Neutral Citation Number: [2020] EWHC 951 (Ch)

Claim No: BL-2019-000414

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

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

Date: 22/04/2020

Before:

Sarah Worthington QC (Hon) sitting as a Deputy High Court Judge

- -

Between:

Ms KAUSAR RAJA	**Claimant/ Respondent**
- and -	
Mr TERRY GODRICK McMILLAN	**Defendant/ Applicant**

- -
- -

Robert-Jan Temmink QC and Gabriel Buttimore (instructed by Teacher Stern LLP) for the Claimant
Philip Coppel QC and John Fitzsimons (Cavendish Legal Group Ltd) for the Defendant

Hearing dates: **21 February 2020**

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Approved Judgment

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

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Sara Worthington QC (Hon)

Sarah Worthington QC (Hon):

1. The issues

1. The Defendant **("D"**) has applied for summary judgment or a strike out of the claim brought by the Claimant **("C"**) for losses she sustained in the purchase of Flat 5 in a development known as the Signal Building in London, SE1. Flat 5 was initially subject to a s.106 planning condition (i.e. a condition pursuant to s.106 of the Town and Country Planning Act 1990) which designated the flat as an affordable housing unit, and thus subject to the affordable housing obligations set out in the s.106 agreement between the London Borough of Southwark and the site's freeholder, Neobrand Ltd (**"Neobrand"**).

2. C's claim against D is for conspiracy to injure by unlawful means and/or for deceit as a joint tortfeasor. C alleges that she was misled into buying Flat 5 by being falsely told that it was sold free of the affordable housing obligation (**"AHO"**) imposed by the s.106 agreement. After C's purchase of Flat 5, the London Borough of Southwark (**"LBS"**) pursued C and 8 other flat owners in the block for breaches of the planning conditions. That claim was settled, as was a further claim by C in negligence against her conveyancing solicitor, but C remains substantially indebted to the lender from whom she borrowed the money to purchase Flat 5, and she now seeks damages from D for the loss caused by D's alleged wrongs.

3. In this judgment I adopt the abbreviations set out in C's Particulars of Claim (**"PoC"**), especially those adopted for the various corporate entities named as co-conspirators or joint tortfeasors. C's claim is exclusively against D, but as co-conspirator or joint-tortfeasor with other parties. D's alleged co-conspirators include various corporate entities which can be described as D's corporate alter-egos, since D is the sole director and in ultimate control of each of them (here with any one or more of them referred to simply as **"DC"**); as well as **LDHA** (the London District Housing Association Ltd), which was the approved Registered Provider under the s.106 agreement; plus certain earlier nominee tenants of Flat 5 (see below); and other "persons [as yet] unknown" to C. D's alleged joint tortfeasors in deceit are a subset of these, including M&E (one of the DCs), LDHA, and/or the two nominee tenants of Flat 5. However, in order to avoid repeatedly naming both D and all his alleged co-conspirators or joint tortfeasors, or the relevant one of them acting in pursuit of the alleged tort, I will simply indicate that such a party is intended by the shorthand **"DX"** unless it is necessary to be more precise. [For details, see PoC paras 6-10, 37-38, 52.]

2. Outline facts

4. It is not disputed that Neobrand granted a head lease of all the designated affordable housing units (**"AHUs"**) in the Signal Building, including Flat 5, to LDHA as a registered AHU provider. LDHA financed this acquisition with money provided by DC, and held the head leases on trust for DC. LDHA then sold a sub-lease of Flat 5 to an individual (one of the DX) who purchased that sub-lease, subject to the affordable housing s.106 condition (the AHO), on a shared-equity basis with the housing association, but did so with money provided by DC, with the sub-lessor agreeing to hold its interest in the flat on trust for DC. On the same day, DC provided the sub-lessor with the necessary additional funds to buy-out all of LDHA's remaining interest in the flat so that the sub-lease was thenceforth held wholly by the sub-lessor on trust for DC. [See PoC paras 11-19, 27-36.]

5. This second step in the transaction, being the buying out of all of LDHA's interest, was allegedly done by a process of "staircasing", permitted under Clause 9 of the s.106 agreement, which process, if effective, would render the AHO no longer binding as against the tenant effecting such staircasing, or anyone deriving title from him.

6. "Staircasing" is defined in the s.106 agreement as "the purchase by the owner of a Shared Ownership Unit [such owner here being the sub-lessor of Flat 5] of additional equity in the Shared Ownership Unit", with the AHO no longer being binding against any such tenant "Staircasing to 100%", or any person deriving title from him. [See PoC paras 20, 21; D's Defence at para 23(3); and C's stress on "additional" in Part 18 responses 8 and 11.]

7. The sub-lessor never lived in the flat; instead it was rented out commercially. DC paid the sub-lessor for his nominee services. The sub-lessor sold the sub-lease to another party, whom DC also paid for his nominee services, who similarly took the sub-lease subject to the trust for DC, to whom the proceeds of sale were ultimately paid when C purchased the flat. Both nominee tenants are named as parties to the conspiracy (i.e. included in the DX). C alleges she purchased the flat from the second nominee tenant in reliance on representations that the affordable housing condition no longer applied. Those representations it is alleged were false.

8. As noted in the previous paragraphs, all the funds provided to LDHA or the nominee tenants for the acquisition of the head-leases and sub-leases were provided by DC, and all the declared trusts of these head-leases and sub-leases were in favour of DC. The trusts of the sub-leases gave DC "the absolute right to deal with the Property including its management letting and sale … in such manner as the Beneficial Owner in its absolute discretion shall require" and required the tenant to "take such action and enter into such documents and sign such documents as the Beneficial Owner shall require subject always to the indemnity at clause 6 hereof", with the indemnity indicating that the tenant would not incur any financial liability under the sub-lease for rental or sale costs or any other costs. [See PoC paras 30, 33, 34, 36, as affirmed in D's Defence; and Springford WS paras 73 and 74.]

9. In summary, as alleged by C, DC provided funds to LDHA to buy shared-ownership AHUs, including Flat 5. DC then provided funds and a lump-sum payment to a nominee tenant to acquire a sub-lease of Flat 5 from LDHA. DC provided further funds to his nominee to "staircase" the ownership of the flat to 100%, although beneficial ownership of the flat remained with DC throughout. In short, it is alleged that D effectively acquired the entirety of the interest in the AHU at the outset, and then retained it in its entirety throughout a series of transactions which purported to satisfy and extinguish the s.106 affordable housing obligation requirement which attached to the flat. The flat was then sold on to C.

3. Legal Background to the strike out/summary judgment application

10. The relevant principles for determining applications to strike out or for summary judgment are not contested: see the principles summarised in ***Baxendale-Walker v Middleton*** [2011] EWHC 998 at paras 65-70 (Supperstone J). D's application engages both CPR 3.4 and CPR 24.2.

11. D alleges that the claim should be struck out on the grounds that there is no basis for the allegations pleaded. The relevant principles are set out in ***Three Rivers District Council v Bank of England (No.3)*** [2003] 2 AC 1. Where there are disputed issues of fact, the court

should not strike out a claim unless it is certain it is bound to fail. That is a significant hurdle. On the other hand, with a clear and obvious case, the aim of the strike out jurisdiction is to achieve expedition and save expense.

