baxendale-Walker, who wished to secure finance to acquire a property for the Baxendale-Walker LLP Remuneration Trust. In November 2011 APL lent £3 million to Mr Baxendale-Walker to finance the purchase of a property known as Amberleigh House, 8 Broomfield Road, Oxshott, Surrey, KT22 0LW ("the Amberleigh Loan"). The Amberleigh Loan was secured against Amberleigh House. The loan was for a term of 18 months and it was repaid within that term, together with interest at an agreed rate of 0.834% per month.

8. On 9 March 2012 Mr Baxendale-Walker secured a loan of £3,661,000 from a lender known as Omni Capital Partners Ltd ("the Omni Loan") to assist in the purchase of a property in Weybridge known as Burleigh House, Rabbit Lane, Hersham, Surrey, KT12 4AX ("Burleigh House").

9. In early 2013 Mr Baxendale-Walker was seeking to refinance the Omni Loan. Mr Liyanage therefore put Mr Baxendale-Walker in touch with Mr Levack with a view to APL making a further loan to Mr Baxendale-Walker to refinance the Omni Loan. On 19 March 2013 APL loaned to Mr Baxendale-Walker £3,865,042 ("the Burleigh Loan"), subject to certain deductions which left a net advance of £3,661,360. Interest was payable on the Burleigh Loan at a monthly flat rate of 2.8% on the balance for the duration of the loan. If interest payments were made within seven days of falling due, and no arrears were outstanding, then interest would be reduced to the flat rate of 1.4% per month.

10. The Burleigh Loan was made pursuant to an agreement known as "the Facility Agreement". The Burleigh Loan was paid by APL (via solicitors) to Omni Capital Partners Ltd to redeem the Omni Loan. Funding for the Burleigh Loan was arranged by APL from SG Hambros. The Burleigh Loan was secured by a legal mortgage and registered as a first charge against the title of Burleigh House.

11. Initially Mr Baxendale-Walker continued to make monthly payments on the Burleigh Loan. On 9 July 2014 he ceased to make the payments that were required by the terms of the Facility Agreement.

The Proceedings in the County Court at Central London

12. On 16 October 2014 proceedings were issued against APL and Mr Levack by Mr Baxendale-Walker in the County Court at Central London in respect of the Burleigh Loan ("the County Court Proceedings"). At the time, Mr Baxendale-Walker was subject to an Extended Civil Restraint Order which expired on 14 November 2014. I was informed that the Extended Civil Restraint Order only restricted his ability to bring proceedings against the Law Society and therefore did not prevent commencement by him of the County Court Proceedings.

13. In the County Court Proceedings Mr Baxendale-Walker sought a declaration to the effect that the Burleigh Loan was unenforceable. Mr Baxendale-Walker's case on the Burleigh Loan was pleaded on certain grounds ("the Regulatory Grounds") which in summary were that:

a) the Burleigh Loan was unenforceable as a matter of consumer credit law because APL was not regulated by the FCA; and

b) the Burleigh Loan terms were unfair and therefore apt to be set aside under certain provision of the Consumer Credit Act 1974 and/or the Unfair Terms in Consumer Contracts Regulations 1999.

14. Mr Baxendale-Walker also pleaded in the original version of the Particulars of Claim that he had not signed the Burleigh offer letter and the Facility Agreement and that he believed he had not executed the mortgage.

15. APL brought a counterclaim for a declaration, in wide terms, that the Facility Agreement and the charge over Burleigh House were enforceable. It asked for a declaration that:

> "…the loan agreement and its charge over Burleigh House are enforceable against the Claimant and a declaration in respect of the sums due under the agreement and charge."

In his Defence to the counterclaim Mr Baxendale-Walker denied that APL was entitled to the declaration sought.

16. At a pre-trial review in the County Court Proceedings, on 24 June 2016, issue 1 on the list of issues for trial was as follows:

> "At common law (and ignoring the effect of statute), is the Claimant bound by the terms of the Facility Agreement and/or Mortgage Deed? In particular:
>
> (a) Did he sign those documents and/or otherwise agree to their terms?
>
> (b) Alternatively is he estopped from denying that he signed those documents or otherwise agreed to those terms?

17. Issue 1 was deleted from the list of issues as Mr Baxendale-Walker's counsel accepted that the Facility Agreement and the mortgage deed for Burleigh House were executed with his authority. This was recorded in the recitals to an Order of Recorder Hancock QC made at the pre-trial review which stated that: "*… it being agreed that issue 1 in the list of issues be deleted on the basis that the claimant accepts that he was bound by the facility agreement and mortgage deed*". Thereafter, Mr Baxendale-Walker's Claim in the County Court Proceedings continued on the Regulatory Grounds alone. The counterclaim continued to seek a declaration in wide terms.

18. The trial of the County Court Proceedings commenced on 18 July 2016 and lasted for 5 days. On the first day HHJ Lamb QC, with considerable foresight in the light of subsequent events, required the Particulars of Claim to be amended to reflect the admission made at the pre-trial review. Previously, the Particulars of Claim stated that Mr Baxendale-Walker did not sign the offer letter and the Facility Agreement and was unaware who purportedly signed them in his name. The Particulars also stated that Mr

Baxendale-Walker was, "*unaware that he ever executed the Mortgage*." The Particulars were amended to plead that Mr Baxendale-Walker did not "*recall*" executing those documents but that he "*accepts that he is bound by its terms, subject to applicable legislation*". Mr Baxendale-Walker signed the amended Particulars of Claim on 19 July 2017.

19. Mr Baxendale-Walker's claim was dismissed and APL obtained the declaration sought in its counterclaim, subject to certain exceptions which are not relevant to the issues before me. Paragraphs [5] and [6] of the Order of Judge Lamb dated 9 January 2016 declared that:

> "(5) Excluding the Defendant's legal costs and interest on those costs, the balance due from the Claimant to the First Defendant pursuant to the terms of the Facility Agreement (after giving credit to the Claimant for the Brokerage Arrangement Fee and Arrangement Fee and interest on those fees) is £6,759,495 as at 3 January 2017, with interest running thereafter on the sum of £3,722,998 (being the sum of the advance less the sums specified at (1) above) until repayment at 2.8% per month
>
> (6) Save in respect of the Brokerage Arrangement Fee and Arrangement Fee mentioned in paragraph (1) of this Order, the Facility Agreement is binding on the Claimant and enforceable by the First Defendant, and the Mortgage is binding on the Claimant and enforceable by the First Defendant as security in respect of the Claimant's aforesaid liabilities under the Facility Agreement and for costs and interest on costs as provided in clause 14 of the Mortgage, subject to any order that the Court may make pursuant to the reservation at (4) [regarding costs] above"

20. On 3 January 2017 Mr Baxendale-Walker applied to HHJ Lamb for permission to appeal the order in the County Court Proceedings but was refused. The application for permission to appeal was renewed on paper before Green J on 29 March 2017 but permission was again refused. The application for permission was then renewed at an oral hearing before Blake J. At that hearing an application was also made to rely on new evidence, although no mention was made of the matters now sought to be relied upon by Mr Baxendale-Walker. Blake J refused permission to appeal on 9 May 2017.

21. On 15 February 2018 Mr Baxendale-Walker applied in the County Court to vary the order of HHJ Lamb so as to limit the declarations to the Regulatory Grounds relied on in the Amended Particulars of Claim. I shall return to that application later in this judgment.

Other proceedings relating to the Trusts

22. Since issuing the County Court Proceedings Mr Baxendale-Walker has pursued multiple legal proceedings across the world concerning APL, Mr Levack and the Trusts.

23. On 28 May 2015 he issued a claim in the County Court at Central London against Paul Levack, Dukeries Healthcare Limited, Riverside Healthcare Limited and APL ("the Fees Claim"). The claim was in respect of various fees that he alleged were owed to his companies (Baxendale Walker LLP and Minerva Services Ltd) but had

been assigned to him. Mr Baxendale-Walker applied to strike out the defence to the Fees Claim but the application was dismissed with indemnity costs by Master Matthews, who recorded that the application was totally without merit. An application for permission to appeal against that order was dismissed by Henderson J (as he then was) on 19 May 2016 and that appeal was recorded as being wholly without merit. The Fees Claim was eventually dismissed by order of HHJ Parfitt on 2 September 2016.

24. On 25 April 2017 a claim was also commenced in the Superior Court of the State of California by Mr Baxendale-Walker and a business known as Hawk Consultancy LLC against APL and Mr Levack. The claim complained about the level of interest charged by APL in respect of the Burleigh Loan and alleged that the loan was usurious under the applicable California statute. Mr Baxendale-Walker also claimed for emotional distress caused by Mr Levack and APL's conduct. A motion to dismiss that claim was filed in California and the claim was dismissed by order of Hon. Mark Mooney on 16 October 2017.

