Neutral Citation Number: [2022] EWHC 31 (Ch)

Claim No: CC-2021-BRS-000011

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS AT BRISTOL
BUSINESS LIST (Ch D)

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

Date: 11/01/2022

Before :

HH JUDGE RUSSEN QC

(Sitting as a Judge of the High Court)

- -

Between :

ANDREAS READ	**Claimant**
- and -	
EASTERN COUNTIES LEATHER GROUP LIMITED	**Defendant**

- -
- -

ZOË BARTON QC and **OLIVIA CHAFFIN-LAIRD** (instructed by **Gunner Cooke LLP**) for the **Claimant/Respondent**
MATTHEW GILLETT (instructed by **Lester Aldridge LLP**) for the **Defendant/Applicant**

Hearing date: 15th December 2021

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Approved Judgment

This judgment was handed down by the judge remotely by circulation to the parties' legal representatives by email and its release to Bailii at 09:00 on 11 January 2022.

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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HH JUDGE RUSSEN QC

HHJ Russen QC:

Introduction

1. This is my judgment on the Defendant's application made by an Application Notice dated 23 July 2021 and issued on 1 August 2021 ("**the Application**") which seeks the striking out of the Claim issued on 23 June 2021 ("**the Claim**"). The length of this judgment is an inevitable reflection of the relative procedural complexity of the earlier proceedings between the parties in Truro County Court and the issues they have generated for the purposes of the Application.

2. In this judgment I refer to the Claimant as Mr Read and to the Defendant as ECLG.

3. The Application was heard remotely on 15 December 2021. Ms Barton QC and Ms Chaffin-Laird represented Mr Read and Mr Gillett represented ECLG. I am grateful to counsel for their concise and helpful submissions.

4. The Claim brought by Mr Read seeks the setting aside of a settlement embodied in a Tomlin order made by Deputy District Judge Thomas, sitting in the Truro County Court, on 15 August 2018 ("**the Tomlin Order**"). The Tomlin Order was made at the first hearing in a claim for possession of Mr Read's property (and home) at Valhalla, Droskyn Point, Perranport, TR6 0GS ("**the Property**"). That claim ("**the Possession Proceedings**") was issued by ECLG on 25 June 2018. The Possession Proceedings were based upon ECLG having mortgages over the Property to secure two loans totalling £895,796.51. The first loan was advanced on 23 September 2011 in the sum of £679,669.51 and the terms of it were later varied (including agreement upon the principal amount outstanding as £590,000) on 20 May 2016. The second loan was advanced on 24 October 2013 in the sum of £216,127. At the commencement of the Possession Proceedings the redemption figure for the loans (including £932,640 of legal costs and administration fees) was said by ECLG to be over £2.3m.

5. The Claim was issued the day before the date set for Mr Read's eviction from the Property pursuant to a warrant for possession obtained by ECLG in the Possession Proceedings. It was due to be enforced on 24 June 2021. That was the second warrant for possession which ECLG had obtained in the Possession Proceedings (after the making of the Tomlin Order) and it was issued after ECLG had in July 2020 obtained "summary judgment" against Mr Read's application to set aside the Tomlin Order.

6. In the light of the Claim being issued in the face of the appointment of bailiffs, on 24 June 2021 Deputy District Judge Doman suspended the warrant for possession and transferred the Possession Proceedings to this court.

7. This Court is therefore now seized of both the Claim and the Possession Proceedings.

8. I should also now mention one further set of proceedings between the parties, which Ms Barton QC described as "**the JV Claim**". The JV Claim is another High Court claim which Mr Read has brought in the Bristol Circuit Commercial Court against ECLG and its director, Mr Ian Moore. The JV Claim is listed for a CCMC before me next month.

9. Mr Read is a property developer and has carried on business both as a sole trader and through at least one company. Mr Moore owns land neighbouring the Property. In one of the applications made by Mr Read in the Possession Proceedings (made in November 2019) Mr Read said he had known Mr Moore for over 10 years. Mr Read's position is that the lending which resulted in the Possession Proceedings was part and parcel of a wider joint venture between himself and Mr Moore which the bringing of those proceedings served artificially to ignore. He says that by bringing the Possession Proceedings ECLG has created a divide between the lending behind them and these litigious joint venture issues; and that, if the Tomlin Order is set aside, matters should proceed with one stream-lined set of statements of case being served in the Claim and the JV Claim.

The Claim

10. The Claim is made on the basis that the settlement embodied in the Tomlin Order (being a contract) was procured by misrepresentation and should be declared to be "*void and of no effect*" or, alternatively, should be rescinded. Further, Mr Read also seeks to set aside the Possession Proceedings on the basis that they were an abuse of process. On that basis he says that the Possession Order made by Deputy District Judge Rutherford on 27 February 2020 ("**the Possession Order**") and subsequent warrants for possession should be set aside as having been "*fraudulently obtained*".

11. The Particulars of Claim ("**PoC**") in support of the Claim set out diverse grounds which are said to affect the validity of the agreement to enter into the two loans, the terms of those loans, and the propriety and validity of the steps taken in the Possession Proceedings on the basis of the purported indebtedness created by them.

12. Some of these matters appear at first sight to be legally innovative when viewed against the contractual documentation evidencing the two loans. They include alleged implied terms that "*business interest rates would not apply*" (though the PoC also state that a rate of 0.5% above base and a default rate of base plus 4% was agreed), that ECLG would exercise reasonable care and skill in providing the loan, and also to the effect that, as director, Mr Moore was acting in compliance with his general and fiduciary duties to ECLG. Rectification of the express terms of the first loan is sought to the extent that those terms do not reflect those allegedly implied. An assignment of existing security held by Clydesdale Bank Plc ("**Clydesdale**") to ECLG as part of the first loan (see further below) and to which Mr Read was a party is alleged by the PoC to not have been possible or, if possible, not to have occurred.

13. So far as the post-lending wrongdoing alleged against ECLG is concerned, the PoC allege that it was agreed that the first loan would be repaid from the rent received from ten commercial units at Porth, Newquay, Cornwall ("**Porth Beach**") falling within the joint venture mentioned above. Mr Read says that he transferred that property to a limited company as further security for the loan and it was then immediately transferred to Mr Moore, who failed to ensure the rental income was so applied. Along with the allegedly ineffective assignment of the Clydesdale security, this is a matter upon which Mr Read relies in alleging that ECLG made false representations to him and to the court in procuring the Tomlin Order. Another allegedly false representation relates to ECGL's competency to lawfully enter into the loans.