12. That test is similar but not identical to that for summary judgment, where the court will not grant summary judgment unless the claim has no real prospect of success, and there is no other reason why the case or issue should be disposed of at a trial: see the summary of the relevant legal principles in ***Easyair Ltd v Opal Telecom Ltd*** [2009] EWHC 339 (Ch) at para 15 (Lewison J), approved by the Court of Appeal in ***AC Ward & Sons Ltd v Catlin (Five) Ltd*** [2009] EWCA Civ 1098 at para 24 (Etherton LJ).

13. There are three aspects to these principles. In relation to issues of fact, these principles suggest an application for summary judgment will be dismissed if the disputed claim is more than merely arguable: see ***Swain v Hillman*** [2001] 1 All ER 91 at 92; and ***ED&F Man Liquid Products Ltd v Patel*** [2003] EWCA Civ 472. Summary judgment must not involve the court conducting a mini-trial: see ***Swain*** at 95 (Lord Woolf MR). On the other hand, it may sometimes be clear that there is no real substance to the factual allegations made, even taking into account the further evidence which may realistically be available at trial: see ***ED&F*** at para 10; ***Three Rivers DC v Bank of England (No.3)*** at para 95 (Lord Hope).

14. In relation to matters of law, these principles indicate that where an application for summary judgment gives rise to a short point of law or construction, and the court is satisfied that it has before it all the evidence necessary for the proper determination of the question, and that the parties have had an adequate opportunity to address it in argument, it should decide the issue.

15. Finally, the court will not deliver summary judgment if there is some other reason why the case or issue should be disposed of at a trial. None was suggested by the parties, although it is conceivable that there may be other similar claims in the wings.

4. Arguments advanced by the parties at the hearing

16. The arguments advanced by the parties fall into three parts. First, C argues that D's application for strike out or summary judgment should be dismissed because issues of fraud, as alleged here, are inherently unsuitable for summary judgment, and there are no separate grounds for a strike out. This is dealt with under the heading "The short route to dismissal of D's application". Secondly, D argues that C's claims should be struck out because they are based on allegations of fraud which have not been appropriately pleaded. This is dealt with under the heading "Special requirements in respect of pleading fraud and dishonesty". Finally, D argues that C's claims should be struck out or determined summarily to the extent that, even if all the primary allegations of fact were made out, there are one or more legal issues that are decisive of the claim in D's favour, or, alternatively, that C has no real prospect of proving the facts that are essential to making out her claim. This is dealt with in the longest section, under the heading "The long route in advancing D's application for a strike out or summary judgment".

5. The short route to dismissal of D's application

17. In essence, the "short route" to dismissal of this application is that the case involves issues of fraud and dishonesty, and so is inherently unsuitable for summary determination or strike out. In particular, the court must not conduct a mini-trial of the issues at this stage: see above, and also ***Alpha Rocks v Alade*** [2015] EWCA Civ 685 at para 25 (Vos

LJ); and ***Swain v Hillman*** [2001] 1 All ER 91 at 95 (Woolf MR). Instead, the issues should be determined at trial with the benefit of disclosure and cross-examination: ***Alpha Rocks*** at paras 31-32.

18. D disputes that assertion, suggesting that ***Alpha Rocks*** does not support C's case, since it was concerned only with an application to strike out for abuse of process, not to strike out because the claim was bound to fail. But that particular difference was not material to the Court's conclusion that a strike out or summary judgment application should not be conducted as a mini-trial of contested issues, still less where those issues involve contested allegations of fraud and dishonesty which will often depend crucially on the evidence revealed by disclosure and cross-examination: see ***Alpha Rocks*** paras 31 and 32.

19. This does not mean that allegations of fraud and dishonesty must always go to trial: see ***AAI Consulting Ltd v FCA*** [2016] EWHC 2812 (Comm); and ***Cunningham v Ellis*** [2018] EWHC 3188 (Comm). However, those claims were struck out on the basis that the particulars of claim were inadequate in themselves to support the claim being made. These cases thus apply the settled principles and affirm rather than contradict the general point made in ***Alpha Rocks***. That point appears equally relevant to the facts here, but still leaves open D's own arguments for a strike out or summary judgment.

6. Special requirements in respect of pleading fraud and dishonesty

20. D's first argument is that C's PoC do not meet the special requirements which are essential when pleading fraud or dishonesty. Although not put so firmly, D would seem to be making the same claim as that made in ***JSC Bank of Moscow v Kekhman*** [2015] EWHC 3073 (Comm) – the primary authority relied on by D – at para 14: i.e. that in a case where fraud is alleged (as is the case with conspiracy and deceit here), "there is an anterior question as to whether fraud is properly pleaded at all, in other words whether the requirements imposed by the rules of Court and as a matter of law in respect of pleading fraud have been satisfied." In ***Kekhman***, the strike out and summary judgment applications were dismissed because the claimant had pleaded facts which, if proven, would justify an inference that the defendant had been dishonest, even though these facts were not ones which were only consistent with dishonesty.

21. In ***Kekhman***, in setting out the relevant law on this issue, Flaux J at paras 15-18 cited extensively from ***Three Rivers District Council v Bank of England*** [2001] UKHL 16; [2003] 2 AC 1, and then, at para 20, set out in short form the test that needs to be met:

> "At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge."

By way of emphasising the balance needing to be struck, Lord Hope in ***Three Rivers*** at para 55 noted the important distinction between the pleadings as such, which must leave no doubt as to the case that is being alleged or the essential basis for it as set out in the particulars, and the state of the evidence on those asserted facts, which is a matter for trial (although of course a claim may be struck out if it can be shown that the claimant has no real prospect of successfully pursuing the claim by establishing those facts).

22. Further, if allegations of fraud or deceit rest upon drawing inferences about a defendant's state of mind from other facts, then those other facts must be clearly pleaded, and the inference of dishonesty must be more likely than one of innocence or negligence: ***Cunningham v Ellis*** at para 42, citing ***Portland Stone Firms Limited v Barclays Bank*** [2018] EWHC 2341 (QB) at paras 26, 29; and ***JSC Bank of Moscow v Kekhman*** [2015] EWHC 3073 (Comm) at para 20. In applying these principles, however, the court may take a "generous approach to pleadings" given that the defendant may have "tried to shroud his conduct in secrecy": ***Cunningham v Ellis*** at para 43 citing ***Portland Stone*** at para 27.

23. On the basis of these legal principles, D suggested that C cannot simply raise the conjecture of dishonesty and leave it to the court to draw inferences. But C has not done that. Dishonesty is specifically pleaded by virtue of the very particular claims advanced, being in unlawful means conspiracy based on deceit, and deceit itself [PoC paras 37, 38, 52]. D can thus be in no doubt as to what is alleged. Moreover, C has set out in detail the facts on which the allegations of dishonesty are based: see below. Further, if the facts as alleged by C are made out, then the inference of dishonesty is more likely than one of innocence or negligence. See in particular the specific context alleged to pertain to DX's dealings with C (as summarised in para [9] above), the specific representations alleged to have been made by DX to C (see below) and the alleged state of D's and DX's knowledge at the time (see below). It is not to the point that D disputes some of these facts, especially facts relating to D's and DX's knowledge. D needs to go further and show that C has no real prospect of proving the facts as alleged. That is a matter for the next section.

