Neutral Citation Number: [2022] EWHC 1100 (Ch)

Case No: BL-2021-BRS-000029

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS & PROBATE (CH)

Civil & Family Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 7th April 2022
Start Time: 1523 Finish Time: 1624

Before:

HIS HONOUR JUDGE RUSSEN, QC
(Sitting as a Judge of the High Court)

- -

Between:

(1) STEPHEN KINDRED
(2) MARY KINDRED
(3) GEOFFREY PETER SIMCOX

Claimants

- and -

(1) CHRISTOPHER WARHURST
(2) PAUL SERJEANT
(3) DEBORAH SERJEANT
(4) CATHERINE SERJEANT

Defendants

- -
- -

MR. ALEX TROUP (C) for the **Claimants**
DR. SANDY JOSEPH (C) for the **1st Defendant**
MS. CHERYL REID (C) (instructed by **Gordons Partnership**) for the **2nd to 4th Defendants**

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APPROVED JUDGMENT

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JUDGE RUSSEN QC:

1. This is my judgment on two applications made by the defendants, the first application being made by an application notice dated 17th November 2021 by which the second to fourth defendants seek to strike out a claim made against them by the first and second claimants which they say relates to issues resolved by a settlement agreement. I will describe that as the "RSA" because it is titled as a Release and Settlement Agreement, dated 13th April 2021.

2. The second application is made by the first defendant, by application notice dated 26th November 2021 and he seeks to strike out the causes of action against him, and indeed to have himself removed as a defendant under CPR 19.4, on the basis that because he has since sold his share in the subject matter yacht which is at the centre of the proceedings, and did so pursuant to the RSA, he no longer has any interest in the yacht; and therefore there should be no causes of action pursued against him in respect of the ownership of the yacht.

3. The applications respectively rely upon CPR 3.4.2(b) in the first application by the second to fourth defendants, that is an abuse of process argument, and although not expressly, the first defendant's application is under CPR 3.4.2(a), namely the claimant discloses no reasonable grounds for bringing the claim against him.

4. On the hearing of the applications, I have been assisted by the representations made by Ms. Cheryl Reid, counsel for the second to fourth defendants; Dr. Sandy Joseph, counsel for the first defendant and Mr. Alex Troup on behalf of the claimants.

5. I will say at the outset that I have been persuaded that the existing Particulars of Claim should be struck out, albeit that that does not mean that the proceedings come to an end. In particular, it is recognised by the second to fourth defendants that there is a claim which really arises out of, rather than was settled by, the RSA, and which is advanced against them by the first and second claimants. Therefore, that claim needs to be addressed, once properly particularised, and in due course defended.

6. I have been persuaded by Mr. Troup that although it will require fundamental re-casting, there are matters which he has identified by reference to the existing pleading (which I should emphasise is not his and I have been greatly assisted by his analysis of the existing pleading) which should not be struck out. There are matters alleged by the claimants, including the third claimant, which I feel unable to say should be halted in their tracks; although I emphasise that they do need to be re-pleaded and the pleading has to start afresh.

7. I have so far skirted around the subject matter of the dispute between the parties. Time at today's hearing is advancing and has gone beyond the time allotted for it and the disposal of the applications, and I do not intend to rehearse too much of the background to the dispute. Suffice it to say that it arises out of what certainly prior to April 2021 was the parties' common, legal and beneficial ownership of a yacht which at present I understand is moored in Greece. It is a 50-foot Beneteau yacht known as the "Condor" built in 2007.

8. By way of brief background, I can pick up what is said by Mr. Serjeant, the second defendant, in support of his and his wife's and daughter's application at paragraphs 9

and 10 onwards of his witness statement dated 17th November 2021. The position by July 2020 was that the present parties to the proceedings before me were the co-owners of shares in the yacht and co-legal owners of the yacht. Not in shares that the number of parties to these proceedings might indicate, but in respect of 25 per cent shares. For example, the second to fourth defendants between them held a one-quarter interest.

9. The third claimant was the most recent arrival to the syndicate, as it was in 2019, in that he acquired his 25 per cent share in the yacht in November 2019. Shortly before that, by a Yacht Share Syndicate Agreement ("YSSA") dated 26th October 2019, the then co-owners had entered into that year's agreement for the management and shared expenses of the yacht. Mr. Simcox, the third claimant, came in shorty after that under a Bill of Sale which, in effect, meant that he displaced a Mr and Mrs Dewhurst by acquiring their 25% share.