14. Before exploring the case of fraudulent misrepresentation further I should highlight that Mr Read also seeks to lay the blame for the Tomlin Order at the door of the legal representative (to whom I refer as "**X**")) who represented him at the time (at least so far as far as ECGL was concerned). Although the PoC say X was Mr Read's trusted friend and adviser, and that Mr Read believed X to be a practising barrister, it is alleged that this was not in fact the case. The PoC also allege that X drafted the Tomlin Order at the direction of Mr Moore and failed to act in accordance with Mr Read's instructions. They allege that:

> "*At all material times [X] acted with Mr Moore and/or ECGL to conspire with* [sic], *encourage and/or facilitate the Tomlin Orders. For the avoidance of doubt, it is averred [X] and/or Mr Moore and/or ECLG knowingly and/or intentionally and/or acting with reckless disregard procured and/or induced Mr Read to enter into the Tomlin Orders in breach of their duties/equitable obligations to the Court.*"

15. These are very serious allegations (and some of them echo what was said by Mr Read in the Possession Proceedings) and they are yet to be established. X has not been joined as a party to the Claim and therefore has no voice in these proceedings. The PoC say that the alleged lack of authorisation to practise is currently the subject of investigation by the Bar Standards Board. In these circumstances I do not think it is fair to identify X by name in this judgment when it is not necessary to do so.

16. Ms Barton QC did not draft the PoC. In her submissions against the validity of the Tomlin Order she focussed upon two of the representations alleged in paragraph 44 of the PoC. These were described as:

    i) the "**FSMA Point**" which was based upon ECLG's alleged inability to lawfully enter into the loans by reason of the company's lack of authorisation by the Financial Conduct Authority to conclude a regulated mortgage contract (or to make arrangements in that regard or administer such a contract) so that ECLG was in breach of the general prohibition imposed by section 19 the Financial Services and Markets Act 2000 ("**FSMA**"). The effect of that would be that the loans were unenforceable against Mr Read, though this would be subject to him repaying the balance of any advances received, unless ECLG were to succeed in an application to the court that they nevertheless be enforced: see sections 26 and 28 of FSMA; and

    ii) the "**Repayments Point**" which relates to the application of the rental income from Porth Beach in repayment of Mr Read's indebtedness. Although the skeleton argument referred to this point going to the indebtedness under both loans, Mr Read's pleaded case is that some months prior to the second loan of October 2013 he agreed with Mr Moore on behalf of ECLG that repayment of the first loan would be made from the rental income from Porth Beach in displacement of ECLG's strict contractual rights under that loan. The PoC alleged that in 2011 Mr Read let Porth Beach to a third party at an annual rent of approximately £120,000 (later rising to £151,000 p.a.) with the consequence that Mr Moore received some £840,000 over 7 years prior to the commencement of the Possession Proceedings. This, he says, was sufficient to repay the first loan in full but, wrongly, the rent was not credited to the loan.

17. Looking at the other representations alleged in paragraph 44 of the PoC, particularly against the contractual documentation governing the first and second loans, I can well see why Ms Barton singled out the FSMA Point and the Repayments Point from those others in seeking to resist the Application.

18. Even so, I consider the pleading of the misrepresentation claim to be deficient when tested against the requirements of CPR PD 16 para. 8.2. Paragraph 44 of the PoC does not identify the detail of the representations alleged to have been made prior to the making of the Tomlin Order. That paragraph also fails to identify who on behalf of ECLG is said, for the purposes of the FSMA Point, to have warranted and represented that ECLG had capacity to make the loans to Mr Read and had "*met all legal obligations in so doing*." I note here that paragraph 39 of the PoC (which relates to the earlier dates of the two loans) alleges that ECLG failed to mention that it was not authorised to make the loans. The allegation in paragraph 45 that ECLG knew or ought to have known that it was acting in contravention of the general prohibition under FSMA, on the basis that both loans constituted regulated mortgage contracts and ECLG had the benefit of legal advice, must also be viewed in the light of the concession made on behalf of Mr Read at the hearing that the second loan was not such a contract.

19. That concession was made because the second loan dated 24 March 2013 was secured by a second mortgage over the Property, with the consequence that it fell within one of the exceptions for categorisation as a regulated mortgage contract under Article 61 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 ("**the RAO**").

20. Although I have yet to turn to the basis of the Application, it is appropriate at this stage to note the limited focus at the hearing upon the provisions of the RAO so far as the first secured loan is concerned.

21. That first loan, made on 23 September 2011, resulted in Clydesdale being repaid the sum of £679,669 owed to the bank by Mr Read, on terms which resulted in ECLG taking an assignment of a legal charge of the Property which Mr Read had granted to Clydesdale in 2007. Ms Barton QC submitted that the first loan was clearly a regulated mortgage contract on the basis that the Property was, by September 2011, Mr Read's dwelling (the earlier Clydesdale loan being for the purpose of funding its construction which took place in 2009 and 2010).

22. However, Mr Gillett pointed to documents which had been submitted to Cornwall Council in 2020 and led to the council issuing a Certificate of Lawfulness for the existing use of the Property as a dwelling. Consistent with the council being persuaded that the Property had been used as a dwelling "*for a continuous period of more than 4 years*" for the purpose of issuing the certificate in accordance with the planning legislation, the documentation included a letter from a Mr Terence Jones confirming that Mr Read had used the Property as a family residence "*during the past five years*".

23. This documentation submitted for the purpose of satisfying the statutory test for issuing such a certificate in September 2020 does not, of course, demonstrate when Mr Read *first* began to use the Property as a dwelling. Nor does it assist with the question, raised by the language of Article 61 of the RAO, of whether or not in September 2011 it was intended to be used as a dwelling. Mr Gillett drew my attention to the terms of a Lease dated 23 September 2011 (the date of the first loan) by which Mr Read granted to

himself and his wife a lease of the Property of just over 6 months for it use as a "*Guest House with owners' accommodation*." Again, this in my view cannot on a summary determination be conclusive in providing an answer to that question under Article 61.