24. In the absence of proof by D that C's claim is bound to fail because C will be unable to make out the alleged facts (as to which, see below), I am not persuaded that C's claim should be struck out because the allegations of fraud are not properly pleaded. C has made it plain that D is facing allegations of fraud and dishonesty, and the facts on which those allegations are based have been set out in detail. It is a different matter whether C will be able to prove those facts and succeed at trial, but that is not the test for a strike out or summary judgment.

7. The long route in advancing D's application for a strike out or summary judgment

25. D's substantive application for a strike out or summary judgment is based on assertions that the essential legal elements of C's two alleged claims – in unlawful means conspiracy and in deceit – cannot be made out, either as a matter of law or because the necessary supporting facts either have not been alleged or cannot be made out. The essential legal elements are not in dispute, but need to be set out to determine whether D's claims can be made out. I take each tort in turn.

8. The tort of unlawful means conspiracy

26. As set out in **Clerk & Lindsell on Torts 22nd Ed**., para 24-98, the tort of unlawful means conspiracy is committed where two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a third party who does incur the intended damage: see ***Baxendale-Walker v Middleton*** [2011] EWHC 998 at para 60. It is not necessary for the injured party to prove that causing damage was the main or predominant purpose of the combination: some lesser intent to harm the claimant will do (see below).

27. D's case here is that C's claim should be either struck out or summarily dismissed because it is impossible for C to make out any of the five critical elements of the claim. In particular, D alleges that: (i) there was no agreement or combination; (ii) even if there was an agreement or combination, there was no agreement to use means that were unlawful – i.e. the deceit claim cannot be made out; (iii) DX did not know of the facts that are said to make what was alleged to have been agreed "unlawful"; (iv) DX had no intention to harm C; (v) C has suffered no causative loss or damage. I consider each in turn, since – subject only to what I say below on (iii) – proof of any one of them would be fatal to C's claim.

(i) The necessary combination

28. The law is clear. There must be a combination, or a conspiracy, to effect the unlawful means: see Nourse LJ in ***Kuwait Oil Tanker Co SAK v Al Bader*** [2000] 2 All ER (Comm) 271 (***"Kuwait Oil Tanker"***) at paras 111-112 and 132-133. That analysis suggests it is necessary for two or more persons to combine with a common intention – i.e. deliberately, even if tacitly – to achieve a common end, but that the very existence of the agreement can often only be inferred from the overt acts eventually implemented. It follows that it is usually impossible to establish precisely when or where the initial agreement was made or when or where other conspirators were recruited. What is necessary, however, is that the parties to the combination "be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert *at the time of the acts complained of*", those acts being the ones that constitute the unlawful means (at para 111, emphasis added).

29. Although the parties must share the same object, the various advantages to be derived from that same object need not be the same: ***Crofter Hand Woven Harris Tweed Co Ltd v Veitch*** [1942] AC 435 at 479 (Lord Wright).

30. D suggests that C's claims fail on this front because of the legal impossibility of the allegation, or alternatively because of factual shortcomings in the PoC in establishing the conspiracy. I take each in turn.

The legal point – a conspiracy is impossible between D and his alter egos

31. In both written and oral submissions, counsel for D made much of the point that what is needed for a conspiracy is the combination or agreement of two or more autonomous legal persons. That is uncontroversial. But he then went on to argue that C's own case collapsed by virtue of insisting that all the conspirators were owned and controlled by D, thus making a conspiracy a logical impossibility as D would merely be conspiring with himself. Defendant counsel's written skeleton, at paras 52-58, summarises the point:

> "If it is really the Claimant's case that the Defendant controlled all five corporate bodies involved in the alleged conspiracy then the allegation appears to be that the Defendant conspired with himself. Such a proposition is fatal to the Claimant's case as any alleged unlawful means conspiracy must involve agreement between two or more persons.
>
> Returning to its pleaded case, it is notable that each of the four companies was under the control of the Defendant. They were, for all intents and purposes one-man companies under the complete control of the Defendant. They are not for the purposes of an unlawful means conspiracy "other persons." This is not some arcane, lawyer's point. …

> Thus … the Claimant is left alleging an agreement or combination with no-one but the Defendant.
>
> This is fatal. By itself it collapses the conspiracy."

32. I do not regard this analysis as sustainable. Stated so baldly, it would seem to ignore completely the separate legal personality of companies, to misconceive ***Meridian Global Funds Management Asia Ltd v Securities Commission*** [1995] UKPC 5, [1995] 2 AC 500 (***"Meridian Global"***) and directly to contradict not only ***Prest v Petrodel Resources Ltd*** [2013] UKSC 34, [2013] 2 AC 415, but any number of company law cases before and since.

33. To the extent that D's assertion of impossibility of a conspiracy between a director and his one-man companies is restricted to unlawful means conspiracies, it is contradicted by the persuasive analysis of Gloster J in ***Barclay Pharmaceutical Ltd, AAH Pharmaceuticals Ltd, AAH Ltd v Waypharm LP*** [2012] EWHC 306 (Comm), at paras 220-229, citing ***Taylor v Smyth*** [1991] 1 IR 143 (Irish SCt) at 165 (McCarthy J). See also ***Belmont Finance (No 1) v Williams Furniture*** [1979] Ch 25 (CA).

34. It is true that the contrary assertion has been accepted in cases of criminal conspiracy. The authority cited is invariably the judgment of Nield J in ***R v McDonnell*** [1966] 1 QB 233 (Bristol Assizes), expressing the opinion that a conspiracy requires not merely two legal persons but two separate minds. That proposition itself might be doubted and the analysis underpinning it revisited. If a director of a one-man company can contract with his company, then it is difficult to see why he cannot conspire with it: for the former, see ***Lee v Lee's Air Farming Ltd*** [1961] AC 12 (PC). Although not the basis of the analysis in the case, the exceptionally restrictive approach in ***McDonnell*** might perhaps be justified on the basis that a criminal conspiracy is complete and liability attaches once the agreement is formed, even before any harm befalls the victim. As between two conspirators being a sole director and his sole one-man company it may seem unwarranted to impose criminal liability at that instant. But that same justification would not seem to apply once the number of parties or companies in the criminal conspiracy expands beyond the single company and its one-man director, and indeed the criminal conspiracy claim would seem well designed to deal with the possible harms then likely, even when – and perhaps particularly when – all the companies are directed by the same person. For present purposes I would simply distinguish this case on the basis of its criminal context.

35. In short, I am not persuaded by the argument that C's PoC cannot possibly disclose a conspiracy where the conspirators are D and his alter egos. This, then, is not a basis for summary judgment or strike out. To the extent that the point of law might be arguable despite the authorities noted above (see **Clerk & Lindsell on Torts 22nd Ed**. para 24-96), those arguments should be advanced in a full trial, not in an application of this nature: see ***AAH Pharmaceuticals v Birdi*** [2011] EWHC 1625 (QB) at para 31 (Coulson J).

Various factual points of pleading

36. In addition to this legal point, D advanced several further arguments suggesting that C's PoC were insufficient to support the allegations of conspiracy or combination.

37. **First**, D claimed that the facts upon which it is alleged that LDHA was part of the conspiracy are insufficient to support the claim. However, the facts alleged by C do not have to be proved at this stage. They must however make it clear to D the case he will have to answer; they must be facts which, if made out, will provide evidence of the

conspiracy or combination alleged; and there must be a realistic prospect that these facts can indeed be made out at trial.