25. In 2016, companies acting on behalf of Mr Baxendale-Walker (Minerva Services Limited (BVI), Minerva Services Limited (Belize) and Buckingham Wealth Ltd) brought proceedings in Belize against the trustee of the Trusts claiming fees of £7,292,873. That claim was struck out and summary judgment given against the claimants by Abel J on 30 May 2017.

26. In July 2017 Mr Baxendale-Walker initiated proceedings against Bay in Belize seeking to have Bay removed as a trustee of the Trusts. In September 2017 those proceedings were stayed and proceedings were issued in England ("the Trust Proceedings").

The proceedings which directly relate to these applications

27. On 31 May 2017 APL issued residential possession proceedings in the County Court at Kingston (the "Possession Proceedings") in respect of Burleigh House. Possession is claimed on the basis that: Mr Baxendale-Walker had not paid the sums due in respect of the loan and interest; the term of the loan was 12 months from 14 March 2013; and demand for repayment had been made on 16 October 2016.

28. On 1 June 2017 Mr Baxendale-Walker commenced proceedings in the Chancery Division of the High Court seeking a declaration that the Amberleigh Loan, the Burleigh Loan and the charge over Burleigh House were void or alternatively voidable as a result of the new information that became available in the County Court Proceedings ("the Chancery Proceedings").

29. In the Chancery Proceedings, Mr Baxendale-Walker contends, in summary, that the Burleigh Loan and the Amberleigh Loan are void or voidable, and/or that he is entitled to damages because:

    i) The agreement with Hambros by which APL secured funding to make the loans to Mr Baxendale-Walker is void for mistake (i.e. a mistake about APL's entitlement to charge the Trusts' funds and/or to make a profit other than for the Trusts) or alternatively on the grounds of illegality or public policy (because the Arrangements have not been implemented properly but are being

used in a way that amounts to tax evasion). It is contended that the title to the funds lent by Hambros never passed to APL to be lent to Mr Baxendale-Walker.

ii) Further or alternatively, the Burleigh Loan and the Amberleigh Loan were entered into by Mr Baxendale-Walker in reliance on a mistake, including as to APL's title to lend the funds and/or in reliance upon seven misrepresentations.

iii) Certain statements by Mr Crampin in the Trust Proceedings are said to be further reasons why the Burleigh Loan is void, as pleaded in the Reply, which Mr Baxendale-Walker seeks permission to amend.

30. Mr Baxendale-Walker filed a defence to the Possession Proceedings on 22 June 2017 relying on alleged procedural irregularities in APL's pleadings and a *res judicata* argument. Mr Seitler QC, during the course of his elegant submissions on behalf of Mr Baxendale-Walker, abandoned the *res judicata* argument. On 14 July 2017 the hearing of the Possession Proceedings was adjourned by consent and the matter was transferred to the High Court to be case managed with the Chancery Claim. This judgment therefore concerns both the Chancery Proceedings and the Possession Proceedings.

31. Mr Crampin, on behalf of APL, contended that:

i) other than the profits claim pleaded in paragraph 51.3 of the Particulars of Claim, Mr Baxendale-Walker's claims in the Chancery Proceedings, including the matters sought to be raised in the Reply are barred by *res judicata*;

ii) alternatively, Mr Baxendale-Walker's claims in the Chancery Proceedings should be struck out, or summary judgment should be given; and

iii) Mr Baxendale-Walker has no defence to the Possession Claim and a possession order should therefore be made.

Res judicata – legal principles

Virgin Atlantic v Zodiac

32. *Res judicata* has, historically, been a doctrine of great complexity, and numerous authorities have been cited in hearings where it has arisen. However, in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160, SC Lord Sumption provided a comprehensive explanation of the general principles in nine paragraphs; [17] – [26]. At paragraph [17] he characterised *res judicata* as a portmanteau term which is used to describe a number of different legal principles with different juridical origins. He separated the portmanteau term into six principles, and I set out below those which are relevant to the present application, namely: cause of action estoppel; issue estoppel; the *Henderson v Henderson* principle: and the general rule against abuse of process.

i) "…once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause

of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.

ii) " …there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 St Tr 355 . "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537 , 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181 , 197–198.

iii) " …there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 , 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones."

iv) "Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

33. At paragraph [20] Lord Sumption considered the decision of the House of Lords in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 in which the implications of the *Henderson v Henderson* principle were fully examined. Lord Sumption characterised the issue in *Arnold* as whether, in operating a rent review clause under a lease, the tenants were bound by the construction given to the same clause by Walton J in earlier litigation between the same parties over the previous rent review. The House of Lords approached the matter on the basis that the law had changed since the earlier litigation. Lord Keith of Kinkel began his analysis by restating the classic distinction between cause of action estoppel and issue estoppel:

"Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened. (104D-E)

Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue. (105E)"

34. At paragraph [21] Lord Sumption referred to the consideration by Lord Keith in *Arnold* of the *Henderson v Henderson* principle that *res judicata* extends to *"every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time*." Lord Keith regarded this principle as applying to both cause of action estoppel and issue estoppel.

Cause of action estoppel, was "*absolute in relation to all points decided unless fraud or collusion is alleged*". But in relation to points not decided in the earlier litigation, Lord Sumption explained that Lord Keith's judgment recognised that *Henderson v Henderson* opened up:

> "the possibility that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to the existence or non-existence of a cause of action" (105B).

35. Lord Sumption stated at paragraph [22] that:

> "*Arnold* is accordingly authority for the following propositions:
>
> (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.
>
> (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.
>
> (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

36. At paragraph [23] Lord Sumption recorded a submission made on behalf of Virgin that recent case-law had re-categorised the principle in *Henderson v Henderson,* so as to treat it as being concerned with abuse of process and to take it out of the domain of *res judicata* altogether. In those circumstances, it was contended that the basis on which Lord Keith qualified the absolute character of *res judicata* in *Arnold* by reference to that principle was no longer available, and his conclusions could no longer be said to represent the law.

37. Lord Sumption rejected that submission at paragraph [24]. He explained that the principle in *Henderson v Henderson* has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. He referred to the decision of the House of Lords in *Johnson v Gore-Wood & Co* [2002] 2 AC 1, where Lord Bingham said at 31:

> "*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency

> and economy in the conduct of litigation, in the interests of the parties and the public as a whole.

Lord Bingham continued:

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party."

He concluded that:

> "It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

38. Lord Sumption explained at paragraph [25] that *res judicata* is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. He considered that they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. He referred to the statement of Lord Keith in *Arnold v National Westminster Bank* at p 110G, that "*estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process.*"

39. At paragraph [26] Lord Sumption recognised that if this is the principle, it might be said that it should apply equally to the one area hitherto regarded as absolute, namely cases of cause of action estoppel where it is sought to re-argue a point which was raised and rejected on the earlier occasion. However, he rejected this:

> "But this point was addressed in *Arnold*, and to my mind the distinction made by Lord Keith remains a compelling one. Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."

The effect of an admission

40. In the circumstances of the present case it is also necessary to consider the effect of an admission in relation to *res judicata*. An admission has the same effect as if the issue were decided by the court. The effect of an admission is to make it unnecessary for the court to decide the issue. This principle was expressed by Diplock LJ (as he then was) in *Thoday v Thoday* (supra) at p.198:

> "If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition assert that the condition was fulfilled if the court has in the first litigation determined that it was not, nor deny that it was fulfilled if the court in the first litigation determined that it was."

41. This principle is the basis upon which a party who has consented to judgment is estopped from relitigating the claim; see *In re South American and Mexican Company ex parte Bank Of England* [1895] 1Ch 37 at 45, where Vaughan-Williams J (as he then was) said:

> "It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interests of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end."

Estoppel by record

42. It was contended on behalf of APL that Lord Sumption's analysis of the principles underlying *res judicata* was not as comprehensive as it might appear. It was argued that there exists another, older form recognised by Coke: estoppel by record, and the County Court is a court of record. Reference was made, amongst other authorities, to *Huffer v Allen* (1866-67) LR2 Ex 15 at 18, where Kelly, CB said:

> "it is not competent to either party to an action to aver anything either expressing or importing a contradiction to the record, which, while it stands, is as between them and evidence of uncontrollable verity."

43. It was submitted on behalf of APL that in modern times the principle, prohibiting inconsistent decisions, clearly applies where a court of record makes a declaration as to the parties' rights; and that the same or a similar principle applies to a formal admission which, so long as it stands, forms part of the record and itself creates an estoppel by record. I do not accept this submission. I do not consider that estoppel by record forms part of the modern law of *res judicata* and I do not agree that Lord Sumption's principles need further expansion. The ancient principle of estoppel by record has been subsumed into cause of action estoppel, and there is no justification for introducing a further category which would operate as an absolute estoppel. In my

view, the position is summarised, correctly, in Spencer Bower and Handley, *Res Judicata*, 4th ed. at paragraph [1.17]

> "The term estoppel by record, although widely used in the past, is misleading. It is the *res judicata*, not the record, which creates the estoppel, and it is immaterial whether the court or tribunal is required to keep a written record of his decisions or not.