24. As I mentioned at the hearing, I was struck by the fact that the lease was entered into on the same date as the first loan was made. However, no submissions were made on the significance or otherwise of this fact from the perspective of that loan coming within one of the identified exceptions to Article 61 of the RAO (in the form it took in September 2011).

25. It therefore follows that if ECLG made a representation to Mr Read about its authorisation under FSMA to enter into a regulated mortgage contract then that representation should be assumed, for the purpose of determining the Application, to have been untrue in relation to the first loan of September 2011 but true in relation to the second loan of March 2013. That is the position for present purposes whether or not ECLG would have grounds for a successful application to court to enforce the first loan despite its lack of FCA authorisation: compare *Helden v Strathmore* [2011] EWCA Civ 542; [2011] Bus LR 1592, [43]-[53] in relation to the test under section 28(3)-(5) of FSMA.

26. The basis of the Repayments Point is also unclear. Paragraph 44 of the PoC pleads a representation prior to the making of the Tomlin Order (in August 2018) that the rent from Porth Beach had "*been properly applied and offset against the Loans in line with the agreement at paragraphs 26-28 above*." Not only do those earlier paragraphs only refer to an agreement that the rental income should go towards repayment of the *first* loan but they also aver that Mr Read knew (or at least suspected) that the agreement had not been acted upon when ECLG sought repayment in 2016. That earlier demand for repayment therefore seems at odds with ECLG representing the contrary 2 years later or Mr Read relying upon any such representation. I have already mentioned that the Possession Proceedings were commenced with ECLG alleging a redemption figure for both loans of over £2.3m. The Particulars of Claim in the Possession Proceedings referred only to a formal variation of the first loan in May 2016 (mentioned below) and alleged "*the Defendant has not made payment in accordance with the terms of Loan 1 as varied*."

27. Having addressed the basis of the Claim, it is necessary to highlight some of the more important aspects of the Possession Proceedings.

The Possession Proceedings

28. The procedural history of the Possession Proceedings and the preceding transactions of (presumed) secured lending by ECLG to Mr Read are helpfully summarised in the witness statement of Danielle Montezuma (a partner in Lester Aldridge LLP) in support of the Application. She says the Possession Proceedings have "*a long and chequered history*". I will only identify the main points which are material to the Application.

29. Ms Montezuma explains that they were issued in the light of Mr Read's failure to make any repayments under the loans advanced to him by ECLG.

30. As mentioned above, the first loan was made on 23 September 2011 in the sum of £679,669.51, with ECLG taking security through the assignment of Clydesdale's legal charge of 2007. The loan was initially repayable, together with interest and fees, within 90 days of that date (with further provision, at ECLG's discretion, for a fees-based extension of 30 days at a time). A letter dated 20 May 2016 from ECLG to Mr Read set out the further agreement between them reached in consideration of ECLG allowing him further time to settle arrears and repay the loan. The letter noted the principal sum of £590,00 then agreed to be outstanding (giving credit for a repayment of £89,669 made in October 2013), recorded the fees and interest due (giving credit for a part payment of £36,127 also made in October 2013) and stated that ECLG would, for a fee, permit further extensions until 20 May 2017.

31. The second loan made on 24 October 2013 was in the sum of £216,127 and advanced for the purpose of funding the development of a 5 bedroom detached house on the property known as Covverbean, Bolingley, Cornwall. The principal sum and interest were repayable by Mr Read upon his receipt of the proceeds of sale of that property. Mr Read sold the property in December 2017.

32. The second loan was provided on terms which included Mr Read giving ECLG a second legal charge over the Property (then known as Ocean View) as well as a first charge over the property to be developed with the funding. The further charge over the Property was executed by him on 24 October 2013.

33. ECLG say that Mr Read failed to make repayments in accordance with the first and second loans. A formal demand for repayment was made on 12 April 2018. The Possession Proceedings were issued on 25 June 2018.

34. The Tomlin Order was made at an early stage of the Possession Proceedings and in the absence of any defence being served. Ms Montezuma addresses it in paragraphs 13 to 16 of her witness statement:

> *"13. The County Court Claim was listed for a first hearing on 15 August 2018. Ahead of that hearing, the parties agreed a Tomlin Order, ("the Tomlin Order"), which provided that the Claimant agreed to make payment of a reduced sum of £1,725,000.00 (being a discount of approximately £645,000 in relation to the sum sought in the Particulars of Claim) by way of 29 monthly instalments of varying amounts. The Tomlin Order provided that time was of the essence for payment of the settlement sum by way of the instalments, and that in the event of any default the Claimant agreed to give possession of the Property to the Defendant (without further order from the Court being necessary) by no later than 14 days after the date on which the relevant instalment was due. The Tomlin Order also provided at paragraph 8 that if the Claimant had not given vacant possession to the Defendant by 4:00pm on the 14th day after the date on which the relevant instalment was due, the Defendant would be entitled immediately and without further order to apply for a warrant for possession of the Property. It was a further term of the Tomlin Order (paragraph 6) that if the Claimant were to make payment of the settlement sum as stipulated the Defendant would make payment to the Claimant of the sum of £200,000.00 within 14 days of payment of the final Instalment. The Claimant thereafter made payment of 2 instalments due under the Tomlin Order.*

14. The Tomlin Order was signed by the parties (by my firm on behalf of the Defendant and by the Claimant in person) prior to the hearing on 15 August 2018 and the Defendant's agent attended at the hearing to seek the District Judge's approval of the terms of the same as there was insufficient time to file it in advance of the hearing. A copy of the signed Tomlin Order together with the emails from [she here refers to X] *to Mr Moore of the Defendant attaching the signed Tomlin Order (which was also copied to the Claimant) are at pages 238 to 247 of DMO1.* [X] *stated in his email to the Defendant dated 14 August 2018 (page 242 of DMO1) that he had witnessed the Claimant signing the Tomlin Order. Deputy District Judge Thomas approved the Tomlin Order at the hearing and the Claimant was not in attendance. After the Tomlin Order had been approved,* [X] *attended late in the hearing and confirmed that the Claimant had agreed the Tomlin Order.*

15. Following the agreement reached pursuant to the Tomlin Order, the first two instalments due from the Claimant under the terms were £10,000 due by 4pm on 31 August 2018 and £10,000 due by 4pm on 30 September 2018. The Claimant made those payments (albeit late) by way of a BACS transfer to my firm of £10,000 received on 3 September 2018, and two payments of £5,000 received on 1 and 3 October 2018 respectively. Copies of letters sent to the Claimant by my firm following receipt of those payments are at pages 248 to 251 of DMO1.