38. The PoC para 37 clearly puts D on notice that LDHA is alleged to be part of the conspiracy, and not an independent arms-length party to the scheme of transactions described earlier. It is not fatal to the claim that it may only be possible to infer the conspiracy from the overt acts eventually implemented: see para [28] above, relying on ***Kuwait Oil Tanker***. To that end, the very fact of a registered housing association entering into a series of transactions whereby, as alleged in the PoC, Flat 5 is never at any stage occupied as an affordable housing unit by a qualified AHU tenant may call for explanation or lead to inferences. But the PoC make more specific allegations. They allege that LDHA has been "*caused*" by the agreed conspiracy with the co-conspirators to grant sub-leases and make certain representations [PoC para 37(b)], with LDHA acting to those ends under the direction of Phillip Butt and/or Fraser Allen and with their knowledge and intentions attributed to LDHA [PoC paras 38(a), 51]. By this mechanism LDHA is alleged to be a party to the conspiracy and to have acted to make fraudulent misrepresentations [PoC paras 42, 43, 46, 47, 49]. Note that this is not the only mechanism alleged: see too the trust arrangement between LDHA and DC [PoC paras 30, 36].

39. D suggested that the specification that LDHA is alleged to have acted under the direction of Phillip Butt and/or Fraser Allen [PoC para 38(a)] is inadequate to indicate how LDHA was a party to the conspiracy. In particular, D suggested that Fraser Allen's acts, knowledge and intentions cannot be attributed to LDHA as he was not an officer of LDHA. However, that is not a legal prerequisite to attribution: the analysis and outcome in ***Meridian Global*** is to the contrary. D further suggested that the PoC are inadequate in that they do not plead the specific acts undertaken by Phillip Butt and why those acts can be attributed to LDHA. Instead, however, the PoC allege with sufficient particularity all the relevant acts undertaken by LDHA in granting the subleases and making specific representations, and then assert that those acts were pursued under the direction of these two men. C conceded during the oral hearing that this assertion could have been particularised in greater detail. That may be so, but it is also true that the necessary details are likely to emerge only after discovery and cross-examination, since the inference to be drawn from the PoC is that these two men have a relationship with the other conspirators, including D, that somehow ensures that LDHA is bound into the conspiracy. Some evidence of such a relationship emerged in the witness statements put in evidence in the oral hearing: see Pabla WS paras 19-34, especially paras 28-29; Sharma WS para 5; Ramakrishnan WS para 4.

40. In short, and despite any shortcomings in the PoC (as to which, see ***Cunningham v Ellis*** at para 43 citing ***Portland Stone*** at para 27, noted at para [22] above), I am of the view that the PoC are sufficient to alert D to the case he must answer in this regard, and that the alleged facts, especially in combination with the other facts surrounding the conspiracy alleged in the PoC, are sufficient to indicate to D the evidence on which proof of a conspiracy is to be based. Further, there is no reason to suppose that C is bound to fail in making out the facts to support that evidence at trial.

41. **Secondly**, D suggested that various persons alleged to be parties to the conspiracy, such as the nominee tenants, could not have been party to any conspiracy initiated "prior to 19 September 2012" [PoC para 37], since they were not even in contemplation at that stage. PoC para 37 and its construction were the subject of oral submissions at the hearing (see below at [84]). D urged that this paragraph makes it plain that the combination was

necessarily complete by the nominated date, other than in respect of M&E (one of the DCs), who is specifically named as entering later. The paragraph is not elegantly drafted, but the more logical reading of it is that the conspirators initiating the plan prior to 19 September 2012 had a scheme to involve others, including the nominee tenants, who were to be recruited in the future, paid, and utilised to achieve nominated ends. Whatever the drafting difficulties, it must have been plain to D the case he had to answer, and the allegations as to who was involved in the conspiracy and how: see the approach set out in ***Kuwait Oil Tanker***, outlined at [28] above. Moreover, even on D's interpretation, nothing of substance would change in relation to C's claim against D: all the alleged facts relating to the nominee tenants would remain relevant to the plan to implement the alleged conspiracy involving D, even if the PoC had by virtue of a drafting error failed to capture the nominee tenants as additional co-conspirators; these nominee tenants could in any event be bound into the plan and given directions by DC as a result of the trust arrangements under which the sub-leases are held.

42. It thus follows, in my view, that any alleged shortcomings in the PoC so far as they relate to the nominee tenants are insufficient to warrant a strike out or summary judgment of C's claim.

(ii) The necessary unlawful means – the alleged deceit

43. C's allegations of unlawful means conspiracy are based on the unlawful means of deceit. D asserts that C's allegations in deceit are bound to fail. If true, this would be fatal to C's entire case in both unlawful means conspiracy and in deceit. I consider this separately at paras [64]-[83].

(iii) The necessary knowledge that the means are unlawful

44. D further asserts that a claim in unlawful means conspiracy will fail unless the defendant appreciated that the proposed acts were unlawful. In support, D relies on ***Meretz Investments NV v ACP Ltd*** [2006] EWHC 74, [2007] Ch 197 at paras 371-372 per Lewison J, noting that this was in part reversed by the Court of Appeal at [2007] EWCA Civ 1303, [2008] Ch 244 (**"*Meretz Investments*"**), but adding that arguably the Court of Appeal required even greater knowledge on the part of the defendant, referring especially to paras 95-98, 124-127, and also citing in further support the more recent cases of ***Bank of Tokyo v Baskan Gida*** [2009] EWHC 1276 (Ch) at paras 836-837; and ***Digicel (St Lucia) Ltd v Cable & Wireless plc*** [2010] EWHC 774 (Ch) at Annex I paras 94-118. By contrast, D also noted the Court of Appeal decision in ***Belmont Finance Corp v Williams Furniture (No 2)*** [1980] 1 All ER 393 (CA), at 404 and 414, which held that a person is a party to a conspiracy if he knows the essential facts that constitute the conspiracy, even though he does not know that they constitute an offence. That case concerned unlawful financial assistance for the purchase of company shares. The defendants had obtained legal advice suggesting their actions were not caught by the statutory bars on financial assistance, but that did not save them from either the primary breach or the conspiracy claim when the court held that advice to be incorrect.

45. This is a difficult area of law, but I do not myself read the cases relied upon by D as going so far as to require a defendant to *know* that the 'means' used were unlawful before a claim in unlawful means conspiracy can be made out. ***Meretz Investments*** was concerned (in part only by way of *obiter*) with whether legal advice which indicated that a proposed course of action was legal, and thus would not involve a breach of contract, was sufficient to excuse a defendant alleged to have *intended* to induce a breach of contract, or a

defendant alleged to have *intended* to harm the claimant as is required to make out a claim in unlawful means conspiracy. When the defendant's state of knowledge is used to these ends – i.e. to determine the defendant's relevant intention – it would seem perfectly proper to regard the defendant's reliance on pertinent legal advice as able to deny his intention to induce a breach of contract, and, more doubtfully perhaps, his intention to harm the claimant in the manner required for an unlawful means conspiracy. However, to have that impact on intention, the legal advice must be pertinent to the issues in play. For example, the wrong of inducing a breach of contract (as in ***Meretz Investments***) requires the defendant to have an intention to induce the breach of contract; by contrast, the wrong of providing financial assistance for the purchase of shares does not require intention at all, and so legal advice will have no role to play in determining whether or not the wrong has been committed (as in ***Belmont***). That makes the issues in conspiracy claims rather harder. There are admittedly suggestions in ***Meretz Investments*** that the same approach to determining intention to induce a breach of contract would operate to relieve the defendant of an intention to harm the claimant in the conspiracy claim. I remain unsure. It is one thing to say that the defendant in ***Meretz Investments*** should not be liable for conspiracy, but inevitably he will not be, as the unlawful means requirement will fail if there was no unlawful inducing of a breach of contract. But should the conspiracy claim fall away in the ***Belmont*** scenario, where the wrong persists despite the legal advice? In those circumstances, surely the answer is as held in ***Belmont*** itself.