The authors record that in *Carl Zeiss* (No 2) [1967] 1 AC 853, 933 Lord Guest said:

> "As it is now quite immaterial whether the judicial decision was pronounced by a tribunal which is required to keep a written record of its decisions… It may be convenient to describe res *judicata* in its true and original form as "cause of action estoppel""

Cause of action estoppel in the present case

44. Lord Sumption's summary at paragraph [17] of *Virgin* makes clear that cause of action estoppel applies both to the existence and non-existence of a cause of action. In the present case, the declarations in the County Court Proceedings declared, in effect, that the Burleigh Loan was binding and enforceable and so decided that a cause of action was vested in APL to enforce the Burleigh Loan. Necessarily, the declarations also recognised the non-existence of a cause of action vested in Mr Baxendale-Walker for avoidance of the Burleigh Loan. Mr Baxendale-Walker now seeks to avoid the Burleigh Loan on the basis of several alleged causes of action. APL contends that all such causes of action are barred by cause of action estoppel. The admission by Mr Baxendale-Walker, to the effect that the Burleigh Loan was enforceable (subject to regulatory issues) meant that he gave up all other challenges to enforceability apart from those regulatory issues. It would offend against the policy preventing re-litigation of identical claims to allow him to challenge the enforceability of the Burleigh Loan again, in circumstances where he has lost on the counterclaim in the County Court Proceedings and all applications for permission to appeal have been dismissed.

45. In response, it was contended on behalf of Mr Baxendale-Walker that contextually, the admission was limited to an acknowledgement that he could not positively assert that he had not signed the Facility Agreement or the mortgage deed. The County Court Proceedings decided no more than that the Burleigh Loan was enforceable despite Mr Baxendale-Walker's regulatory challenges, and despite his original pleading that he had not signed those documents.

46. Mr Seitler relied upon the outstanding application to HHJ Lamb to vary or revoke his declaratory order pursuant to CPR r.3.1(7). It was suggested that the form of order annexed to this application showed the declarations that the judge ought to have made. I did not find this persuasive. The form of order annexed to the outstanding application takes no account of Mr Baxendale-Walker's admissions and is plainly defective. Even if it did take account of the admissions, I see no reason why HHJ Lamb would consider substituting these alternative, limited, declarations for the final order that he made, which declarations were granted pursuant to the counterclaim.

47. I reject the submissions made on behalf Mr Baxendale-Walker in respect of the admissions. The counterclaim in the County Court Proceedings was expressed in general terms, the effect of which was to ensure that further, as yet unpleaded, challenges by him to the enforceability of the Burleigh Loan could not subsequently be made. The effect of the admissions was the same as if the point had been decided by the court, and the only challenges left open to the enforceability of the Burleigh Loan were the regulatory issues, which were considered and rejected in HHJ Lamb's judgment. The declarations made in the County Court not only declared that the Burleigh Loan was enforceable, but also quantified monies due to APL. In effect, they gave to APL the rights of a litigant entitled to a money judgment.

48. I shall apply the principle set out by Lord Sumption in *Virgin* at paragraph [26] that: "*Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims*." The attempt in the Chancery Proceedings to challenge the enforceability of the Burleigh Loan by Mr Baxendale-Walker is a direct challenge to the outcome of the County Court Proceedings. To allow it to continue would offend the core policy against re-litigation of identical claims. In my judgment, Mr Baxendale-Walker is barred by cause of action estoppel from making this challenge.

Issue estoppel

49. Additionally, in my judgment, Mr Baxendale-Walker is barred from challenging the enforceability of the Burleigh Loan by reason of issue estoppel. The issue raised by the counterclaim was the enforceability of the Burleigh Loan. That issue, which was determined against Mr Baxendale-Walker, decided the question of whether he could avoid the Burleigh Loan. There are no special circumstances, such as a change in the law, which would make it unjust for issue estoppel to apply. He is not entitled to relitigate that issue in subsequent proceedings against APL.

50. APL also contended that issue estoppel extended to the Amberleigh Loan. It accepted that the admissions and the declarations did not extend to the Amberleigh Loan, and that there were certain immaterial factual differences between the two loans, such as their dates and amounts and the circumstances in which they were made. However, according to Mr Baxendale-Walker's proposed amended pleadings, the same facts are relied upon to avoid both the Amberleigh and Burleigh Loans. In those circumstances, it was submitted that the issues decided in the County Court Proceedings in relation to the Burleigh Loan are necessarily common to both loans, and that Mr Baxendale-Walker is barred by issue estoppel from contradicting the non-existence of a cause of action to avoid the Amberleigh Loan.

51. It was also alleged that the Amberleigh claims were inconsistent with, and barred by, paragraph [34.8] of Mr Baxendale-Walker's Reply in the County Court Proceedings, where it was contended that he admitted that the Amberleigh Loan was valid and binding.

52. I do not accept that issue estoppel applies to the Amberleigh Loan, because the issue of the enforceability of the Amberleigh Loan was not decided in the County Court Proceedings. Identity of the issue is required in order for issue estoppel to apply.

53. Paragraph 34 (8) of the Reply states that:

> "It is the case that the claimant had previously borrowed the sum of £3 million in relation to Amberleigh house. That fact, and the fact that the lending was repaid in full without complaint is irrelevant."

This paragraph does not admit that the Amberleigh Loan was binding. It is true that this paragraph acknowledges that the Amberleigh Loan was repaid in full and without complaint, and raises none of the issues upon which Mr Baxendale-Walker now seeks to rely. This, however, is relevant to *Henderson v Henderson*/abuse of process, rather than to issue estoppel.

Henderson v Henderson/abuse of process

54. The parties addressed these specific and general principles together. As to the Burleigh Loan, on behalf of APL it was submitted that the allegations now sought to be raised could and should have been raised by Mr Baxendale-Walker when defending the counterclaim, as the enforceability of the Burleigh Loan was directly in issue. As to the Amberleigh Loan, on behalf of APL it was submitted that it would be an abuse of process to allow identical allegations which could and should have been raised in the County Court Proceedings concerning the Burleigh Loan to be relied upon to avoid the Amberleigh Loan. On behalf Mr Baxendale-Walker, it was submitted that new information has emerged which could not with reasonable diligence have been raised in the County Court Proceedings, and to rely upon such new information did not contravene the *Henderson v Henderson* principle and was not an abuse of process.

Alleged new information

55. According to paragraph [45] of the draft Amended Particulars of Claim, new information that became apparent during the course of the evidence at trial in the County Court Proceedings was:

    i) that the Burleigh Loan had been funded, not with assets from the Trusts but with funds that had been borrowed from Hambros;

    ii) that APL made the Burleigh Loan (and the Amberleigh Loan) for its own profit and/or that of Mr Levack.

56. According to paragraphs [46] – [49] of the draft pleading, new information which came to light after the conclusion of the County Court Proceedings was of interest-free loans of trust monies to Riverside and Dukeries by APL, which are said to be examples of APL conferring benefits (i.e. loans on better than commercial terms) on parties excluded from benefitting under the Trusts, and in particular on parties connected to Mr Levack. This new information is said to be contained in the Riverside accounts for 2014 and 2015, and in the Dukeries accounts for 2015. In paragraph [46] of the Reply, the omission to raise these claims in the County Court Proceedings is sought to be justified on the basis that evidence of Mr Levack and Mr Taylor during cross-examination "*illuminated otherwise obscure documents which APL had not disclosed in those proceedings.*"

57. The draft amended Reply seeks permission to plead a new case said to be based upon new information in the form of submissions made by Mr Crampin on 18 December 2017 in opposition to Mr Baxendale-Walker's application for interim relief in the Trust Proceedings. This is said to reveal, for the first time, that the Arrangements recommended by Mr Baxendale-Walker were not implemented, with the consequence that the Trusts were never properly constituted.