16. The next instalment due under the Tomlin Order was £12,500 payable by 31 October 2018. That instalment was not paid, and the Defendant showed forbearance at this time as I understand from Mr Moore that the Claimant had indicated he would be late in making payment due to awaiting an imminent VAT repayment. Unfortunately, the payment of £12,500 due by 31 October 2018 did not arrive, nor subsequent payments of £12,500 due by 15 November 2018, £17,500 due by 15 December 2018, £311,250 due by 31 December 2018 or £10,000 due by 15 January 2019."

35. In her witness statement Ms Montezuma went on to explain how, in the light of Mr Read's default in making repayments, the County Court issued a warrant for possession of the Property on 20 March 2019. However, by an agreement recorded in a letter dated 14 March 2019 from Lester Aldridge to Mr Read, ECLG agreed to withdraw the warrant on terms that he would apply for refinancing so that ECLG would receive repayment under the loans by 21 June 2019. If Mr Read could secure re-finance to make a payment of £1.5m then ECLG would accept that sum in full and final settlement of its security under the two charges. If the repayment (which was to be no less than £1m) was in a lesser sum then the terms of the letter recorded that Mr Read would remain liable to pay the balance of the sum of £1,705,000 by 14 October 2019, albeit on terms that he would credited with the sum of £34,100 for every £100,000 by which the initial repayment exceeded £1m.

36. By the letter dated 14 March 2019, countersigned by Mr Read the same day under a notice advising him to take independent legal advice before signing, ECLG referred to the Tomlin Order and asserted its right to possession of the Property. The letter stated that, by agreeing to its terms, Mr Read acknowledged his liability under the charges and under the Tomlin Order and that in consideration of ECLG's agreement he would not seek to challenge the loans, the charges or the Tomlin Order in the event of ECLG proceeding to exercise its rights under the Tomlin Order in the event of further default in his part.

37. The day before the deadline for repayment under the letter of 14 March 2019 the parties reached a yet further agreement for repayment of the loans. The terms were recorded in a letter from Lester Aldridge dated 20 June 2019. The essence of this further agreement was that Mr Read would make a payment of £1m by no later than 29 July 2019 in satisfaction of the first charge held by ECLG. The balance of £1,705,000 would remain secured by the second charge and be repayable by no later than 30 September 2019. Like the letter dated 14 March 2019, the letter of 20 June 2019 was expressed to be without prejudice to ECLG's rights under the charges and the Tomlin Order and in that respect contained the same acknowledgments by Mr Read as contained in the March letter.

38. I should add here that these variations of the Tomlin Order appear to be the reason why the PoC in the Claim (see in particular paragraphs 43 and 44 of the PoC) sometimes refer to "the Tomlin Orders" (plural).

39. Mr Read was not able to make the repayment agreed in June 2019 nor a repayment of £1,350,000 by 30 August 2019 (and then 30 October 2019) which was subsequently proposed by Lester Aldridge on behalf of ECLG in later correspondence.

40. ECLG obtained a second warrant for possession of the Property to be enforced on 26 November 2019.

41. On 22 November 2019 Mr Read applied to suspend that warrant on the basis that he was "*in discussion with [ECLG], [ECLG] having agreed to a stay of execution pending the organisation by [Mr Read] of a refinancing proposal. [Mr Read] requires more time to organise this, but also wishes to address the amount which [ECLG] is claiming by way of an action for set off*." His application referred to Porth Beach and to him having "*offered the Defendant the opportunity of coming in with him on this venture on a 50/50 basis in order to repay him* [sic] *the monies lent*."

42. Importantly for the purposes of the Application before me, Mr Read also said he would argue the Tomlin Order was not valid "*as he was forced to sign it under duress and without having had the full contents of the Order properly explained to him*". He referred to X having misled and tricked him into signing the Tomlin Order which resulted in a very unfavourable and inequitable legal bargain. Mr Read's application of 22 November 2019 also said that ECLG was not authorised to provide any form of mortgage as it was not authorised by the FCA to conduct lending business. On that basis he said that "*it was always the parties' intentions that the monies were to be repaid by way of the Claimant involving the Defendant in project works* [sic – Mr Read's application was presented as if he was the claimant]".

43. The application of 22 November 2019 was not the first occasion that Mr Read had made a reference to the potential implications of FSMA. Ms Montezuma's statement also refers to an extract from an email which Mr Read sent to Mr Moore on 24 February 2019 and which was therefore part of the communications by which the parties re-negotiated repayment terms after the issue of the warrant for possession following the default mentioned in her paragraph 16. Even though the first variation was agreed the following month, I was told the remainder of the email contained without prejudice material. That email is therefore of some significance given the FSMA Point in the Claim.

44. In that email Mr Read referred to having obtained legal advice and said:

> "*They've both told me that there's an issue with not just the charge, but the loan itself. Basically this sort of loan can only be given by a regulated lender. It's a criminal offence for any non regulated company to do it. So if we defend on that basis and the judge agrees with the experts, then not only are both the loan, and the Tomlin order, unenforceable, Eastern Counties is looking at a massive fine. The original loan was with the Clydesdale, then you bumped them out. But no doubt to make things easier for themselves Lester [Aldridge] just got Clydesdale to assign their existing loan and charge to Eastern Counties. Thing is, Clydesdale is a regulated lender. So they can do these sorts of loan; but Eastern Counties aren't . So that's where the problem occurred.*"

45. On 25 November 2019 District Judge Middleton dismissed the warrant for possession on the basis that the terms of the Tomlin Order required a possession order to be made prior to the issue of a warrant.

46. ECLG applied for a possession order on the ground of Mr Read's breach of the Tomlin Order. Mr Read successfully sought an adjournment of the hearing of that application from 23 January to 27 February 2020.

47. The Possession Order was made by Deputy District Judge Rutherford on 27 February 2020. Mr Read was not in attendance. The Possession Order noted that Mr Read had made no application to set aside the Tomlin Order and that there were considerable arrears under its terms. It also recited that Mr Read had failed to attend the hearing but had lodged a bundle of documents with the court the day before. Evidence filed in support of the later cross-application by ECLG (for "summary judgment") mentioned below states that DDJ Rutherford regarded the filing of the bundle as "*a delaying tactic*".