46. On the facts before me in this hearing, these issues of the relevance of legal advice are material in considering the 'intention to harm' in the conspiracy claim and the intention to deceive in the deceit claim, and I return to them in those contexts. However, for present purposes, I cannot see that ***Meretz Investments*** or the later cases also relied upon by D go so far as to require a defendant to *know* that the 'means' used were unlawful before a claim in unlawful means conspiracy can be made out. As before, to the extent that the point is arguable (as to which, see **Clerk & Lindsell on Torts 22nd Ed**. para 24-95 at fn 522), that is a matter to be aired at trial, not on an application such as this. Accordingly, I do not regard any flaws in this element of C's claim, if indeed there are such flaws, as sufficient to warrant a strike out or summary judgment.

(iv) The necessary intent to harm

47. This is the most difficult issue of law in this hearing. The tort of unlawful means conspiracy requires the conspirators to act *with the intention of causing damage to a third party*: see para [26] above. There is considerable debate over the meaning of "intent to cause damage", or "intent to harm or to injure". Here the parties disagree on the law. They also disagree on whether certain facts set out in the PoC provide support or deliver a rebuttal of this aspect of C's claim. In such circumstances the proper response is surely that seriously contested issues of law and fact should be aired fully, with all the relevant detail before the court after full discovery and cross-examination, and not by way of an application such as this. That is my view. However, the parties addressed the issues in some detail, so I provide a response.

The parties' approach to the law

48. It is D's case that (i) the intention to harm C must be present at the inception of the conspiracy; (ii) it must be the *cause* of the combination; and (iii) the conspirators must intend the harm to be inflicted *through* their unlawful behaviour. The **second** requirement is the most hotly contested and I deal with that first. D suggested that an intention to harm C will not be the cause of the combination unless the intended harm is either the desired

end or the necessary means to the desired end of the conspiracy being carried out, citing ***Newson Holding Ltd & Ors v IMI Plc & Ors*** [2013] EWCA Civ 1377, [2014] Bus LR 156 at paras 32-35 per Arden LJ (an unlawful means conspiracy case), which in turn cites Lord Nicholls in ***OBG Ltd v Allan*** [2007] UKHL 21, [2008] AC 1 (***"OBG"***), paras 164-167 (an unlawful interference and an inducement of a breach of contract case). Notably, it is ***OBG*** which provides the language used by D. I return to that later. D further suggests that intention to harm C cannot be the cause of the combination unless D entered the conspiracy believing that C would *necessarily* suffer loss as a result of its implementation: see ***Air Canada & Ors v Emerald Supplies Limited & Ors*** [2015] EWCA Civ 1024, [2016] Bus LR 145 (CA) at para 167 (an unlawful means conspiracy and unlawful interference case). That paragraph does not assert a positive requirement, however; it makes the simpler negative point that an intention to harm cannot sensibly be described as a cause of the defendant's conduct (as said to be required in ***OBG***) if the defendant is not even sure that the claimant will suffer loss at all (in that case because any losses would likely be passed on). Nor, the parties agree, is it sufficient that the possibility of loss by C is merely a foreseeable possibility.

49. Applying that view of the law, D's case is that the facts set out in the PoC will not support a finding of the necessary intent to harm. First, there is no direct evidence of D's intent. That is common, however, especially in fraud cases. Secondly, D suggests that no inference of the necessary intent can be drawn. He suggests that such an inference cannot be drawn simply from the harmful consequences of the implementation of the conspiracy unless all other possible and more benign inferences of intent can be eliminated. This is despite ***Kuwait Oil Tanker***, noted earlier at para [28], and D relies instead on ***JSC BTA Bank v Ablyazov (No 8)*** **[2012] EWCA Civ 1411, [2013] 1 WLR 1331** at para 52. However, that paragraph refers to the drawing of inferences from circumstantial evidence in a criminal case, where the relevant test is beyond reasonable doubt. I doubt this test is appropriate in tort cases. Equally, D suggests that such an inference cannot be drawn on the basis that harm to C is the necessary and essential "obverse side of the coin" to the benefit desired by D, as explained in ***OBG***, at para 167. Moreover, and for the same reason, D suggests that the ***Newsom*** test, set out in the previous paragraph, cannot be met (i.e. that harm to C is either the desired end or the necessary means to the end desired by D), nor can the ***Emerald Supplies*** test be met (i.e. that D entered the conspiracy believing that C would *necessarily* suffer loss as a result of its implementation). And every one of these conclusions is said by D to rest on the fact that D was pursuing his own business interests, *with the benefit of legal advice*, so that he (and presumably all the DX controlled by him) had no reason to think that any harm *at all* would befall C. If that is right, then a great deal rests upon the efficacy of the legal advice obtained by D. I return to that.

50. First, though, it is worth contrasting the test of intent to harm advanced by C. C took a similar starting point, but reached different conclusions. C cited ***Emerald Supplies*** at para 133 for the "well established" proposition that the concept of intent to harm has the same meaning for both the tort of unlawful means conspiracy and the tort of unlawful interference, citing ***Meretz Investments NV v ACP Ltd*** [2007] Ch 197 (ChD). That proposition was not analysed or debated in ***Emerald Supplies***, and was simply accepted by all the parties in that case. I return to this, as I am not sure the proposition can stand in the light of more recent Supreme Court decisions. Nevertheless, if true it means that authorities on either form of tort are relevant in establishing what is needed, and C relied especially on ***OBG*** at paras 61, 63 and 167. In particular, C noted that in some circumstances the court will infer an intent to injure from acts which a conspirator does to promote his own objectives: see the "obverse side of the coin" argument advanced by

Lord Nicholls in ***OBG*** at para 167. See too Nourse LJ in ***Kuwait Oil Tanker***, paras 107, 116-121 (an unlawful means conspiracy case), expressly adopting the conclusions of Oliver LJ in considering intention in the similar field (as Nourse LJ described it) of misfeasance in public office in ***Bourgoin SA v Minister of Agriculture, Fisheries and Food*** [1986] 1 QB 716 at 777:

> "If an act is done deliberately and with knowledge of its consequences, I do not think that the actor can sensibly say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them."

51. Adopting this version of the test of intention to harm, then proof of intention, according to C —although not put in quite these words – may come down to determining whether D acted "with knowledge of the consequences" of his undoubtedly deliberate acts in entering into the scheme. On the facts, this would again come down to whether D can rely on his assertions that the scheme as implemented was lawful and effective, or was at least believed on good grounds by D to be so, so as to enable D to deny that he had any knowledge of the likely adverse consequences for C and thus deny he had an intention to harm.