The Hambros loan

58. In my judgment the existence of the Hambros loan could have been discovered with reasonable diligence. Whilst Mr Seitler did not formally concede this point, he made clear that he was going to say very little about it. In particular:

    i) The source of funding for the Amberleigh and Burleigh Loan was specifically raised on behalf of Mr Baxendale-Walker before commencement of the County Court Proceedings. Solicitors acting for him at that time, Messrs. Irwin Mitchell, wrote a letter before action dated 11 September 2014 which said:

    > 'From further searches it has also become apparent that APL has been trading as a dormant company for several years. As such, it does not appear that either arrangement entered into could have been facilitated by the use of APL's funds. We request that you provide us with further information in relation to where the funds to the arrangements have been sourced from.'

    ii) Disclosure by APL in the County Court Proceedings on 10 November 2015 included a large number of documents which were also included in the trial bundle, which revealed APL's borrowing from Hambros (including documents dated in 2011 when the Amberleigh Loan was made). Those documents showed, clearly, the source of the loans.

    iii) The transcript of the oral evidence in the County Court Proceedings contains numerous references to Hambros' loans to APL of which all parties were plainly aware.

The allegation that APL made the Burleigh Loan (and the Amberleigh Loan) for its own profit and/or that of Mr Levack

59. Mr Seitler relied very strongly on the argument that this was new information, which he described as the golden thread which ran through all of his arguments. He contended that there was a critical distinction between APL making a profit on its own account when making loans, and making a profit for the Trusts in its capacity as a fiduciary agent. He argued that until late 2017 Mr Baxendale-Walker believed that APL was only handling trust assets as a fiduciary agent. He relied upon Mr Baxendale-Walker's witness statement which asserts that he had been misled into believing that APL was a fiduciary, prohibited from using the trust assets save for the benefit of the Trusts.

60. The issue of whether APL was a fiduciary or not was actually raised during the trial of the County Court Proceedings. Therefore, this cannot be described as a point which could not have been found with reasonable diligence. In particular, Mr Grant QC on

behalf of Mr Baxendale-Walker submitted in his written closing submissions at paragraph 9.6 that: "*Indeed the totality of his [ie Mr Levack's] evidence contradicts the notion that APL (and therefore Mr Levack) was acting in some fiduciary capacity, acting for the interests not of itself but of a trust.*" This was disputed by Mr Waters QC for APL, who submitted that APL was acting as a fiduciary.

61. As to profits, on 21 July (day 4 of the trial) Mr Levack was cross-examined by Mr Grant. He was asked whether APL had made a profit from the Burleigh Loan and accepted that the company, which he equated with himself, had done so. Re-examination did not change this position. At the hearing before me, it was contended that Mr Levack's responses to these questions, and his re-examination on the issue, revealed new information. The allegedly new information was, in brief: that Mr Levack considered that the Amberleigh Loan, the Burleigh Loan and various other loans made by APL were made for APL's own profit; and/or that of Mr Levack, rather than for the benefit of the beneficiaries of the Trusts. I agree that the evidence shows that APL was making a profit and that Mr Levack, as a layman, regarded APL as a corporate extension of himself. I do not accept that the evidence is clear that the profit was made for APL on its own behalf, rather than on behalf of the Trusts.

62. In any event, Mr Seitler submitted that it was at that point in the County Court Proceedings that the "*scales fell from his [Mr Grant QC's] eyes*". During the busy period at the close of the trial, whilst drafting closing submissions, it was submitted that it would not have been practical for Mr Baxendale-Walker's legal team to appreciate the full implication of this evidence, and to raise the matter with HHJ Lamb.

63. I reject this submission. More than five months elapsed between when this evidence was given and the hand down of the judgment. After close of evidence in July 2016, on 28 September 2016, there was a further day of closing submissions in the County Court Proceedings. On 3 January 2017 the judgment of HHJ Lamb was handed down. There was no attempt to rely upon the allegedly new information between July 2016, when the evidence was given, and January 2017. If this was information which had not been appreciated during the trial, but which was of such significance that the judge should have changed his decision, then counsel for Mr Baxendale-Walker would have been obliged to draw this to his attention, before judgment was handed down. Further time elapsed during which Mr Baxendale-Walker unsuccessfully sought permission to appeal, during which there was no attempt to rely upon the allegedly new information.

64. Subsequent to the hearing before me, Mr Baxendale-Walker served a further witness statement which sought, amongst other things, to explain why this matter had not been raised earlier. I was informed by Mr Seitler on the last day of the hearing that Mr Baxendale-Walker had prepared a lengthy witness statement to deal with a point which I had raised during the course of argument concerning a Security Interest Agreement. I was told that that evidence would need to be reviewed, and a shorter version was likely to be served, to deal with that point, which I was prepared to allow. In the light of Mr Baxendale-Walker's further evidence, I have not felt it necessary to rely upon the Security Interest Agreement when considering reasonable diligence.

65. The witness statement that was eventually served on behalf of Mr Baxendale-Walker strayed well beyond the issue of the Security Interest Agreement, and no permission

has been requested or granted for it to be admitted in evidence on other issues. Nonetheless, since APL filed written submissions in reply, I shall set out my conclusions on this further statement, even though it has on these other issues not been admitted in evidence.

66. Mr Baxendale-Walker claims that he was unable to attend the County Court Proceedings in person because of health difficulties. He states that a live transcript was taken for the benefit of his legal advisers, but he himself did not read the transcript of what was said at the time of the trial. He states at [19] that:

> "To the best of my recollection I did not look at all the transcript of the cross-examination of Mr Levack until well into 2017. I had no reason to. The transcript was considered in detail in May 2017 because, without waiving privilege, I was considering with my legal team whether to commence proceedings against Mr Atholl Taylor; upon reviewing those transcripts, the significance of what Mr Levack had said regarding APL's dealings in his own interest was collectively discovered. It was shortly after that point, in June 2017, that I commenced the present proceedings against APL and in parallel against Bay Trust."

67. In the light of this evidence, it was submitted on behalf Mr Baxendale-Walker that because he was precluded from attending court on health grounds, he could not reasonably be expected to consider the transcripts in case some piece of evidence might prompt an amendment to his claim. Nor should he be fixed with constructive knowledge, namely the knowledge of his advisors of the evidence that Mr Levack had given. It was argued that on an application of this nature, evidence of his state of knowledge must be accepted. It is also suggested that an application for a late amendment to Mr Baxendale-Walker's pleadings in the County Court Proceedings would have had little, if any, chance of succeeding. Finally, it is suggested that an application to amend could still be made even though judgment has been handed down, and Mr Baxendale-Walker is willing to make such an application if that is what is required.

68. I do not accept these submissions. APL points out, and I agree, that the question of reasonable diligence arises in the context of the obligation to bring forward every point which properly belongs to the subject of the litigation. It applies to all points which were not brought forward whether from "*negligence, inadvertence, or even accident*".

69. Having regard to the counterclaim, the subject of the litigation in the County Court Proceedings was the enforceability of the Burleigh Loan and mortgage, and not merely the regulatory issues that Mr Baxendale-Walker wished to pursue. The points upon which he now wishes to rely properly belonged to the subject of the litigation in the County Court Proceedings, as he seeks to avoid the enforceability of the Burleigh Loan and mortgage.

70. The question of reasonable diligence must be objectively assessed. A party may well not know of a point because he has not found it through negligence, inadvertence or accident. However, it would have been found if reasonable diligence had been exercised. It is neither relevant nor sufficient to state that Mr Baxendale-Walker did not personally know the information, or that his lawyers had not appreciated its significance. The question is not what he knew, but what could have been discovered

if reasonable diligence had been exercised. Information passed to him by his lawyers, and instructions given by him to his lawyers, are also irrelevant. In my view, Mr Baxendale-Walker's later statement, even if it were admissible on this issue, does not show that the points on which he seeks to rely could not have been raised if reasonable diligence had been exercised.

71. Furthermore, even if his actual knowledge were relevant, I do not consider that Mr Baxendale-Walker's latest evidence is adequate to explain what that knowledge was, nor when the evidence that APL might be trading for profit on its own account first came to his attention. I am, of course, conscious of the need to avoid a mini-trial on a summary application of this nature. However, as Lewison J (as he then was) said in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15](iv):

> "This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents."