10. In paragraphs 9 onwards of Mr. Serjeant's witness statement, having explained how the Dewhursts sold their share, he refers to the yacht needing repairs and the discovery of damage to the keel in the winter of 2020. In his paragraph 10, he refers to a meeting being convened by telephone between the parties to discuss the keel repair options. He says that on that occasion the first and third claimants suggested owner maintenance of the yacht to avoid additional cost.

11. Disputes began concerning a majority decision, said to be contrary to the YSSA, and the claimants argued that they had cast a majority decision for owner maintenance on the keel to be completed by early 2021. This was not accepted by the defendants.

12. Mr. Serjeant then goes on to explain how it is that by March 2021 the defendants, principally the first defendant acting on behalf of the syndicate, as he considered, default notices were being served upon the claimants. Indeed, in relation to the third claimant, Mr Simcox, Mr Serjeant's paragraph 13 says that the effect of the final default notice issued to the third claimant was that he, Mr Simcox, was "deemed" to be removed as a party to the YSSA and the sale of his share by the Dewhursts in 2019 was "voided".

13. At his paragraph 14, Mr Serjeant refers to various disputes as to ownership and about the YSSA continued between the parties after that date. He says: "*I convened a series of meetings between the parties to carry out meaningful negotiations and resolve matters over a period of ten days with one meeting to be held every other day, a total of five meetings. If this process failed, the yacht would be put up for sale. The outcome of the meetings was that the first and second claimants agreed to purchase the shares of myself and the third and fourth defendants for £17,500 subject to contract, as was recorded in emails at the time*".

14. Then, importantly because this is at the heart of the second to fourth defendants' application: "*Finally, by way of a settlement agreement and release, the SAAR, dated 13th April 2021, the Dewhursts agreed to purchase the first defendant's share in the yacht for £17,500 and the first and second claimants agreed to purchasing my joint share in the yacht with the third and fourth defendants for £17,500*". The RSA was exhibited to the statement.

15. Mr Serjeant goes on: "*The Dewhursts paid the first defendant as per the settlement agreement but the first and second claimants did not pay me or my wife and daughter*

as per the settlement agreement. There has therefore been a breach of the settlement agreement by the first and second claimants".

16. I now move away from the narrative in Mr. Serjeant's witness statement.

17. It is important to note that the third claimant, Mr Simcox, was not a party to the RSA. After the entry into the SRA, and the claimants' would say in part by reference to matters occurring after the date of the SRA with Mr. Troup drawing my attention to in particular the matters pleaded in paragraph 7(oo) of the Particulars of Claim, the claimants issued their Claim Form. The date of which is actually too obscure for me to read but I think it was probably on or about 5th October 2021. It recited in much greater detail the dispute that Mr. Serjeant had outlined in his witness statement in a very long paragraph 7(a) to (z) and beyond, with double letters continuing the sub-paragraph lettering.

18. The Particulars of Claim rehearse the dispute and introduce the RSA at paragraph 7(ll), which says:

> "By purported agreement dated 13th April 2021, the defendants, to the objection of the third claimant, agreed to sell unidentified 25 per cent shares in the yacht to a Mr. and Mrs. Robert Dewhurst and the first and second claimants. Prior to 13th April 2021 it was the defendants' perverse contention that they had power to sell the shares of the claimants".

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19. In fact, looking at the RSA, what it provides for is the sale of the defendants' respective shares: the first defendant's share to Mr. and Mrs. Dewhurst, who are coming back into the syndicate and the co-ownership, and the intended sale of second to fourth defendants' share to the first and second claimants

20. Paragraph 7(nn) of the Particulars of Claim says that the first defendant, without lawful power or authority, purported to sell the share belonging to him to Mr. and Mrs. Robert Dewhurst. It says he failed to account for the present owners for the sale price of £17,500 and instead appropriated it to himself.