52. The fact that D's legal advice may have a significant impact on the outcome regardless of which approach is taken to "intent to harm" is not automatically a cause for reassurance. The legal advice has this impact because it may disprove the existence of the *relevant* intention. It is however critical to know *what* relevant intention must be disproved.

Comment on the legal requirement of "intent to harm"

53. **Clerk & Lindsell on Torts 22nd Ed**. acknowledges the difficulties in this area: see paras 24-99—24-100. Stepping back and looking at the economic torts more generally, one of the sources of confusion must surely be the tendency to cite propositions as if they carried equal force across all four of the principal economic torts (i.e. lawful means conspiracy, unlawful means conspiracy, unlawful interference with economic interests (the intentional harm tort), and procuring a breach of contract). This tendency operates even though it is acknowledged that there is no unified theory holding these torts together, as to which, see Lord Walker in ***OBG*** at para 264. If the torts are distinct, then it follows that even though "intention to harm" and "unlawful means" may be common to several of these torts, it cannot be assumed that the content of these concepts is the same in each context: see this point noted by Lords Sumption and Lloyd Jones in ***JSC BTA Bank v Khrapunov*** [2018] UKSC 19, [2018] 2 WLR 1125 (SC) **(*"JSC"*)** at para 6.

54. Looking to the issue here, analogies are commonly drawn between unlawful means conspiracy and either (or both) lawful means conspiracy or unlawful interference. Both parties have done this here, either explicitly or implicitly. Yet unlawful means conspiracy is fundamentally different from the other two torts in at least one crucial respect. The latter torts both impose a liability on a defendant for loss caused by a wrong that is not otherwise actionable by the claimant against the defendant, either at all, or at least if the defendant were acting individually. If that is to be justified, then "a high degree of blameworthiness is called for" in the defendant, and it is to that end that "intention serves as the factor which justifies imposing liability on the defendant": see ***OBG*** at para 166 per Lord Nicholls. See too ***JSC*** at para 10, where the point is made that it is the predominant purpose of injuring the claimant that makes the lawful means conspiracy actionable, *whereas it is merely the use of unlawful means* that makes the unlawful means conspiracy actionable. This difference in the use of "intent to harm" as a control mechanism is likely

to have a profound impact on the appropriate concept of "intent to harm" in each of the three different torts. In particular, unlawful means conspiracy is likely to have less-demanding tests than the other two torts.

55. If potentially inapt analogies are discarded, and focus is turned to what the cases say about intention to harm in the context of unlawful means conspiracy, and not in the context of the very exceptional economic torts where intention to harm is the sole justification for imposing liability, then a rather different picture emerges. The words used by the court refer less to "intent *to* harm the claimant" and rather more to "intentionally harming the claimant". To that end, see Lord Bridge in ***Lonrho plc v Fayed*** [1992] 1 AC 448, at 465–466:

> Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators ***intentionally injure*** the plaintiff and use unlawful means to do so, *it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful*. (emphasis added)

56. That same type of formulation is repeated in ***JSC***, indicating that it does not matter that the predominant purpose was to benefit the defendant, it suffices if the unlawful means was "directed against the claimant", and where that is done then a "constructive" intent to harm the claimant is derived from the fact that the defendant should have known that injury to the claimant was likely: see ***JSC*** para 13, and also see paras 11 and 16. See too Lord Hope in ***Revenue and Customs Commissioners v Total Network SL*** [2008] UKHL 19, [2008] 1 AC 1174 (HL) ***("Total")*** at paras 42-44 (the unlawful means is "directed at" the claimant and intended to secure that result), and Lord Walker in ***Total*** at para 82 ("intentional injury" is all that is required), and para 93 (the unlawful means are the means by which harm is "intentionally inflicted" on the claimant).

57. It follows that "intent to harm" in an unlawful means conspiracy may not impose an especially demanding requirement. It certainly does not come close to the requirement in lawful means conspiracy cases where the intention to harm must be the predominant intention of the conspiracy. In unlawful means conspiracies that is not required (although it may be present on the facts, and is said by C to be so here: see PoC para 37). Indeed, some cases have suggested that where the unlawful means is a tort, the difference between the requirements needed to prove the unlawful means conspiracy and those needed to prove the joint tortfeasance may be vanishingly slim: see Lord Walker in ***Total*** at para 94.

58. On this basis, I would suggest that C's more relaxed formulation of the "intent to harm" requirement comes closer to what is demanded by the relevant cases, even though C draws on authorities that consider different economic torts, and one I would consider not analogous and thus not necessarily likely to be helpful.

59. By way of closing, one comment should be made concerning D's **third** element, set out earlier in para [48]. The point being made by D in that context is that the harm caused to

the claimant must be directly caused by the unlawful means, and not merely incidental to it: see ***JSC*** at para 14, and ***Total*** at paras 42-44 and 93-95. The well-known illustration of "merely incidental harm" was given by Lord Mance in ***Total*** at para 119: where a pizza delivery business obtains more custom, to the detriment of its competitors, by instructing its drivers to ignore speed limits and jump red lights, that unlawful activity is not caught by the unlawful means conspiracy tort. That tort requires conspiring *to use unlawful means to cause harm to the claimant*: if the unlawful means do not deliver the harm, then the tort is not committed. I would not regard this as a matter of intention, but of causation. In Lord Mance's example, the pizza delivery business did indeed intend to better its own business at the expense of its competitors, but its unlawful means did not directly deliver that detriment. Here, by contract, the allegation is that D's deceit caused C's loss.

The relevance of D's legal advice

60. Given the law just set out, it follows that in the present context D's receipt of appropriate legal advice that covers the issues in play and advises on the legal standing of the parties and indicates that the proposed course of conduct is lawful may be used by D in an effort to rebut any inference that D (or any DX in a similar position) intended to harm C by way of an unlawful means conspiracy. Equally, D's receipt of appropriate legal advice that covers the issues in play and advises on the legal standing of the parties and indicates that the proposed course of conduct is lawful may be used by D in an effort to rebut any inference that D (or any DX in a similar position) intended to misrepresent the relevant facts to C in a manner amounting to deceit. See the analysis in ***Meretz Investments***, noted earlier at paras [44]-[45]. That case held that a defendant who sets out to protect his own interests in the belief that he has a lawful right to do what he is doing does not have the intention required for the tort of inducing a breach of contract (because the actions as advised did not constitute a breach) or, it seems, the tort of conspiring to injure by the unlawful means of inducing a breach of contract, even though the inevitable result will be to cause loss to another (see Arden and Toulson LJJ at paras 124, 127, 174, 180). By analogy with that case, what D would need to show here is not simply that he was legally entitled to do what he did, as here the unlawful means is different: D would have to show that the legal advice provided to him indicated that *the facts as represented to C* were true, and thus there was no intent in what D did either to harm C or to misrepresent the true facts to her.

61. The fact that D obtained legal advice on three occasions, from thee different counsel, during the course of implementing his scheme is therefore a major plank in D's claim for a strike out or summary judgment. But in order to provide this effective whitewash, the advice must be firm and on point, even if it is judged by later courts to be incorrect: see ***Meretz Investments*** at para 109 per Arden LJ. Here C argued that the advice D obtained is far from meeting that test. I agree. However, bar these few comments, I defer discussion until the consideration of the deceit claim, where it is also relevant. That avoids repetition, although some issues then dealt with are material only to one tort or the other. I can however say here that I do not regard the legal advice as providing D with a fast route to a strike out or summary judgment.