72. Mr Baxendale-Walker's latest evidence must be considered in the context of the other material before the court. In particular:

   i) In paragraph [19] of his latest witness statement, Mr Baxendale-Walker relies upon his recollection that he did not look at the transcripts at the time of the trial. However, at paragraph [5] of his first witness statement in response to APL's applications, Mr Baxendale-Walker states that he has suffered from increasingly serious ill-health, which is affecting his mental capacity, including his powers of recollection. He claims in that statement not to rely upon his recollection of events. At paragraph [9] of his witness statement in the County Court Proceedings he stated that "*I have no or scanty independent recollection of the facts relating to this case including in particular the events of 2010. I cannot remember what Mr Levack and Mr Roden look like.... So I can only be guided by what the documents say.*" He has given no evidence that his condition has improved since then. It follows that no weight can be attached to his recollection of whether he looked at the transcripts during the trial.

   ii) Mr Baxendale Walker states, correctly, that he did not attend the trial of the County Court Proceedings. He claims that he could not attend due to ill-health, and reliance is placed on that claim in the context of reasonable diligence. I accept, for the purposes of this application, that he was suffering from memory loss caused by dementia at the time of the County Court Proceedings. However, HHJ Lamb did not accept this as an explanation for his non-attendance at trial. Judge Lamb stated at paragraph [6] of his judgment that Mr Baxendale-Walker did not appear before him and there was no satisfactory evidence to explain his absence from the court, which was the subject of a separate ruling made on day 2 of the trial (page 4). Mr Baxendale-Walker's latest evidence does not address Judge Lamb's ruling, nor explain why, in spite of that ruling, he could not attend the trial.

   iii) Mr Baxendale-Walker does not give any evidence in his latest statement as to when he looked at written submissions served on his behalf. His evidence only

refers to the transcripts and does not refer to the written closings. There are numerous references to the transcripts in his counsel's closing written submissions at trial dated 29 July 2016. An issue during the trial was whether APL made the Burleigh Loan by way of carrying on business. Paragraph 9 of the Claimant's Closing asserts, based on Mr Levack's evidence, that APL, controlled by Mr Levack, was making loans in the course of business. There was an unmistakeable implication that both the Burleigh and Amberleigh Loans (amongst other loans) were made by APL for profit; see, for example, the statement that Mr Levack was vague in his evidence about whether he had made loans for profit *before* APL was incorporated; and the reference to Mr Levack's description of the Amberleigh Loan as "*good business*". In the light of this evidence it was expressly asserted in the written closing that APL was not acting as a fiduciary for the Trusts.

73. Dealing briefly with the remaining points made on behalf Mr Baxendale-Walker, I do not accept that the burden of showing reasonable diligence can be discharged by the suggestion that an application to amend would most likely have failed. If the evidence was of the significance now suggested, then permission should have been sought from the trial judge to withdraw the admissions, prior to any application to amend the pleadings. It may be that HHJ Lamb would have refused such an application, which would undoubtedly have been the subject of an application for permission to appeal on behalf Mr Baxendale-Walker. A failure to raise this point either at the time the evidence was given, or in the several months before the judgment was handed down, only diminished the prospect of being able to withdraw those admissions subsequently.

Interest-free loan of trust monies to Riverside and Dukeries

74. At paragraphs [58] – [64] of the amended Particulars of Claim it is pleaded that new evidence has emerged of interest-free loans of trust monies to Riverside and Dukeries. This is said to be contained in the accounts of Riverside and Dukeries, and in the evidence of Mr Levack given in the County Court Proceedings which is said to show that the Trusts had not been operated within their restricted terms. I do not accept that this point could not have been made, with reasonable diligence, at the time of the trial. The relevant accounts, which include statements acknowledging the existence of the loans and the fact that they were interest-free, were publicly available from their filings between December 2014 and January 2016, well in advance of the trial. Furthermore, there was no attempt to withdraw the admissions, nor amend the pleadings after Mr Levack's evidence had been given.

The draft amended Reply

75. The draft amended Reply seeks to rely upon allegedly new information, in the form of submissions made by Mr Crampin on 18 December 2017 in opposition to Mr Baxendale Walker's application for interim relief. Paragraph 4X of the draft claims that the "New Information" was unknown to Mr Baxendale-Walker until those statements were made. I do not accept this, since essentially the same information was pleaded in paragraphs [82] and [83] of the Particulars of Claim in that case, which were served on 11 October 2017.

76. In any event, in my judgment, counsel was not revealing information which was previously unknown, but merely attempting to explain in his own words the complex tax arrangements that Mr Baxendale Walker had himself described in his fifth Affidavit filed on 17 August 2017 in Belize.

77. I refuse permission to amend the Reply. This appears to me to be a misconceived attempt to characterise submissions by counsel as new information, and thereby to improve Mr Baxendale-Walker's position in relation to *Henderson v Henderson*/abuse of process.

Conclusions in relation to Henderson v Henderson/abuse of process

78. In relation to the Burleigh Loan, in my judgment Mr Baxendale-Walker's claims in the Chancery Proceedings are a direct attack on the Order of HHJ Lamb in the County Court Proceedings. The points now sought to be relied upon should have been raised before those proceedings were concluded. Relitigation of these points would prejudice the interests of other litigants and would amount to unfair harassment of APL and Mr Levack. It would be contrary to the principle in *Henderson v Henderson*, and would amount to an abuse of the process of the court to allow the claim to avoid the Burleigh Loan to proceed.

79. I reach the same conclusion in respect of the Amberleigh Loan, where the same allegations are relied upon in an attempt to avoid that loan. If those allegations had been raised in the County Court Proceedings in relation to the Burleigh Loan and had succeeded, then it would be an abuse of process for APL to deny them in subsequent proceedings concerning the Amberleigh Loan. For the same reason, it is now an abuse of process for Mr Baxendale-Walker to assert them in subsequent proceedings concerning the Amberleigh Loan.

80. Furthermore, paragraph [34(8)] of the Reply shows that Mr Baxendale-Walker chose to acknowledge the existence of the Amberleigh Loan and the fact that it was repaid without complaint. If he wished to assert it was void or voidable, then he could and should have made his position clear before the County Court Proceedings were finally concluded.

Conclusion on res judicata

81. In my judgment, Mr Baxendale-Walker is barred by cause of action estoppel and issue estoppel from attempting to avoid the Burleigh Loan. Furthermore it would be contrary to the principle in *Henderson v Henderson*, and an abuse of process, for Mr Baxendale-Walker to pursue his claim to avoid the Burleigh Loan and the Amberleigh Loan.

The profits claim

82. Mr Baxendale-Walker makes a claim, which is pleaded (briefly) at paragraph [51.3] of the proposed amended Particulars of Claim, that APL is obliged to account for its profits from all of its loans to the Trusts and that Mr Baxendale-Walker is a beneficiary of the Trusts, and can bring such a claim ("the Profits claim"). APL accepts that this claim is not *res judicata*; see paragraph [13(1)] of its opening skeleton. APL applies to strike out the Profits claim or for summary judgment in

respect of it. Although Mr Seitler made detailed submissions in support of Mr Baxendale-Walker's standing as a beneficiary, he spent little, if any, time on the Profits claim. It is not included in the claim form; the prayer for relief in the Particulars of Claim; in the many written submissions made on behalf Mr Baxendale-Walker; nor in his evidence. Nonetheless, it has not been formally abandoned, and so I shall deal with it separately from the other claims which I have concluded are barred by *res judicata*.

83. As to whether Mr Baxendale-Walker is a beneficiary, this was clearly a live issue, as it relates to certain other of his claims. Mr Crampin submitted that the case now advanced on behalf of Mr Baxendale-Walker was inconsistent with his Reply, even in its most recent incarnation, paragraph [9] of which pleads that:

> "The Claimant's allegations and Claims hereunder do not depend upon any contention that the Claimant was or is a beneficiary of the Trusts. Insofar as any allegation in the Claimant's Particulars of Claim or this Reply are inconsistent with the foregoing averment, the Claimant does not rely on such allegation."

84. However, paragraph [62] of the Reply pleads an alternative case that Mr Baxendale-Walker is a beneficiary, without prejudice to his primary position that his case can and should succeed without establishing that he is a beneficiary. In terms of the "primary position" put forwards by Mr Baxendale-Walker that he does not need to be a beneficiary of the Trusts to plead the profits claim, I accept APL's submissions that to bring the profits claim Mr Baxendale-Walker must establish that he is a beneficiary.The correct position is set out in *Lewin on Trusts* 19th ed. [39-071]: :

> "only beneficiaries, that is those to whom the trustees are liable to account,… have standing to take proceedings in respect of a breach of trust. This would exclude from this right other parties who may have an indirect interest in the affairs of the trust, such as settlors, protectors and the beneficiaries' family members. The trustees do not stand in a fiduciary relationship to such persons."

Mr Baxendale-Walker's "primary position" has no prospect of successand is wrong in law

85. The inconsistency in Mr Baxendale-Walker's pleadings led to a somewhat arid dispute between counsel as to the precise construction of the word "hereunder" in paragraph [9] of the Reply. Whilst I accept that the draft amended Reply is not a model of clarity, I do not consider that this takes matters any further. Mr Seitler made it clear in his oral submissions that Mr Baxendale-Walker is contending that he is a beneficiary of the Trusts. If I reach the view that the Profits claim should proceed to trial on the basis that he is a beneficiary who is arguably entitled to relief, then I would give permission to Mr Baxendale-Walker to amend to clarify the Reply.Mr. Baxendale-Walker claims to be a beneficiary because he comes within the original definition of "the Beneficiaries" in the deeds establishing the Trusts, a definition which includes "past and present Providers". "Providers" is defined as:

> "(i) a person who provides or has provided or may in future provide to the Founder services or custom or products or finance (save for items of a capital

nature); and (ii) a person who provides or has provided or may in future provide finance to the Trustees or any manager from time to time of the Trust Fund."