48. After the making of the Possession Order in February 2020 Mr Read sought to challenge ECLG's right to possession of the Property. These necessarily involved either direct or indirect challenges to the Tomlin Order upon which the Possession Order was founded. Pared down to what is necessary for an understanding of the Application, the relevant events are as follows:

    i) The issue of an Application Notice dated 4 March 2020 by which Mr Read applied to set aside the Possession Order. He stated that he was confused about the date of the February hearing (believing it to have been listed for 28 February not 27 February) and that was the reason for his non-attendance. So far as the challenge to Tomlin Order was concerned, he said it did not bear his usual signature (so that "*it is possible that my signature is therefore a fraud*"); that the document he did sign was not as the Tomlin Order turned out to be so that he had a defence of non est factum; and that ECLG had used its superior economic power to force him into a settlement agreement (which on his understanding involved use of the Porth Beach rental income in repayment of the loan and other wider joint venture matters). His grounds referred to duress, undue influence and to ECLG collaborating with X, his former legal counsel.

    ii) The issue of an Application Notice dated 24 April 2020 by which Mr Read applied to set aside the Tomlin Order as it was "*not the document given to me to*

sign and in the alternative the Tomlin Order does not bear my signature." Mr Read's supporting witness statement again set out his understanding of the settlement (involving ECLG benefiting from Porth Beach) and said that X had done the exact opposite of acting on his instructions to "*defend the claim vociferously*". He said he had signed only the back page of a document which X had explained contained the terms of the settlement required by Mr Read and that he was "*certainly never shown a repayment schedule, which would tie me into paying a sum which had already essentially been paid once*" by the arrangement involving Porth Beach. The witness statement also relied upon alleged duress, unjust enrichment of ECLG, undue influence, promissory estoppel and non est factum. It concluded by mentioning the issue of the JV Claim by which Mr Read was claiming some £6.5m from ECLG.

iii) The above two applications were heard by District Judge Stone on 28 April 2020. The transcript of the judge's judgment records his observation that the basis of the application to set aside the Tomlin Order was not entirely clear and that Mr Read "*has not quite gone as far as to say that the signature is a forgery, and in fact today, he has told me he does not really know what happened because he cannot remember, which means that he is not putting forward a positive case of fraud. It is more a case that he cannot remember signing the document. He tells me that he was not provided with a copy of that document.*" By his order dated 28 April 2020, District Judge stone dismissed the application of 27 February 2020 to set aside the Possession Order and he listed the more recent application of 24 April 2020 for a case management hearing on 20 May 2020. The judgment shows that the dismissal of the first application reflected the judge's application of the test under CPR 39.3, in relation to Mr Read's non-attendance at the hearing on 27 February 2020, and in particular the requirement that Mr Read should show "*reasonable prospects of success at the trial*" if the possession order was to be set aside. It is clear that, for the purpose of applying that test, the judge treated the later application as creating an issue for a trial, though I should note that he also mentioned the court's case management power to revoke an order under CPR 3.1 and (chiming with that) he made passing reference to CPR 40. He concluded that the chances of Mr Read being able to argue successfully that the Tomlin Order should be set aside were "*extremely slim at best*". He went on to explain his reasons for that conclusion by addressing a number of difficulties in the way of Mr Read doing so which were summarised by his observation that a lot of water had passed under the bridge since the Tomlin Order was made. This included the variations of the Tomlin Order terms in March and June 2019. As District Judge Stone observed, *"[f]ar from therefore suggesting that the Tomlin Order was invalid or not binding on him, he was in effect doubling down on the agreement and trying to find another way to comply with its terms."*

iv) The issue of an Application Notice dated 15 May 2020 by which ECLG sought "*summary judgment in respect of the issue of [Mr Read's] application dated 24 April 2020.*" The application was supported by a witness statement of Ms Montezuma which recited the procedural history and set out ECLG's position as to why the various and sometimes divergent grounds of challenge to the Tomlin Order raised by Mr Read had no reasonable prospect of success. As appears from its language and the final paragraph of the witness statement, this

application under CPR 24 also assumed that Mr Read, the defendant, had raised a claim, or issue, which (but for the application for reverse summary judgment) might otherwise not be determined summarily.

v) On 19 May 2020 District Judge Middleton made an order that the directions hearing on 20 May, on Mr Read's application dated 24 April 2020, should be vacated and that application together with ECLG's application for summary judgment should be heard together on 27 July 2020. The judge's order expressly noted that "*this order is not an acceptance that an application is "a particular issue" for the purpose of CPR 24 and therefore the jurisdiction for the Claimant's application remains live.*"

vi) On 27 July 2020 District Judge Stone granted ECLG's application by summarily dismissing Mr Read's application to set aside the Tomlin Order. The judge's order also records the refusal of Mr Read's application for permission to appeal. There was no transcript of his judgment given that day in the bundle before me on the hearing of the Application.

vii) On 20 August 2020 HHJ Gore QC made an order on consideration of the papers which (a) refused Mr Read's out-of-time application for permission to appeal District Judge Stone's order dated 28 April 2020 and declared it to be totally without merit; and (b) refused Mr Read's application for permission to appeal District Judge Stone's order dated 27 July 2020. The reasons given in support of the first refusal included the observation that the proposed appeal was an impermissible collateral attack on the Possession Order. Those in support of the second refusal included what the judge described as "*a curious and inconsistent alternative case*" based on non est factum alongside what he said was an unsubstantiated denial by Mr Read that he had signed the Tomlin Order. HHJ Gore QC made directions for any renewed oral application for permission to appeal the order dated 27 July 2020 which included an "unless" provision that a transcript of DJ Stone's judgment in support of it should be obtained by 16 October 2020.

viii) On 2 November 2020, at a telephone hearing attended by Mr Read and ECLG's counsel, HHJ Gore QC dismissed Mr Read's renewed application for permission to appeal the order of 27 July 2020 and declared it to be totally without merit. It is not clear whether Mr Read had obtained a transcript of the judgment given on 27 July 2020 as previously directed. There was no transcript of the hearing before or the judgment of HHJ Gore QC in the bundle before me on the hearing of the Application.