21. That is an indication of the fundamental point which Mr. Simcox, the third claimant, certainly propounds. It is that the co-ownership of the yacht is not regulated by any YSSA but in fact is regulated by principles of trust law in that, he says and this will be his case going forward, that the yacht is co-owned legally by a number of parties and that each of those parties (or groups of parties) has a beneficial interest in the yacht.

22. Standing back, these proceedings really rest upon the third claimant's position in relation to three agreements.

23. The first is the 2019 YSSA which was dated about a fortnight before he acquired his 25 per cent share in the yacht. In essence, he says that the Bill of Sale to him covering that 25 per cent share, involved all four sets of legal owners, as they then were as at October/November 2019, selling and transferring the yacht to three of the existing owners and also Mr. Simcox, the third claimant. Mr. Simcox relies upon the fact that

the Bill of Sale was said to be transferred to him free of encumbrances and paragraph 2 on page 86 of the bundle says: "*The Transferees hereby agree to hold the Boat as legal co-owners in the shares set out above*".

24. Therefore, in summary, he would say that even though the YSSA (and clause 13.2 on the transfer of any share) expressed the intention that any purchaser of a share should be bound by that YSSA, at least for the balance of the term covered by it, he, Mr. Simcox, says that he was not required to subscribe and adhere to the YSSA. Therefore, he says, the only relevant agreement covering his and his co-owners' ownership of the yacht is that Bill of Sale which is sufficiently certain in terms of the intention, the identification of the shares and legal ownership to constitute an effective a declaration of trust.

25. So that is the first agreement, the YSSA of 2019, on which Mr. Simcox takes a stand and which accounts in large part for the proceedings. The second agreement upon which he takes a position is the RSA of April 2021. It is common ground he was not a party to it and therefore it is common ground that he has not himself either effected the release of claims in clause 7 of the RSA or entered into the covenant not to sue in clause 8 of the RSA. That said, as has been drawn to my attention, about a fortnight after the entry into the RSA, by an email of 29th April 2021, Mr Simcox wrote an email to Mr. Serjeant, the second defendant, as if Mr. Serjeant had agreed to sell his share, which of course is what the RSA provided. That email emphasised in bold type that it would be: "*Steve and I —*", this is the third claimant writing *"—who were the ones buying your share, so it's me you now have to deal with*".

26. The only agreement providing for a sale of the second to fourth defendants' share was the RSA, but the Particulars of Claim cast doubt upon the validity of the RSA to which, as I say is common ground, Mr. Simcox was not a party.

27. The position adopted in fact by all three claimants in relation to the RSA also accounts in large part for the proceedings, because in large part, and in particular in seeking declaratory relief about legal and beneficial ownership which is at odds with what the RSA was intended to achieve, it is as if the claimants are proceeding on the basis that it is of no effect whatsoever. I will come back to the position of the first and second claimants in relation to the RSA in a short while.

28. The third agreement on which the third claimant, Mr Simcox, has a position and which plays a large part in the way the case has been brought and now carefully analysed by Mr. Troup, is the Bill of Sale entered into by the first defendant and the Dewhursts, as contemplated by the RSA. This stands in contrast to the Bill of Sale of November 2019 in that it did not involve all the then legal owners transferring to themselves and a different legal owner. This later Bill of Sale was only between the first defendant and Mr. and Mrs. Dewhurst. It provided that the first defendant, described as "*The transferors*" (plural, even though it was only the first defendant) *"— hereby transfer a one-quarter share of the yacht to the transferees*". On its second page the transferees agreed to indemnity the transferor, the first defendant, against any future claims and costs arising from the ownership of the share in the yacht from 13th April 2021. So, so far as there is a claim arising out of matters after that which is to be pursued in these proceedings, it may be of some impact indirectly for the Dewhursts, but that remains to be further thought about, I suspect.

29. The position adopted by the claimants, therefore, in relation to that last Bill of Sale is that they would recognise that Mr. Warhurst has validly transferred his beneficial interest in the yacht, and indeed Mr. Troup has volunteered the need to correct the second prayer of the particulars of claim (page 191 of the bundle) because it is recognised that he should not be declared to be a beneficial owner of his former share. However, the claimants nevertheless say that he, the first defendant, remains a legal owner of the yacht and that will be the position unless there is agreement that he should retire or, as sought by the claim, that he be removed as a trustee of the yacht. That trusteeship being said to be a necessary incidence of his legal ownership.