86. Mr Baxendale-Walker contends that as he provided various services, most notably establishing the Trusts, he was a Provider and so one of the Beneficiaries. On this basis, the definition of Beneficiaries is so wide that it would include anyone who has provided or may in future provide any service of any nature to the Founder of the respective Trusts. For example, in the case of the Levack Trust, it would include an Amazon courier who delivered a package to the Founder, Mr Levack.

87. The definition of "Providers" was narrowed by deeds of variation in 2012, to persons who have been involved in the providing of finance. It was common ground that if such variations were effective, they would exclude Mr Baxendale-Walker from being a beneficiary. In 2017 there were further deeds of variation that expressly excluded Mr Baxendale-Walker from being a beneficiary.

88. Mr Baxendale-Walker disputes the validity of the 2012 variations on two grounds:

i) they purport to have retrospective effect and this is impermissible; *Bank of New Zealand v Board of Management of New Zealand Officers' Provident Association* [2003] UKPC at [26]; and

ii) the scope of the 2012 amendments is extremely wide, seeking to replace the 2010 deeds entirely and to substitute a new class of beneficiaries. This cannot have been within the reasonable contemplation of the parties when the 2010 deeds were executed (or at least there is a reasonable prospect of showing that it was not within the reasonable contemplation parties); *PNPF Trust Co v Taylor* [2010] PLR 261 136 – 145)).

89. As to retrospectivity, the 2012 deeds of variations have two clauses – one prospective (clause 1) and one retrospective (clause 2). Even if Mr Baxendale-Walker is correct and the retrospective amendment in clause 2 is impermissible, clause 1 remains. Mr Seitler pointed to a potential triable issue in respect of partial severance of a clause. However, this does not arise, in my view, in respect of clause 1. The result is that Mr Baxendale-Walker would still no longer be a beneficiary by virtue of clause 1. He would arguably have been a beneficiary when the Amberleigh Loan was entered into, so might still have some standing in respect of profits from that loan. He would not, however, have been a beneficiary when the Burleigh Loan was entered into in 2013.

90. However, Mr Crampin contends, and I agree, that clause 2 operates as a contractual estoppel, as between the parties to the contract, since they can agree to adopt a matter as a contractual convention, "*whether it be the case or not*"; see Spencer Bower, *Reliance-Based Estoppel* (5th ed, 2017) at paragraph [8.67]; *Peekay Intermark Ltd v Australian and New Zealand Banking Group Ltd* [2006] 2L1 R 511. This applies to the retrospective part of the clause.

91. As to whether the 2012 amendments were reasonably within the contemplation of the parties when the original trust deeds were entered into, the power of amendment in the original trust deeds was in the widest possible terms, namely a power to, "*alter or add to any of the provisions of this Deed in any respect.*" In the light of this express provision, I reject the contention that the 2012 amendments cannot have been within

the reasonable contemplation of the parties when the 2010 deeds were executed, or that there is a reasonable prospect of showing that they were not within the reasonable contemplation of the parties.

92. As to the 2017 deeds of variation, Mr Baxendale-Walker contends that the deeds are void and of no effect because they were an attempt to exclude him from such beneficial status as he might enjoy, so as to deprive him of standing to police Bay's conduct as a trustee of the Trusts. Trustees owe a duty when exercising a power not to use that power for an "*ulterior purpose*". One of the categories of use of a power for an ulterior purpose is for a "*corrupt purpose*", which is a purpose that is intended to benefit the person exercising the power, rather than the beneficiaries, *Lewin on Trusts*, 19th ed. paragraphs [29-292] - [29-293].

93. In my judgment, the suggestion that the 2017 deeds were entered into for a corrupt purpose, namely to stop Mr Baxendale-Walker from scrutinising the trustee's conduct and to prevent future misconduct, is fanciful. I do not consider that Mr Baxendale-Walker has been attempting to scrutinise the trustee's conduct and to take steps to prevent future misconduct. His intention in claiming to be a beneficiary is to avoid repayment of the Burleigh Loan and interest.

94. The 2017 deeds were confirmatory, and entered into as a complete answer to Mr Baxendale-Walker's arguments in this litigation that he was a beneficiary. It was in the interests of the Trusts for Mr Baxendale-Walker to be excluded as a beneficiary, since he is attempting to rely on that status to deprive the Trusts of the principal and interest of the Burleigh Loan, of security for the Burleigh Loan, and of interest and fees paid in respect of the Amberleigh Loan. Therefore, in my judgment, the case that the 2017 deeds were entered into for an ulterior or corrupt purpose is strikeable, and has no real prospect of success.

95. Furthermore, even if Mr Baxendale-Walker was a beneficiary of the Trusts I do not consider that he would be entitled to an account of the profits that the Trusts have made from the loans, which is the remedy that he seeks in the Profits claim. Any accounting would be between APL and the trustee of the Trusts. Even if Mr Baxendale-Walker could establish he is a beneficiary, the Trusts are discretionary and Mr Baxendale-Walker would have no right to payment of any of the profits. The fact that Mr Baxendale-Walker has an unwinnable case from which he would not receive any possible benefit is, in itself, a sufficient ground for striking out this aspect of his claim (see *Harris v Bolt Burdon* [2000] L.T.L. February 2, 2000, CA).

96. For these reasons, I reach the conclusion that the Profits claim should be struck out, and that summary judgment should be granted in respect of it to APL.

The merits of the other claims

97. As I have concluded that Mr Baxendale-Walker's is barred by either cause of action estoppel, issue estoppel, or abuse of process from advancing the other claims, it may be thought that to consider the merits of the other claims is a waste of judicial resources, which could otherwise be devoted to hearing other cases, and is contrary to the policy upon which *res judicata* is based.

98. At the present hearing, the parties agreed that I should hear the *res judicata* argument at the same time as the argument on the merits. With hindsight, it would have been better if I had not acceded to this suggestion, and had heard the *res judicata* argument first. However, having been addressed in detail on the merits, I have reached the view that all of Mr Baxendale-Walker's claims in the Chancery Proceedings are strikeable, and that summary judgment should be given in respect of them. I have decided to set out as brief, as is possible, reasons for this conclusion.

99. Apart from the Profits claim, Mr Baxendale-Walker's claims can be placed into five main categories:

    i) mistake;

    ii) breach of trustee powers;

    iii) failure to constitute the Trusts;

    iv) illegality/public policy; and

    v) misrepresentation.

Mistake

100. Mr Baxendale-Walker argues that the Hambros Facilities Letters, the Burleigh Loan and the Amberleigh Loan are void because they were entered into under various mistakes, namely:

    i) The Facilities Letters were void because:

        a) of a mistake as to APL's title to the funds it charged to Hambros; and/or

        b) Hambros mistakenly believed that APL was entitled to make profits on its own account without breaching its fiduciary duties.

    ii) The Burleigh Loan (and accordingly the Amberleigh Loan) were void because:

        a) APL and Mr Baxendale-Walker were under the mistaken belief that APL had title to the funds that comprised the Burleigh Loan and the Amberleigh Loan;

        b) further or in the alternative, Mr Baxendale-Walker's obligations were never engaged due a total failure in consideration as good title was never advanced.

101. Mr Baxendale-Walker contends that the mistake in respect of the Facilities Letters meant that title to the funds that comprised the Burleigh Loan and the Amberleigh Loan did not pass from Hambros to APL and subsequently from APL to Mr Baxendale-Walker. In my judgment, this claim is fundamentally flawed, for the following reasons.

102. First, the alleged mistake as to APL's title, which is said to be a common mistake (see paragraphs [81] – [84] of Mr Baxendale-Walker's opening Skeleton) would not void

the Facility Letters in the light of clause 7(c) of the Security Interest Agreement dated 21 November 2011 between APL and Hambros (then Societe Generale), which covers this situation. Clause 7(c) contains a representation and warranty by APL that it is the sole legal and beneficial owner of and has good title to the Collateral. In *Great Peace Shipping Ltd v Tsavliris Salvage Ltd (CA)* [2003] QB 679 Lord Philips MR held at paragraph [75] that:

> "Just as the doctrine of frustration only applies if the contract contains no provision that covers the situation, the same should be true of common mistake."

103. Accordingly, if Mr Baxendale-Walker could show that there was a mistake then Hambros, not Mr Baxendale-Walker, would have the option to enforce the warranty, but the Facilities Letters would remain valid.