ix) The issue of an Application Notice dated 18 June 2021 by which Mr Read sought seeking the striking out of the Possession Proceedings, alternatively reverse summary judgment "*on the basis [ECLG] has no reasonable grounds for bringing the claim, has no real prospects of succeeding and/or the proceedings are an abuse of process*." He also sought the setting aside of a warrant for possession due to be enforced on 24 June 2021. The witness statement in support of the application (made by Mr Fulda, Mr Read's solicitor) accepted Mr Read's entry into the Tomlin Order and the subsequent variations of its terms. However, in addition to challenging the validity of the assignment of the Clydesdale security on the first loan, the witness statement also relied

upon the FSMA Point in saying that the Tomlin Order should be set aside. That said, although paragraph 59 of the statement referred in general terms to Mr Read having accordingly entered into the Tomlin Order as a result of misrepresentations by ECLG or alternatively by mistake, the alleged misrepresentation is even more vague than paragraph 44 of the PoC and the thrust of the paragraph is that the court would not have made the Tomlin Order if the true legal position in relation to want of authorisation (as Mr Read seeks to analyse it, at least in relation to the first loan) had been brought to the court's attention. In this respect the tenor of the statement is closer to Mr Read's email of 24 February 2019 than the suggestion that a pre- Tomlin Order representation was made by ECLG on the FSMA Point. The witness statement also mentioned the JV Claim.

x) On 23 June 2021 District Judge Stone dismissed this further application as being wholly without merit. There was no transcript of his judgment in the bundle before me but it was common ground between the parties that this was because the judge concluded that it was procedurally misconceived, seeking as it did a strike-out or reverse summary judgment after there had been judgment in favour of ECLG (in the form of the Possession Order) in the proceedings. It was on this date that the Claim was issued. I have already explained that the next day Deputy District Judge Doman suspended the warrant for possession due to be enforced that day.

49. Mr Read's direct challenges to the Tomlin Order in the Possession Proceedings were therefore unsuccessful, as were his renewed applications for permission to appeal against the disposal of the first of them.

The Application

50. The Application seeks to:

> "*strike out the claim and allow the Defendant to enforce the judgment in its favour as this claim is an abuse of process, has no real prospects of success and the Defendant is entitled to the benefit of its properly obtained judgment*."

51. The draft Order attached to the Application sought an order that *"[T]he Claim is struck out and marked as totally without merit*" and not to the alternative of reverse summary judgment.

52. Mr Gillett's skeleton argument assumed that the Application seeks, alternatively, the striking out of the Claim and reverse summary judgment against it. He referred to both Part 3.4 and Part 24 of the CPR. In relation to the first, Mr Gillett referred both to the Claim being abusive and to Mr Read's statements of case failing to disclose reasonable grounds for bringing the Claim.

53. Proceeding on the basis that the Claim is an abuse of process and wholly without merit, ECLG also invites me to mark it as totally without merit (echoing HHJ Gore QC and District Judge Stone) and to issue a Civil Restraint Order against Mr Read.

54. I address the principles of substantive law raised by ECLG's arguments on the Application in later sections of this judgment. However, I summarise ECLG's position at this stage in order to highlight a significant difference between the parties as to the scope of the Application. This gives rise to an issue of procedural law.

55. Ms Barton and Ms Chaffin-Laird referred to the language of the Application quoted in paragraph 50 above and submitted that, on its face, it is limited to an application to *strike out* the Claim. They said that the supporting witness statement of Ms Montezuma inviting the court (at her paragraphs 51 and 77) to enter summary judgment against the Claim, on the basis that it has no real prospect of success, marked an unjustified departure from the language of the Application. Their primary contention was that no summary judgment application was properly before the court.

56. Focussing upon the language of CPR r.3.4(2)(a) - *"that the statement of case discloses no reasonable grounds for bringing or defending the claim"* – their submission on behalf of Mr Read was that the court should assume that the facts on which he relies in support of the Claim are true (citing *Morgan Crucible Co plc v Hill Samuel Bank & Co* [1991] Ch 295 at 314B per Slade LJ) and that a statement of case is unsuitable for striking out if it raises a serious issue of fact that can properly be determined only by hearing oral evidence (citing *Wragg v Partco Group Limited* [2002] BCC 782, at 796F per Leveson J at [33] and at 812E per Potter LJ [48]). They also relied upon *Bridgeman v McAlpine-Brown* (19 January 2000, unrep. CA) in support of that second proposition and to other authority cited in the White Book at para. 3.4.2.

57. That authority includes *Soo Kim v Young* [2011] EWHC 1781 (QB). Ms Barton QC drew my attention to that case, in connection with my observation upon the non-conformity of paragraphs 44 and 45 of the PoC, for the proposition that:

> *"Where a statement of case is found to be defective, the Court should consider whether that defect might be cured by amendment and, if it might be, the Court should refrain from striking it out without first giving the party concerned an opportunity to amend."*

58. For the reasons I recently gave in *Potgieter v Village* [2021] EW Misc (18), and so far as an application framed only by reference to CPR 3.4(2)(a) is concerned, I accept that it is not open to an applicant for a strike-out to challenge the factual assertions in the subject statement of case on the grounds that they are fanciful (and cannot constitute "*reasonable grounds*" for supporting the claim because they are said to be untruthful or not realistically sustainable) when the court should instead assume them to be true for the purposes of the application. Pending any further clarification by the Court of Appeal that might be thought to be required in the light of more recent competing obiter dicta (in that court) on the point, it seemed to me that the court's decision in *Bridgeman v McAlpine-Brown* was also authority for this approach and was to be preferred over a more recent High Court decision (*Maranello Rosso Limited v Maran (UK) Ltd* [2021] EWCA Civ 326) than the *Morgan Crucible* case relied upon by Ms Barton QC and Ms Chaffin-Laird.

59. However, this line of argument on behalf of Mr Read begs the question as to whether it is right to say that the Application does not embrace a summary judgment application. In fairness, Ms Barton QC did not press the argument too hard in her oral submissions and her skeleton argument had anticipated the court treating the Application as if it

sought summary judgment by referring to the very familiar principles in *Easyair v Opal* [2009] EWHC 339 (Ch), at [15]. Both the skeleton argument and her oral submissions also placed reliance upon CPR 24.2((b) for the constraint upon the court's power to grant summary judgment where there is a compelling reason why the case should be disposed of at a trial.