30. I come back, therefore, to the attack that is made upon the claim respectively by the second to fourth defendants and the first defendant.

31. The second to fourth defendants attack the claim made against them by the first and second claimants by resting their position essentially upon the SRA of April 2021. Ms. Reid for those defendants did say that, if the first defendant had succeeded in striking out the whole claim, which is a position that I have already indicated I am not persuaded should follow, she would have sought to have ridden on the coat-tails of that in asking for the entirety of the claim to be struck out.

32. With one exception, which is the claim pleaded in paragraph 7 (qq) of the particulars of claim which involves the first and second claimants saying that the second defendant fraudulently and in breach of statutory duty under the Land Registration Act made an application for a unilateral notice to be placed against the title to their residential property in Woking, the second to fourth defendants say the claim cannot succeed and is abusive, vexatious and therefore falls within CPR 3.4.

33. They say that because of what they say the SRA provided in its very wide-ranging release, in clause 7, and a covenant not to sue in clause 8. Clause 7 defined the release claims by reference to "*the Dispute*". That term was not given a definition, so far as I can see, but the first and second recitals identify it and it is in the second recital that it acquires the capital "D". They read as follows:

> "*A dispute has arisen between the parties relating to the ownership and management of the yacht Condor, a syndicate-owned and managed yacht.*
>
> *The parties have settled their differences and have agreed the terms of a full and final settlement of the Dispute and wish to record those terms of settlement on a binding basis in this agreement".*

34. Clause 2 reads:

> *"Effect of this agreement*
>
> *The parties hereby agree that upon signature, this agreement shall immediately be fully and effectively binding on them. The agreement breaks the Yacht Syndicate* (as defined). *This agreement dissolves The Syndicate Bank Account. This agreement novates the 2019 YSA* (as defined) *at Appendix 1".*

35. The RSA then provided for the Dewhursts to buy out the first defendant and for the first and second claimants to buy out the second to fourth defendants: "*Consideration for each purchase provides for a 25 per cent share, being £17,500*".

36. At clause 7 it is said:

> "*This agreement is in full and final settlement of each party hereby releasing and forever discharging all and any actions, claims, rights, demands and set-offs whether in this jurisdiction or any other, whether or not presently known to the parties or to the law and whether in law or equity that is related parties or any of them that ever had, may have or hereafter can, shall or may have against the other party or any of its related parties arising out of or connected with (a) the dispute; (b) the underlying facts relating to the dispute; (c) any inconvenience arising out of the dispute. Any issues relating to the dispute known at the date of this agreement and any other matter arising or connected with the relationship between the parties known about at the date of this dispute".*

37. That language probably could not be wider in terms of catching all and any matters in dispute of the kind explained by Mr. Serjeant in his witness statement or the kind pre-dating 13th April, or indeed possibly post-dating 13th April if they arise out of the co-ownership of the yacht, and as recited in the Particulars of Claim.

38. Therefore, in my judgment, only the dispute that has arisen *because of* the terms of the SRA, namely that referred to in paragraph 7 (qq), survives the release and covenant not to sue in clause 7 and 8 of the SRA.

39. The Particulars of Claim cast doubt upon the effectiveness of the SRA in that respect. They not only describe it as "*the purported SRA*" but in paragraph 7 (oo) say: "*The said purported agreement to sell or the sale itself have not progressed*". The reason for that, going back to page 92 of the bundle and the email that I have already referred to, may in part be because of some dispute as to the appropriate form of the Bill of Sale. But, more fundamentally, it appears to be because the first and second claimants have not, as they agreed without involving the third claimant, transferred the £17,500 to the second to fourth defendants.

40. On that point, the second to fourth defendants say that in the case going ahead, if only on paragraph 7 (qq), they will counterclaim for the £17,500 and seek specific performance of the RSA.

41. Whether or not that comes about, clause 2 of the SRA as a matter of plain language immediately operates to release the defendants from the kind of claim pre-dating 13th April 2021 that the first and second claimants wished to bring against them, whether or not the separate sale provided for by the SRA takes place.