104. Secondly, the alleged mistake would not render the service provided essentially different from the performance contemplated. One of the conditions for an operative common mistake is not therefore satisfied. As *Great Peace Shipping* (at paragraph [73] to [76]) makes clear, the mistake must make the contract impossible to perform. Here the contract was obviously not impossible to perform because it was in fact performed.

105. Thirdly, even if the Facility Letters were void, it would still be incorrect to conclude that title did not pass to APL. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] A.C. 669 Lord Goff stated at p.609 that:

> "…there is no general rule that the property in money paid under a void contract does not pass to the payee; and it is difficult to escape the conclusion that, as a general rule, the beneficial interest in the money likewise passes to the payee. This must certainly be the case where the consideration for the payment fails after the payment is made, as in cases of frustration or breach of contract; and there appears to be no good reason why the same should not apply in cases where, as in the present case, the contract under which the payment is made is void ab initio and the consideration for payment therefore fails at the time of payment."

106. Mr Baxendale-Walker's case as to mistake is, in my judgment, misconceived as a matter of law and has no reasonable prospect of success.

Breach of Power Claims

107. Mr Baxendale-Walker also claims that the two loans were made by APL as a fraud on its power as trustee, in breach of its power, and/or that APL was excessive in the execution of its power. The precise details of these claims vary depending on whether APL was making a profit on its own account or on account of the Trusts but for these purposes it is not necessary to analyse the differences between the two. Mr Baxendale-Walker contends that the result of those breaches is that both the Burleigh Loan and Amberleigh Loan are void.

108. However, where a trustee enters into a contract the contract binds the trustee personally, even if he is not authorised to enter into it by the trust instrument or by general law. The contract is not void, but the trustee has no right of recourse to the trust fund. The beneficiary may ratify the trustee's unauthorised contract, which

would not be possible if it were void. The position was summarised in *Rolled Steel Products (Holdings) Ltd. and British Steel Corporation and other* [1986] Ch 246, CA at page 303:

> "If two trustees convey trust property in breach of trust, the conveyance is not void."

109. Accordingly, any breach or excess of powers by APL would not render either loan void. Mr Baxendale-Walker's case as to breach of powers is, in my judgment, misconceived as a matter of law and has no reasonable prospect of success.

Trusts were not properly constituted

110. Mr Baxendale-Walker pleads a further claim that none of the contributions to the Trusts were paid to Bay as trustee of the Trusts but instead were paid directly by the relevant settlors to APL. On this basis, it is alleged that legal title to the contributions never passed to Bay and so the Trusts were not properly constituted. As a result, it is alleged that either the monies are held on resulting trust for Mr Levack or have passed as *bona vacantia* to the Crown. Mr Baxendale-Walker argues that APL had no power to deal with the funds and that the loans and mortgages are void as a result.

111. Even assuming that Mr Baxendale-Walker was able to establish at trial that the Trusts were not properly constituted, this would not assist him. APL had the capacity to enter into valid contracts of loan with Mr Baxendale-Walker, and there is no suggestion that its acts were *ultra vires*. APL and Mr Baxendale-Walker remain personally bound by the contracts they entered into regardless of whether the Trusts were properly constituted. It does not affect APL's legal capacity to enter into a binding and enforceable contract of loan with Mr Baxendale-Walker, nor does it relieve Mr Baxendale-Walker of his contractual liability to repay it.

112. **Illegality/Public Policy**

113. Mr Baxendale-Walker also contends that various loan documents are void due to illegality/public policy:

i) The Facility Letter was void on the grounds of illegality and/or public policy because:

   a) its purpose was to enable to APL to make a profit properly chargeable to tax, which APL did not intend to pay; and

   b) by charging the Trusts' funds for profit APL was acting as an investment manager in contravention of the regime in the Financial Services and Markets Act 2000.

ii) The Burleigh Loan (and accordingly the Amberleigh Loan) was void on the grounds of illegality and/or public policy because:

   a) its purpose and/or effect was to enable APL to make a profit that ought to have been subject to tax but on which no tax was paid; and

b) because APL entered into it in breach of various fiduciary duties.

114. In *Patel v Mirza* [2016] UKSC 42 the Supreme Court emphasised the need to consider whether refusing to enforce a contract on grounds of illegality/public policy was proportionate in all the circumstances, including: the seriousness of the conduct, the conduct's centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability. In this case, even if it is assumed that the wrongful conduct complained of by Mr Baxendale-Walker can be established, it would not be proportionate to hold that the Facility Letters and the loans are void:

i) the alleged conduct is not central to the various contracts, and the alleged wrongful conduct does not affect the ability of either party to perform the contract. Any tax evasion is a consequence of one parties' choices following the making of the loans and not the result of the loans themselves;

ii) avoidance of the loans would give Mr Baxendale-Walker an unjustified windfall. Even if he paid the principal of the Burleigh Loan into court (as he has now offered to do, although the reliability of this offer is strongly disputed by APL and the ultimate destination of the money paid in is unclear) he would still receive a windfall in relation to interest payments. That would be unjust;

iii) voiding the contracts would potentially deny HMRC tax revenues, which would run contrary to the public policy concerns that Mr Baxendale-Walker advances; and

iv) there are far more proportionate options for dealing with any wrongdoing of APL (if established). Notably: reporting any tax evasion to HMRC, regulatory sanctions in respect of the Financial Services and Markets Act 2002 and action by beneficiaries in respect of any breach of fiduciary duties.

115. I therefore conclude that the Facility Letter, Burleigh Loan and Amberleigh Loan would not be void on the grounds of illegality or public policy even if Mr Baxendale-Walker could establish the wrongdoing that he alleges. I do not consider that Mr Baxendale-Walker has any real prospect of establishing that the wrongful conduct he alleges is of such a nature as to merit voiding the loans.

Misrepresentation

116. Mr Baxendale-Walker submits that in entering into both loans he relied on various misrepresentations made to him, in particular that:

i) the funds for the Amberleigh Loan and Burleigh Loan would be provided from the Trusts' funds;

ii) the profit from the Amberleigh Loan and Burleigh Loan would accrue for the benefit of the Trusts and not for APL and/or Mr Levack personally;

iii) APL was acting as a fiduciary in entering into the Amberleigh Loan and the Burleigh Loan;

iv) APL was lawfully entitled to the monies lent pursuant to the Amberleigh Loan and the Burleigh Loan;

v) the Trusts were validly constituted;

vi) the Arrangements (including the Trusts and APL in its capacity as personal management company) were being operated in accordance with the advice and instruction given by Brunswick Wealth LLP; and

vii) the Amberleigh Loan and the Burleigh Loan would not trigger a tax liability to HMRC and/or a liability which go undeclared and/or unpaid.

117. In his witness statement Mr Baxendale-Walker states at paragraph [83] that, "*I set out the nature of the misrepresentations and the reasons why I relied upon them in detail above.*" In fact, Mr Baxendale-Walker does not give details of any representations made to him, which, on his own evidence, he does not remember. His evidence indicates that he assumed that the Arrangements were being operated as he expected them to be and that he was certain that "*Mr Liyanage would have told me if APL or Mr Levack has said that he was proposing to lend me money in his or APL's own right.*" That is not evidence of a representation made by APL or Mr Levack.

118. Furthermore, representations (ii) – (vii) above did not appear in the original Particulars of Claim served on 19 June 2017, nor in the first draft of the Amended Particulars of Claim served on 19 January 2018. They first emerged a few days before the hearing, when the revised draft Amended Particulars of Claim was emailed to APL's solicitors on 14 February 2018. Mr Baxendale-Walker's witness statement, served on 8 February 2018 does not refer to any of these alleged representations, as they were not a part of his case at the time. If the representations were made to him and relied on by him, he would have referred to them at the start of the Chancery Proceedings. Mr Baxendale-Walker has no reasonable prospect of establishing at trial that these representations were made to him, and relied on by him.

119. Mr Baxendale-Walker also relies upon the filing of dormant accounts by APL but no evidence is put forward that Mr Baxendale-Walker monitored the accounts, and he does not suggest that he did, which, on his evidence, he would not remember. There is no evidence that this conduct amounted to a representation to Mr Baxendale-Walker upon which he relied.

120. There are vague suggestions by Mr. Baxendale-Walker that further evidence as to the misrepresentations will become available at trial, in particular that of Mr Liyanage. No such evidence has been put forward in answer to the applications by APL for strike out/summary judgment, and Mr Liyanage has not put in any evidence to support Mr. Baxendale-Walker's account. In my view, this is, at best, "*micawberism*" i.e. a hope that something may turn up. Although in considering a summary judgment application the court must have regard for evidence available at trial it is only evidence that can "*reasonably be expected to be available*" (see *Royal Brompton Hospital NHS Trust v Hammond* (No 5) [2001] EWCA Civ 550). No such reasonable expectation has been established.