60. Any doubt over the scope and basis of the Application could have been avoided by it identifying the provisions of the CPR upon which ECLG relies, as such applications seeking a final disposal of the claim usually do. However, the Application does use the language of "*abuse of process*" contained in CPR r.3.4(2)(b) and the "*no real prospect of succeeding"* language of CPR 24.2. It is the reference in the Application to the Claim being *"struck out"* because Mr Read "*has no reasonable grounds for bringing the claim*" (my emphasis) which distorts the test under CPR 3.4(2)(a): compare *Potgieter* at [45]-[46].

61. I therefore proceed on the basis that the Application is a combined one made in accordance with CPR 3.4(2)(b) and CPR 24 as paragraph 1.7 of Practice Direction 3A recognises may be done.

The Rival Arguments

62. Mr Gillett emphasised that the Claim seeks not just the setting aside of the Tomlin Order but also the Possession Order. The Possession Order was made following Mr Read's application dated 22 November 2019. The court had also given judgment on his subsequent applications which (having regard to the absence of any such challenge expressly noted by the terms of the Possession Order) did include a challenge to the Tomlin Order.

63. Mr Gillett said that all the issues of substance now raised by the Claim have been raised before by Mr Read in the Possession Proceedings with the consequence that the Claim is abusive for being a collateral attack, or perhaps a direct assault, on earlier decisions of the court. He relied upon the doctrine of res judicata and the rule in *Henderson v Henderson* (1843) 3 Hare 100 in submitting that the Claim was abusive. He said it falls foul of the principles of issue estoppel and cause of action estoppel.

64. Mr Gillett noted that Lord Sumption JSC in *Takhar v Gracefield Developments Ltd and others* [2019] UKSC 13, to which I turn next, was clear to draw a distinction between the equitable right to set aside earlier decision for fraud and the distinct jurisprudence relating to res judicata and the rule in *Henderson v Henderson*. He submitted the Claim is abusive as Mr Read's central allegations have already been raised in the Possession Proceedings through the challenges to set aside the Tomlin Order and/or the Possession Order. He said that, aside from the order made by District Judge Stone on 23 June 2021, each decision in the County Court reflected the court's consideration of the substantive grounds of challenge raised by Mr Read.

65. So far as the absence of merit in the Claim was concerned, Mr Gillett submitted that, especially in the light of those earlier decisions, Mr Read had no prospect (real or otherwise) of establishing the right to set aside a judgment, and any consequential order, by proving that a fraud has been committed by ECLG against him and the court. He

referred to the hurdles governing such a challenge to an earlier decision of the court as confirmed by the Supreme Court decision in *Takhar.*

66. In *Takhar*, at [67], Lord Sumption (with whom Lords Hodge, Lloyd-Jones and Kitchin JJSC agreed) described the test for setting aside a judicial decision on the ground of fraud as one involving "*stringent conditions*". Lord Kerr (with the support of all other members of the court on this point), at [56]-[57], approved Aikens LJ's summary of what must be proved in order for the Court to set aside a decision procured by fraud in *Royal Bank of Scotland plc v Highland Financial Partners LLP* [2013] I CLC 596, at [106], where he said:

> *"There was no dispute between counsel before us on the legal principles to be applied if one party alleges that a judgment must be set aside because it was obtained by the fraud of another party. The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."*

67. Mr Gillett also argued that the first 20 paragraphs of the prayer to the PoC should in any event be struck out. He said those paragraphs seek further relief which cannot be obtained in proceedings of this nature. The Particulars of Claim concludes with a prayer seeking 18 heads of declaratory relief, alongside other forms of relief (some of it alternative to a particular declaration sought) running to 23 paragraphs before the final claim to costs. Only the last declaration sought ("*a declaration that the Tomlin Orders are void and of no effect*") was, Mr Gillett submitted, covered by the court's jurisdiction to set aside a judgment procured by fraud. He said Mr Read had ignored the point that even if the Tomin Order and consequential orders were to be set aside, the result would be the need for a new trial on evidence to take place in the Possession Proceedings. Mr Read had erroneously skipped to the assumption that findings of fact relating to the underlying issues in dispute in the Possession Proceedings would instead be made in the present proceedings.

68. Mr Read's position is that ECLG has brought the Application on an ill-founded understanding that the relevant legal principles are those found in the authorities concerned with rescission of a judgment on the grounds of fraud. Ms Barton QC and Ms Chaffin-Laird said this approach is flawed because it overlooks the distinction between a judgment of the Court and the essentially contractual nature of the schedule to the Tomlin Order. In the case of a Tomlin order, there is not the same conflict between the finality of litigation and the need to ensure that the Court is not misled.

69. They relied upon the decisions of the Court of Appeal in *Watson v Sadiq* [2013] EWCA Civ 822, [49]-[51] and of Ramsey J in *Community Care North East v Durham County Council* [2012] 1 WLR 338, [28], for the proposition that the contract contained in the schedule to a Tomlin order is vulnerable to being set aside on the ground of misrepresentation, fraud, undue influence and the like; and that any such challenge is best brought in the form of a new claim. If the claim is successful then the curial part of the order (staying the proceedings on the terms of a schedule previously assumed to be binding) can then be set aside, most obviously under CPR 3.1(7).

70. Ms Barton QC and Ms Chaffin-Laird cited the decision of the Supreme Court in *Zurich Insurance Company v Hayward* [2017] AC 142 as an illustration of a successful challenge to a settlement effected by a Tomlin order on the basis of the defendant's misrepresentation about the extent of his injuries (indeed, where the claimant insurer had suspicions about this before entering into the settlement). They referred to the judgment of Lord Clarke JSC, at [18], and to the judgment of HHJ Hodge QC in *Ahuja Investments Ltd v Victorygame* [2021] EWHC 2382 (Ch), at [76]-[77] quoting a Court of Appeal authority as well as Lord Clarke, for a summary of the elements of a claim based upon fraudulent misrepresentation. They can be expressed as follows:

i) The defendant makes a false representation to the claimant.

ii) The defendant knows that the representation is false, alternatively, he is reckless as to whether it is true or false.

iii) The defendant intends that the claimant should act in reliance on it.

iv) The claimant does act in reliance on it and, in consequence, suffers loss. It is sufficient for the representation to be an inducing cause and the claimant does not have to show it was the sole cause of his action. A representation which can be shown to be material, in the sense that it was likely to induce the claimant to act, will carry with it a strong (albeit rebuttable) inference that the claimant was induced by it. It is not necessary for the claimant to prove that he believed the representation to be true, though if he did not believe it to be true he may face serious difficulty in establishing that he was induced to act on it or that he suffered loss as a result. If the claimant had full and complete knowledge that the representation was false (as opposed to partial or fragmentary knowledge or mere suspicion which does not carry with it a duty to investigate further) then he obviously cannot succeed.