42. I accept the submission made to me today that there is no ostensible challenge by the first and second claimants to the validity of the SRA. That is plainly right on the evidence and, in particular, the lack of evidence from the first and second claimants as opposed to from the third claimant who was not a party to it. Mr Kindred accepts in his witness statement of 23rd November 2021, at paragraph 3, that: "*I don't understand all the legal stuff involved in this litigation. I can only say why my wife and I signed the 2021 agreement*". Paragraph 13 appears to refer to a time when it was contemplated

that Mr Dewhurst would be selling his share and he says: "*Because of the way things were, when Rob decided to sell his share I decided to sell mine*".

43. At his paragraph 24 Mr Kindred says: "*Against this background —*" and that is the background of disputes and default notices *"— there were involved discussions which in the main Geoff —*", that is the third claimant, *"— was excluded from, which ended up in me agreeing to buy out Paul —*" so that is the second defendant and his family *"— and Rob Dewhurst agreeing to buy out Chris*". Chris is the first defendant. Mr Kindred says: "*I saw this as the obvious way to get back to a harmonious syndicate which is in fact now the case between me, Rob and Geoff, now that Chris and Paul are no longer actively involved*".

44. Then, at paragraph 26: "*Having agreed to buy Paul out, he then came out of the blue with his 2021 agreement. I knew it was not sensible for me to sign it - but Paul said that, if I did not, we were back to the situation I describe in paragraph 24 above*".

45. There is no suggestion in that evidence from the first and second claimants that they seek to challenge the fact and the effectiveness of the agreement in the RSA that they had agreed to buy out the second to fourth defendants. Mr. Kindred says he knew it was not sensible for him to sign it but he appears to recognise that he did sign it.

46. Mr. Simcox in his witness statement, 26th November 2021 says, at paragraph 29: "*In summary, Stephen and Mary —*" the first and second claimants *"— were bullied and oppressed by reference to an invalid 2019 YSSA to sign a settlement agreement 2021 which required purchase of a share (?) in Condor that they did not want and also to relinquish claims against Christopher and Paul for their undoubted breaches of trust obligations*".

47. That is Mr. Simcox saying something on behalf of the first and second claimants. Later in the witness statement, at paragraph 41(g), Mr. Simcox recognises that he was not aware of the SRA until after it had been entered into.

48. Mr. Troup said that the time for a challenge by the first and second claimants to the validity of the SRA had not yet arrived. He said that that would come about when this claim is allowed to proceed on the existing Particulars of Claim. He submitted that, when the second to fourth defendants put in a counterclaim for the £17,500 on the basis that the sale of their share should be specifically performed, it would be at that stage that the claimants would reveal their hand in terms of challenging the validity of the SRA, whether by reference to duress or other grounds affecting its validity.

49. I do not accept that submission in circumstances where the RSA has been adverted to in the Particulars of Claim. It is recited as a relevant contractual development between the parties and indeed it is recognised, as I have already mentioned, that the first defendant's sale of his beneficial share in the yacht is a matter which will have an effect on the claim for what is effectively declaratory relief as to the state of his beneficial ownership.

50. However, it is not just the fact that the implications of the implementation of the RSA, so far as the first defendant's sale is concerned, has to be recognised by amendment to the prayer. There is in my judgment a more fundamental point, which is that when a party pleads an agreement, particularly when it is referred to as a *purported* agreement

and there is a suggestion that the sale of the share under it has not progressed, the onus is very much upon that party to say why what is ostensibly a binding agreement should not be regarded as such. This is especially so when the express terms of the agreement expressly preclude the relevant claimants' pursuit of most of the claims sought to be advanced in the pleading.

51. The failure by a party to an agreement to allege one or more of the established grounds for challenging its validity and effectiveness as a release of those claims, and as a covenant or promise not to pursue them, of course invites just such a challenge as the second to fourth defendants have now made: that the claims are an abuse of process. It is no answer for a claimant, seeking to resist the striking out of the statement of case which, on its face and in the absence of such grounds of challenge to its validity being advanced, constitutes the abuse to say, in effect, "*I will tell you why these Particulars of Claim are not an abuse of process in my Defence to Counterclaim*." On the particular facts of the present case, the pleading of a defence to a counterclaim for specific performance of the sale of the 25% share at the price of £17,500 does not address the issue as to why it is that claims previously comprising "*the Dispute*" were not released once-and-for-all upon the signing of the RSA in accordance with its clause 2. One can therefore readily contemplate the Defence to Counterclaim extending to matters which ought properly to be in the Particulars of Claim.