121. In my judgment Mr Baxendale-Walker's misrepresentation claims have no reasonable prospect of success. Had they not been barred by *res judicata*, I would have granted summary judgment in respect of them.

The application by Mr Baxendale Walker to strike out or summary judgment

122. In the light of my conclusions set out above, I shall dismiss this application.

The Possession Claim

123. The defences to the Possession Claim which continue to be relied upon by Mr Baxendale-Walker are set out at paragraphs [116] - [128] of Mr Seitler's skeleton argument. The primary defence relates to the invalidity of the Burleigh Loan. I reject that, as I have concluded that the Burleigh Loan is valid and enforceable.

124. As Mr Seitler confirmed that Mr Baxendale-Walker no longer disputes the Possession Claim on the basis of *res judicata*, his defence to the Possession Claim now rests entirely on the alleged procedural defects. The alleged defects are:

i) that the Particulars of Claim ought to have been issued in form N120;

ii) that APL has not included a statement as to its own knowledge of who is in possession of the Property as required by paragraph 2.1(5) of Practice Direction 55A;

iii) that the Particulars of Claim do not exhibit the mortgage and/or loan agreements in accordance with paragraph 7.3(1) of Practice Direction 16;

iv) that the basis for possession has not been pleaded; and

v) that APL has not provided relevant details of Mr Baxendale-Walker's circumstances as required by paragraph 2.3(5) of Practice Direction 55A.

Applicable legal principles

125. CPR 3.10 provides that:

> "3.10 Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b) the court may make an order to rectify the error."

126. The Court of Appeal in *Steele v Mooney & Others* [2005] EWCA Civ 96 gave the following guidance in relation to CPR 3.10:

> "22. First, if the phrase "error of procedure" is given a narrow meaning, difficult questions of classification will arise. This will inevitably lead to uncertainty and sophisticated arguments as to how to characterise an error. This would be highly

> undesirable. It seems to us that a broad common sense approach is what is required.
>
> 23. Secondly, rule 3.10 gives the court a discretion. This must be exercised in accordance with the overriding objective of dealing with cases justly: rule 1.1(1) . If remedying one party's error will cause injustice to the other party, then the court is unlikely to grant relief under the rule. This gives the court the necessary control to ensure that the apparently wide scope of rule 3.10 does not cause unfairness.
>
> 24. Thirdly, the general language of rule 3.10 cannot be used to achieve something that is prohibited under another rule. This is the principle established by *Vinos*."

127. In my judgment, the alleged errors complained of (to the extent they are errors) are errors of procedure. It has not been suggested that any other civil procedure rule prohibits the rectification of such errors. Whether to rectify any such errors is therefore an exercise of discretion in the light of the overriding objective set out at CPR 1.1, which is to deal with cases *"justly and at proportionate cost"*.

128. Mr Seitler submits that I ought not to ignore the above defects because the formalities of CPR 55, "*are more than a matter of convenience; they provide an essential framework, the rigidity of which enables justice to be done on critical matters in short order.*" I agree that they should not be ignored. However, it would be wrong to apply a rigid framework which fetters the exercise of the court's discretion.

Form N120

129. Whilst form N120 must be used according to PD 55A paragraph 1.5, APL has provided all the relevant information required by N120, which it has placed in a different format with some additional material. Mr Baxendale-Walker has not pleaded specific information that would have been in form N120 was missing from APL's Particulars. This defect is therefore clearly not substantive but technical in nature and its rectification would cause no injustice to Mr Baxendale-Walker.

Knowledge of who was in possession,

130. APL has pleaded that:

> "To the best of the Claimant's knowledge the following persons are in possession of the property:
>
> the Claimant has been informed, via the Defendant's solicitors, that the Defendant is in possession of the property but this is not within the Claimant's personal knowledge."

131. The requirements of PD 55A, paragraph 2.1(5) are to, "*give details of every person who, to the best of the claimant's knowledge, is in possession of the property*". In my judgment, APL has complied with this requirement. Even if there had been an error in

this respect, the substantive information has been provided and its rectification would cause no injustice to Mr Baxendale-Walker.

Failure to exhibit mortgage and/or loan agreements

132. PD 16 paragraph [7.3] states:

> "Where a claim is based upon a written agreement:
>
> (1) a copy of the contract or documents constituting the agreement should be attached to or served with the particulars of claim…" (emphasis added).

133. The use of the word "should" clearly indicates that this is not a mandatory provision. I do not therefore consider that a failure to comply with PD 16 paragraph 7.3 constitutes a defence to the Possession Claim. Even if the provision was mandatory then the breach would have subsequently been cured by serving copies of those documents on Mr Baxendale-Walker in the exhibits to the witness statement of Mr Wood. In any event Mr Baxendale-Walker is clearly aware of the contents of those documents as he brought the County Court Proceedings in relation to them, and must have had copies before the Possession Proceedings were issued. Even if there had been an error, its rectification would cause no injustice to Mr Baxendale-Walker.

A failure to plead the basis of possession beyond just the sums owing

134. Mr Crampin contends, and I accept that as form N120 makes no provision for the pleading of further details, there is no need to do so. Form N120 does allow for further details to be filled in, but does not mandate them. I do not regard this as a defect. Furthermore, as the mortgage was created by deed expressed to be by way of legal mortgage, section 87(1) of the Law of Property Act 1925 confers the right to take proceedings to obtain possession from the occupiers. Finally, in the circumstances of this case, even if there had been an error, its rectification would cause no injustice to Mr Baxendale-Walker.

Failure to provide details of Mr Baxendale-Walker's circumstances:

135. APL has provided information as to Mr Baxendale-Walker's circumstances, However Mr Baxendale-Walker complains that APL did not refer to his "*severe and degenerative neurological condition*". That condition has not prevented him from conducting substantial litigation in multiple jurisdictions. I do not consider that there has been any failure by APL in this regard, and in any event, Mr Baxendale-Walker has referred to his condition in his Defence. Even if there had been an error, its rectification would cause no injustice to Mr Baxendale-Walker.

Additional points

136. Mr Crampin referred in his skeleton to two further objections raised by Mr Baxendale-Walker in his Defence. As they were not relied upon, either in Mr Seitler's skeleton or submissions, it does not appear that they are pursued. In any event, I do not accept them:

i) that APL failed to explain its claim to enforce the debt while filing dormant accounts at Companies House. This point is irrelevant. There is a mortgage in

place, which is enforceable. How APL's accounts should be filed in the light of any such mortgage is not a matter for the Possession Proceedings; and

ii) that APL takes issue with the precise quantum of the sum said to be required to pay the mortgage and the quantum of APL's costs. The amount owing to pay the mortgage (excluding any sum payable for solicitor's costs and administration charges) is clear because it is set out in the order of HHJ Lamb in the County Court Proceedings:

a) as of 3 January 2017 £6,759,495; and

b) thereafter interest running on the sum of £3,722,998 at 2.8% per month. Mr Crampin stated, and it was not disputed, that this amounts to £3,427.19 per day.

I also accept Mr Crampin's submissions that I do not need to determine APL's costs at this stage. The only claim made in the Possession Proceedings is for possession of Burleigh House, a claim for the total amount outstanding under the mortgage has not been made.

137. In my draft judgment circulated to the parties I expressed the view that Mr Baxendale-Walker's defence to the Possession Claim disclosed no reasonable grounds for defending the claim, and had no reasonable prospect of success. I therefore proposed to grant an order for possession. Further submissions were then made to me on behalf of Mr Baxendale-Walker that:

i) only the County Court has jurisdiction to make an order for possession; and

ii) tMr Baxendale-Walker was willing to pay the sums owing under the mortgage to avoid a possession order being made.

138. I will therefore consider those submissions from Mr Baxendale-Walker at the consequentials hearing in respect of this judgment, together with any submissions APL wish to make in reply. Following that I will determine whether or not to make an order for possession.

Conclusion

139. My overall conclusions are as follows:

i) Mr Baxendale-Walker is barred by cause of action estoppel, issue estoppel and the principle in *Henderson v Henderson*/abuse of process from attempting to avoid the Burleigh Loan.

ii) Mr Baxendale Walker is barred by the principle in *Henderson v Henderson*/abuse of process from attempting to avoid the Amberleigh Loan.

iii) The “Profits claim” advanced by Mr Baxendale-Walker is strikeable, or alternatively has no reasonable prospect of succeeding at trial.

iv) If I had not concluded that Mr Baxendale Walker was barred by the principles of *res judicata* from attempting to avoid the Burleigh and Amberleigh Loans,

then I would have struck out or granted summary judgment in respect of his claims to avoid those loans.

v) Mr Baxendale-Walker's application for summary judgment is dismissed.

vi) APL's application for an order for possession in respect of Burleigh House will be determined at the consequentials hearing.