(v) The necessary causative loss

62. Finally, D argues that C's claim in unlawful means conspiracy cannot be made out because there is no causative loss. D says C needs to show that implementation of the conspiracy was the operative cause of Flat 5 not being free of the AHO. To the contrary,

D asserts that Flat 5 was free of the AHO when sold, and that in those circumstances C has caused her own loss by entering into the settlement agreement with her solicitors and with the LBS. On its face, this is a straightforward legal and factual dispute between the parties, and that is not a matter to be resolved in a strike out or summary judgment hearing. Moreover, on the clear face of it C's case is plainly not one that is unarguable, and D has little chance of being able to show that it is unarguable, especially since it emerged during the course of the hearing that it was D's own counsel who had advised C that in the circumstances she ought to settle with LBS on the basis that LBS had a good case that the AHO still bound Flat 5.

63. In summary, and subject to what I have to say on deceit in the next section, I consider there is no basis for ordering a strike out or summary judgment in relation to C's claim in unlawful means conspiracy. I turn now to the tort of deceit which is both a crucial part of the unlawful means conspiracy claim and the foundation of an independent tort claim against D as a joint tortfeasor.

9. The tort of deceit

64. The classic statement is set out in ***Derry v Peek*** (1889) 14 App. Cas. 337, although D relied on the reiteration in ***Bradford Third Equitable Benefit Society v Borders*** [1941] 2 All ER 205 (HL) at 211, where Viscount Maugham set out the four elements that need to be proved in a claim of deceit: (i) a false representation of fact by the defendant; (ii) the defendant knew the representation was false, or was reckless as to whether it was true; (iii) the representation was made intending that the claimant, or a class including the claimant, act upon it; and (iv) the claimant relied upon the false representation and suffered damage as a result.

65. D alleged various fatal flaws in C's deceit claim, all focusing on D as the sole tortfeasor. In addition, although not until final arguments in reply, D's counsel seemed to come close to suggesting that the allegation of joint liability in deceit was not quite fairly or properly made out by C, since the sole reference to such joint liability was in PoC para 52, and it simply built on and reused the unlawful means claim, and, further, no evidence was pleaded that the joint tortfeasors acted "at the direction of" D or according to a "common design", as would be necessary to make out a claim of joint liability in deceit. I start with this point, and then return to the more specific points made by D.

(i) The general form of the joint liability in deceit claim

66. C's allegation of deceit is set out in the PoC para 52: "The Representations were in furtherance of the Conspiracy [i.e. the unlawful means conspiracy]. Further or alternatively, they were orchestrated and/or facilitated and/or instigated by [D] in furtherance of a common design with [various elements of DX] knowingly or recklessly to deceive [C] into purchasing Flat 5. In the premises, in addition to his liability in conspiracy to injure, [D] is liable in deceit jointly with [various elements of DX] as a joint tortfeasor."

67. From that paragraph, which is the only one alleging an independent tort of deceit, it is plain that the only allegation against D in deceit is as a joint tortfeasor. The rules on what is required to make parties joint tortfeasors are not contested, and are typically described in the same manner regardless of the underlying tort: **Clerk & Lindsell on Torts 22nd Ed**. at paras 4-02—4-06. There it is also noted that "any case of unlawful means

conspiracy could be explained in terms of joint tortfeasance where the unlawful means used constitute the commission of a tort".

68. In ***Sea Shepherd UK v Fish & Fish Ltd*** [2015] UKSC 10 at paras 19-25, Lord Toulson categorised various forms of joint liability. These included cases where a defendant incurs joint liability for the commission of a tort by inducement, incitement, or persuasion (para 19); and also cases where a defendant incurs such liability by assisting in the commission of a tort by another person, pursuant to a common design with that person, to do an act which is, or turns out to be, tortious (paras 21-25 per Lord Toulson and para 37 per Lord Sumption (dissenting only on the facts)). Although the case itself concerned trespass and conversion, not deceit, these comments were made in general terms before addressing the particulars.

69. The PoC allegations would appear to fall within either of these two versions of joint liability, based on (i) the control D is alleged to exert over DX, principally (although not exclusively) via the various trust arrangements that put control of the actions of DX into the hands of DC, plus corporate structures which then put control of DC into the hands of D; or alternatively (ii) pursuant to the common design already articulated in support of the allegations of unlawful means conspiracy. The facts alleged in support of both these arguments are set out in the PoC and have already been considered earlier in this judgment.

70. Given the relevant law, the specific allegations in the PoC, and the relevant supporting evidence, I cannot see any convincing argument for a summary judgment or strike out based on the inadequacy of C's pleadings.

(ii) The specific flaws in C's allegations of deceit

71. That leaves the particular arguments advanced by D in support of claims that C has no prospect of making out her claim in deceit. To that end, D asserted that he did not make any representations at all to C; that if he did they were not representations of fact; and if they were representations of fact, they were true, or he believed them to be true; and in any event they were not the cause of C's loss [D's Defence paras 13, 14, 49-51, 53-54, 56, 58]. These alleged flaws in C's deceit claim all focus on D as the sole tortfeasor, but I treat them more broadly given the claim is one of joint tortfeasance.

72. **The representations were not made by D himself to C and cannot be attributed to him.** This is merely asserted [D's Defence para 13, D's Skel para 70], but in any event it is not to the point. C's allegation is very specifically of joint liability in deceit with a number of named parties [PoC para 52], so it matters not whether D himself made the representations to C or whether he procured them to be made by those named as joint tortfeasors or was party to a common design to that end. D asserts that the representations were made by the solicitors for LDHA and by the nominee tenants [D's Skel para 71], but these instructing parties are named joint tortfeasors (and conspirators), and are expressly holding their interests in the head lease and sub-lease for the benefit of DC and subject to the control and direction of DC, with these companies all in turn subject to the direction of D [PoC paras 6-10, 30, 33, 34]. If the facts are disputed, then they need to be tested at trial, not in this application.

73. **The representations are not representations of fact.** The three specific representations on which C relies are set out in PoC para 49. Each of these representations is an assertion of a fact: i.e. that the nominee tenant is properly qualified to purchase an AHU sub-lease;

that the sublease has been staircased by acquisition of 100% equity in the sub-lease; and that the sub-lease of Flat 5 was accordingly being sold free of the AHO.

74. **Many of the representations do not relate to Flat 5**. The representations set out in PoC para 49 all clearly relate to Flat 5. They are said to be made by the means set out in paras 43-48. To the extent that para 47 says "it is probable" that a letter in the form set out in para 46 in respect of other AHUs was also sent in relation to Flat 5, that will surely emerge in discovery, and the PoC puts D on notice as to the specific allegations. No other example is given [D's Skel para 71(2)]. Otherwise this assertion seems to lack any basis.

75. **The alleged representations set out in PoC paras 43-48 are not false**. The representations set out in PoC para 49 are said to be false for the reasons given in PoC para 50. In response D simply asserts that the representations are true because the nominee tenant was qualified to purchase an AHU, did staircase effectively and therefore Flat 5 was sold free of the AHO. Mere assertion is not sufficient to prove that C "has no real prospect" of successfully bringing her claim. Indeed, it would appear to the contrary given the witness statements presented to the court in this hearing.