52. Although the application by the second to fourth defendants has been presented on the abuse of process ground in CPR 3.4(2)(b), it seems to me a claimant's failure to address the validity of an agreement which expressly precludes the very claims sought to be advanced in his statement of case *might* also be a reason for concluding that the statement of case discloses no "*reasonable*" grounds for bringing them for the purposes of CPR 3.4(2)(a). However, that raises the question as to whether (in an application which is not also combined with one for reverse summary judgment under CPR 24.2) evidence of the RSA would be admissible on a challenge based on that ground. Although the answer to that question is not entirely clear, my own view expressed in the two recent cases of *Potgieter v Village* [2021] EW Misc (18), which Mr Troup referred to in his skeleton argument, and *Read v Eastern Counties Leather Group* [2022] EWHC 31 (Ch) is that it would not be.

53. Nevertheless, in my judgment, the applicant defendants are entitled to deploy the RSA to good effect in support of their challenge based upon the abuse of process ground. Paragraph 1.5 of Practice Direction 3A gives as examples of cases falling within CPR 3.4(2)(b) those where the statement of case is vexatious or ill-founded. The first and second claimants' claims are just that, brought as they are in unexplained repudiation of the RSA.

54. I emphasise that it is not even the case that the claimant parties to it, the first and second claimants, are actually suggesting that the RSA should be set aside. As Ms. Reid correctly submitted, they have not adopted, let alone pleaded, the suggestion they were bullied into signing it. On the contrary, they appeared to recognise that it has been signed and has some effect.

55. In those circumstances, the only claim which should continue against the second to fourth defendants is that arising out of paragraph 7 (qq). In the course of argument at the hearing today, Mr. Troup said that there had been some concern not only on the part of the third claimant, which I will come to in a short while, but also on the part of the

first and second claimants that their shares might have been forfeited, by which I mean their shares as they were prior to the SRA in April 2021.

56. Mr. Troup drew my attention to paragraph 23 of Mr. Kindred's witness statement of 23rd November 2021 where he expressed concern that the first defendant had come up with certain figures and said that until a sum of £18,000 was paid by the claimants, *"— the boat would stay in its cradle at our cost, pending its sale by Paul, as we had lost our shares in the boat*".

57. I had not previously understood, by reading through the application bundle, that there was any suggestion that the first and second claimants had lost their existing 25% share and I had not understood either that the contention that they might have done so was one that could survive the entry into the SRA. However, when the case is re-pleaded perhaps the position from their perspective as to whether or not they thought they were entering into the SRA as a non-owner or, instead, on the basis they were acquiring an additional 25 per cent share in addition to the existing share they owned, will become clearer.

58. I now move to the claim by the third claimant, Mr Simcox, and the challenge to that claim which is made by the first defendant's application. The Particulars of Claim, as Mr. Troup has realistically recognised, are not in ideal form. I accept as a matter of principle the submission that Mr. Troup made to me by reference to *Ardila Investments v ENRC* [2015] 2 BCLC 560, at [81], that the court should not reject a statement of case, in terms of striking it out, even though it might be diffuse and elaborate, if, whatever other distractions it contains, it contains the central allegations which support the claim as pleaded.

59. Standing back, and the documentary picture is not complete and I am told that there are some other documents that would bear upon this, it appears to be the case that certain default notices were served in around March 2021 by the first defendant upon the third claimant. The effect of those, as Mr. Serjeant said in his witness statement dated 17th November 2013, per paragraph 13, was said to be: "*On 30th March 2021 final default notices were issued by the first defendant and the third claimant is removed from being a party of the YSSA and the Dewhursts' sale to the third claimant is voided and the Third Default Notifications are issued*".

60. Then he says: "*Copies of the Notices are exhibited —*" and it is the last one, at page 16 of the bundle and cross-referring to clauses 16.5 and 16.6 of the YSSA, which one can see might support the case that, following non-compliance by notice I think served on 14th March 2021, by the end of that month of March 2021 clause 16.6 had taken effect; and the effect of that was the third claimant lost his share in the boat.

61. In fact, as Mr. Troup rightly pointed out, things do not appear to be as automatic as that. Clause 16.6 of the YSSA says: "*In the event that the defaulting owner refuses to or omits to respond to this notice or it is subsequently deemed that the owner is still in default, he will be asked to resign and to sell his share*". Then, clause 16.7 says: "*If the defaulting owner does not take adequate steps to find suitable replacement within two weeks of the issue of this notice by placing an advertisement in the National Yachting Press or appointing a suitable yacht broker to handle the sale, then the remaining owners may market the share and obtain the best price available in the marketplace at*

the time. The funds raised should first be used to pay any costs incurred and/or outstanding running costs, the balance being paid to the owner in default".

62. I pause here to note that I remain completely unclear as to whether or not any reliance on clause 16.6 and clause 16.7 had in fact led to the third claimant's share materialising in the shape of funds, whether or not some of those funds have been used to discharge outstanding costs. However, again, standing back and reflecting upon the documents before the hearing started, I could understand why the third claimant was so anxious to say that he took free of the YSSA and any risk it carried with it he has somehow lost his share in the yacht through the suggested implementation of its provisions.

63. Certainly in the early part of 2021 he was advocating the entry into what he described as a more democratic YSSA than he would recognise the 2019 to be. Indeed, at one point I think he intimated that he might make an application to the court for an order under various provisions of the Trustee Act 1925 that a draft agreement prepared by him (which is not in the bundle) should become the basis of the co-ownership and administration of the yacht. It is therefore clear that Mr Simcox was anxious that the YSSA should not govern the co-ownership as opposed to principles of trusteeship and it is no doubt on that basis that he says that he has taken free of it.

64. It is on that basis, and I have already highlighted the difference between the Bill of Sale that the first defendant has since entered into and his own in November 2019, that Mr Simcox says the present parties to the claim still remain legal owners of the yacht. Whatever might have happened in the shape of underlying transfers of beneficial interests, either implemented as in the case of the first defendant or intended as in the case of the other defendants, he says they still remain legal owners of the yacht. That is because of the Bill of Sale of November 2019.

65. In my judgment, as with the challenge to the SRA, this case really needs to be identified with greater clarity, though I do recognise that despite the attack which is made upon paragraph 3 of the Particulars of Claim by both Ms. Reid and Dr. Joseph, paragraph 1 those particulars allege that the 2019 Bill of Sale established the legal and beneficial ownership of the yacht between the claimants and the defendants. They are defined as "*the Present Owners*" holding as "*joint legal owners in the following beneficial shares ……*". Paragraphs 3 and 4 of the Particulars of Claim analyse that in terms of trusteeship, with a need for unanimity between them, and paragraph 5 makes the point that the 2019 Bill of Sale was free from the encumbrance of the YSSA. Although "*free from encumbrance*" might more obviously mean is not charged to any third party or otherwise suffers from a defect in title, Mr. Simcox wishes to contend that it means that he took free of the YSSA; and that he certainly was not required to subscribe to it, as clause 13.2 of the YSSA intended should happen upon the transfer of a share.

66. Allowing for the fact that this is a point that emerges from them and therefore is susceptible to the kind of conclusion reached in the *Ardila Investments* case, the Particulars of Claim certainly need to be revisited, as Mr. Troup accepted in certain particular respects and in particular so far as concerns the identity of those who are said current beneficial owners for the purposes of the second paragraph of the Prayer.

67. I say this in circumstances where the defendants, no doubt resisting any financial claims that might be said to have attached until they ceased to be trustees, might well be receptive to the kind of relief that is sought by the claimants. The first paragraph of the

prayer says that the defendants be removed from office as trustees of the legal interests in the yacht Condor.

68. However, the second paragraph says that: "*Legal ownership be vested in the claimants upon trust of the present owners in their respective beneficial shares as specified in paragraph 1 of the particulars above*". In other words, and allowing for the fact that it is recognised that the present beneficial owners do not now include or should not be read as including the first defendant, when he has sold his share to the Dewhursts, what in essence is sought is that the ownership and presumably with it the administration of the yacht should rest with the claimants, even if the defendants, certainly the second to fourth defendants, are treated as still having a beneficial share in it. At first sight, that is a curious claim to make. However, Mr. Troup says that it is justified by the matters alleged in paragraph 7(nn) which, even though the dates do not clearly emerge and the first date is talked about as group liabilities *to* 13th April, he says are matters which have arisen since the entry into the RSA.