76. **D had no actual or reckless knowledge that the representations were untrue.** This is the principal plank in the arguments advanced by D in this hearing in relation to both unlawful means conspiracy and deceit. The claim is that D did not know that the representations were false – and indeed believed them to be true – and so there was no intention to misrepresent anything to C, and therefore no deceit, and therefore also no unlawful means conspiracy, and so the entire edifice of C's various claims collapses. This claim rests on D's assertion that the representations all concerned matters upon which he had secured advice from counsel. But to have that whitewash effect the advice must be firm and on point, even if it is judged by later courts to be incorrect: see ***Meretz Investments***, and the comments above at paras [60]-[61].

The relevance of legal advice

77. Consider the three specific representations alleged to have been made by DX to C (above at para [73]). The first is that the nominee tenant is a person qualified to purchase a sub-lease of an AHU. That is not a matter on which any of the three named counsel advised. Secondly, and more generally, it is not clear whether counsel advised on the scheme as planned, or as implemented, or some different scheme, or only a partial version of it. In particular, it is not apparent that counsel advised on any scheme that provided for DC to have beneficial ownership of both the head lease and the sub-lease at every stage of the transaction. Had DC merely had beneficial ownership of the sub-lease (as proposed in one opinion), but no control over the LDHA, it is not clear that the same scheme could have been effected, with an initial purchase and 100% staircasing of the sub-lease occurring on the same day, with that delivered to a nominee tenant who appears not be qualified to occupy an AHU, and who did not occupy Flat 5 at all. Of all the advices obtained, D takes particular comfort in the 2014 advice from Mr Isaac, who notes that he is being asked to advise whether D can "sidestep" (para 9) the requirement for AHUs to be beneficially owned at the outset by qualified applicants, and do that by insisting such applicants hold their interests on trust for D (or DC) from the outset. Mr Isaac concluded that the answer, "rather counter-intuitively" (para 17), was yes, although importantly his advice is given *on the basis* that the applicant is qualified to purchase a sub-lease (para 8), the D's involvement would post-date the acquisition of head-leases by a registered provider of AHUs (para 10), and that staircasing by a person holding on trust for D is actually permitted in this scenario (paras 14, 15). This suggests that the advice was crucially and heavily qualified, and that a number of absolutely critical elements of the scheme as

implemented by D were not revealed to Mr Isaac. It follows that the advice cannot give D the coverage he claims it does.

78. In any event, even if the advice were clearer and more helpful to D, D cannot simply cherry-pick what he presents to C and to the court. D had initially claimed legal privilege in respect of all this advice, but then included the advice as exhibits to his WS in this hearing. However, the associated instructions were not included, and, as already noted, it is not evident on the face of the advice that the opinions were based on counsel's full knowledge of the details of either the relevant provisions of the AHO in the s.106 agreement, or the full details of D's proposed scheme. C insists that the necessary facts can only be exposed with the benefit of discovery and cross-examination of counsel, and in the meantime D cannot choose what to reveal to his advantage. There is considerable force in this.
79. Further, and regardless of any benefits delivered by earlier legal advice, C suggests that by the time the representations were made to C, D had the necessary actual or reckless knowledge that the representations were untrue. The PoC suggest that on its face the scheme was clearly designed to avoid or sidestep the AHO constraints. A necessary consequence would seem to be that someone has to lose: either LBS will have fewer properly operating AHUs, or C will purchase a flat at full price that carries an unexpected AHO. In the course of the hearing, D's counsel conceded that avoiding the AHO constraints was indeed D's ambition, motivated by profit, and that he hoped – on the basis of legal advice – that the scheme would work effectively to remove the AHO. However, C suggests that by April 2016 D cannot possibly have honestly believed that the flats, including Flat 5, were being sold free of the affordable housing obligation. Not only that, but he must also have known that his gain from the sale would inevitably expose the purchaser, in this case C, to potential loss. This, C argues, is because other developments in which D was interested (including "the Jam Factory development") were the subject of claims in respect of similar schemes, and it is impossible that these failings were not brought to D's notice such that D knew the risk at the time the relevant representations were made. That means that at the time the representations were made to C, and regardless of D's legal advice, D must have had either actual or reckless knowledge that the representations were untrue. Instead, various WS produced in evidence by C for this hearing suggested that D sought to offload the flats as rapidly as possible onto unsuspecting purchasers (including C). This issue goes not only to the deceit claim, but also to the intention to harm aspect of the conspiracy claim.
80. In this context it may be important to differentiate between the allegations of conspiracy and those of deceit. In the case of deceit, falsity is surely assessed at the time the representation is made by one of the joint tortfeasors. In this context C's claim is that, whatever DX might have believed about the truth of the representations at an earlier date (and that is contested), by the time representations were made to C – i.e. after the litigation concerning the Jam Factory – D and DX must have realised that the assertions were not true and that if C relied upon them C would likely suffer a loss.
81. By contrast, in the case of the unlawful means conspiracy, D suggests that there is a timing difference, and that the unlawful means must be known to all the parties at the time the conspiracy is initiated, as must the intention to harm (see earlier at paras [44] and [48]). In this way D suggests he would be able to retain the protection of his earlier legal advice despite any later knowledge. However, and to the contrary, I can find no basis for the rule as suggested by D in any of the authorities to which I was referred, and, if true, such a rule would have strange consequences indeed. It would enable conspirators to proceed completely freely with matters that were legal when plans were hatched but have since become unlawful, and it would deny the right to proceed to others even though their

actions have subsequently become lawful. To avoid that, it would seem preferable to start from the accepted position that no tort of unlawful means conspiracy is committed until the unlawful means is implemented, and from that it would then seem appropriate to find that this is the point at which one should assess whether the means being deployed to cause the harm are indeed unlawful, and indeed the point at which one should assess who is finally to be classed as still amongst the conspirators. As no authorities were cited, however, I make no findings on the matter.

82. **Reliance on the representation and consequential loss.** This is the final element of the tort of deceit and I suggest presents C with no problems, especially given what has gone earlier. As to reliance, see the PoC para 53, no doubt supported by the uncontested inference that a purchaser would not pay the full market price for a flat that was subject to an AHO. And as to causal loss, see PoC paras 54-57 and the very brief comments made earlier at para [62]. To the extent that any of these matters are in dispute, they should be determined at trial, with the benefit of discovery.

83. This all that needs to be said on the deceit claim. Again, I find no support for D's application for summary judgment or a strike out: there are neither legal nor factual issues that would warrant a finding that C's claim is bound to fail or has no real prospect of success.

10. Opportunity to Amend the PoC

84. During the course of the hearing, counsel for C invited me to allow an application for amendment of C's PoC, or allow a broad interpretation of their terms, rather than striking out parts of the claim. As I have not struck out any part of C's claim, I have not considered this further, especially in the light of the robust and justifiable resistance to this from D's counsel. However, I say nothing about the likely success of any future application to amend.

11. Conclusion

85. For the reasons given, I find that D's application for a strike out or summary judgment should be dismissed, and the case should be listed for directions as soon as possible.

86. In the current circumstances I would ask counsel for both parties to consider whether a draft order to this effect and any consequential issues might be dealt with, ideally by agreement, or if absolutely necessary by further written submissions only.