69. The third claimant, Mr Simcox, in particular is therefore saying that the defendants are still legal owners and as such they are accountable as legal owners/trustees regardless of the RSA; and in the first defendant's case, regardless of the Bill of Sale that he has executed since the RSA. However, this should be changed by the legal ownership being transferred to the claimants.

70. All of this needs to be clearly expressed in a way that enables the defendants to understand precisely what is being said against them, the basis upon which it is being said against them. That is in large part reinforced by a point that emerges from Mr. Simcox's own witness statement. At paragraph 30 of his witness statement of 26th November 2021, reverting to the invalidity of the 2019 YSSA, he says: "*I have made my views regarding the invalidity of the YSA clear to Paul and also his solicitors prior to the strike out application being made. Those views have been expressed in pleadings forms as follows*".

71. Then he sets out over the next page or so, more clearly than the Particulars of Claim do and in a way which highlights the absence of a legally comprehensible pleading, why it is that the YSSA does not bind him. However, even that way of expressing things does not fully engage with why the particular relief is sought in the form it is in the Prayer or what the basis of seeking that relief is said to be. It is clear to me that the allegations in paragraph 7(oo) should be clearly particularised, both in terms of date and alleged culpability of the suggested trustees, and also what, if anything, the first and second claimants might also be saying about this.

72. At first sight, in circumstances where it is made clear that there is no challenge in their evidence to the validity of the RSA, a claim by the first and second claimants along the lines of paragraph 2 of the Prayer seems completely at odds with their agreement under the RSA and not obviously the sort of equitable (or certainly discretionary) relief that would be granted to someone who is in breach of the SRA. I emphasise that the first and second claimants are seeking in effect a declaration that the legal ownership should be with the three claimants and that they should hold upon trust for parties that include the second to fourth defendants. During the course of counsel's submissions, I mentioned the need for parties seeking equitable relief to come to court with clean hands.

73. At first sight also, a claim by the first and second claimants to the effect that the second to fourth defendants should be treated as being beneficial owners of the yacht, still, is one that does not lie easily in their mouths if the only reason for the second to fourth defendants still being beneficial owners is that the first and second claimants have failed to stump up the purchase price for their share.

74. As for the injunctive relief sought by the claimants, there is a single sub-paragraph in 7(oo) which alleges, again without any particularisation, that the second to fourth defendants have forbidden the use of yacht by the claimants and sought to obtain assistance from the Greek port authorities and police to prevent them from doing so. Whether or not that has happened and, if it did, whether it happened because the defendants were saying the claimants should not be able to use the yacht until they have paid their syndicate dues, I do not know. The reason I do not know is because, as with most aspects of the pleaded case, the allegations remain rather opaque.

75. There is also claim for defamation damages by the third claimant against the first defendant only. It would be wrong for me to summarily decide that that should be struck out even though Dr. Joseph has drawn my attention, if only orally, to the provisions of the Defamation Act and the need for significant or apprehended and significant harm to reputation. Speaking very generally, I imagine that there may also be questions of whether or not what has been said was untrue and/or supported by a defence of justification. Again, any such issues would need to be crystallised in a Defence which should follow a properly articulated pleading against the first defendant.

76. These matters are obviously not the subject matter of a Part 8 claim and, along with the declaratory relief, the injunctive relief and the damages claim, this defamation aspect of the case needs to be properly pleaded. On these matters, much reduced in scope by excluding matters which formed part of "the Dispute" compromised by the RSA, I conclude the claim should be permitted to proceed. What is required are completely re-vamped Particulars of Claim. In light of the RSA, which on the basis of the evidence presented on the application I must presently assume will remain unchallenged by them, the fresh statement of case will also identify the remaining viable claims of the first and second claimants to that expressed in paragraph 7(qq) and the ongoing alleged breach of trusteeship in 7(oo).

This judgment has been approved by the Judge.

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