71. Even if the FSMA point had no bite in relation to the second loan, establishing some other fraudulent misrepresentation (in relation to either loan) would, they submitted, suffice to vitiate the Tomlin Order.

72. Their fall-back position was that, even if the Possession Order can be treated as the product of a judicial determination reached independently of the Tomlin Order, ECLG's approach to the Application wrongly conflated two matters. The first was the consequence of the Possession Order being set aside; namely the Possession Proceedings not being the subject of any binding determination. The second was the suggested abusive re-litigation of points determined by the Possession Proceedings. This ignored the point that there can be no 're'-litigation of issues raised by the Possession Proceedings if the premise is that there is no such binding determination. If

ECLG wishes thereafter to pursue its claim to possession then the litigation over that issue arises from the lack of any such prior determination, which (Mr Read contends) is itself the consequence of ECLG's own fraud.

73. Ms Barton QC and Ms Chaffin-Laird said that neither cause of action estoppel nor an issue estoppel can have any application to a rescission claim based upon an order having been obtained by fraud unless the same issue of fraud was determined in the first action. They relied upon the following observation of Lord Sumption in *Takhar*, at [61]:

> "*The cause of action to set aside a judgment in earlier proceedings for fraud is independent of the cause of action asserted in the earlier proceedings. It relates to the conduct of the earlier proceedings, and not to the underlying dispute. There can therefore be no question of cause of action estoppel. Nor can there be any question of issue estoppel, because the basis of the action is that the decision of the issue in the earlier proceedings is vitiated by the fraud and cannot bind the parties:* R v Humphrys [1977] AC 121 *(Viscount Dilhorne). If the claimant establishes his right to have the earlier judgment set aside, it will be of no further legal relevance qua judgment. It follows that res judicata cannot therefore arise in either of its classic forms.*"

74. They submitted that the Claim raises the misrepresentation issues for the first time, as they were not raised *prior to* the Tomlin Order in the Possession Proceedings. So far as any challenge in the Possession Proceedings *after* the making of the Tomlin Order is concerned, they argued that there had been no judicial determination of these issues. Further, Ms Barton QC said that any attempt by Mr Read to raise them in the Possession Proceedings had been procedurally misconceived, as was made clear by the last order dated 23 June 2021. Consistent with the analysis of the Tomlin Order as a contract which compromised the Possession Proceedings, he could only properly have challenged its validity by fresh proceedings in the form of the Claim.

75. In resisting that part of the Application which rests upon the Claim lacking a real prospect of success, and as I have already mentioned, Ms Barton QC and Ms Chaffin-Laird referred in their skeleton argument to the familiar principles in *Easyair v Opal,* at [15]. They also pointed to the court's power under CPR Part. 24.2(b) to decline to grant summary judgment against a claim lacking the hallmark of being reasonable arguable (the identification of which those principles are designed to assist) if it is nevertheless be satisfied that there is a compelling reason why the matter ought to be disposed of at trial.

76. They submitted that the essential nature of the misrepresentation allegations base upon the FMSA Point and the Repayments Point (and other allegations) is such that the Claim is not susceptible to determination on a summary basis. The pointed to the following matters which needed to be explored at a trial: (1) the exact nature of the representations said to have been made to Mr Read which called for testimony upon oral conversations; (2) the need for disclosure and oral evidence on the FSMA Point and the Repayments Point; (3) whether or not, as Mr Read avers, Mr Moore on behalf of ECLG agreed that the company would not enforce its contractual rights (if any) and would accept repayment of the loans out of the performance of the JV; and (4) how the loans were recorded in the context of the JV, how rent derived from Porth Beach was applied and whether it was properly applied in diminution of the Loans;

77. In response to the argument that the first 20 paragraphs of the prayer were beyond the proper scope of the Claim, Ms Barton QC countered by saying that, if the Tomlin Order falls away, it is sensible to address the wider issues raised by Mr Read (such as the enforceability of each loan and the terms thereof) in the present proceedings.

Analysis

78. In order to determine the Application it is necessary to consider the allegations which Mr Read now makes in support of the Claim to establish, first, whether or not they constitute an abusive attempt to re-litigate points which either were raised or should have been raised in the Possession Proceedings. On this first inquiry, the test of "should have" is to be approached in the light of what was said in *Takhar* about the restricted scope of the rule in *Henderson v Henderson* where the new claim is based upon allegations of previously concealed fraud on the part of the opposing party. Secondly, if the Claim cannot be categorised as an abuse of the court's process, it is necessary to consider those allegations for the purpose of deciding whether or not they have a real prospect of success at trial. These two inquiries respectively underpin the two limbs of the Application identified above.

79. As the Possession Proceedings did not end with the Tomlin Order, but included subsequent judicial determinations about it, it is necessary for the purpose of both inquiries to consider developments in the Possession Proceedings after that initial compromise. On this point, I note that the last form of declaratory relief in the prayer to the PoC rests upon the Possession Proceedings having been an abuse of process and refers to "*such judgment, warrant for possession and eviction notice being fraudulently obtained*."

80. I express matters this way for the following reasons which emerge from an analysis of the authorities relied upon in counsel's competing submissions:

    i) It is clear that a party will not be able to bring fresh proceedings challenging a judgment in earlier proceedings on the ground of fraud where the same allegation of fraud was made in those earlier proceedings: see *Takhar* per Lord Kerr at [54] and Lord Sumption at [61]. As Lord Sumption noted, the cause of action in the new proceedings must be "*independent of the cause of action asserted in the earlier proceedings*". It is on that basis that he continued with his observation that the new claim cannot be caught by a cause of action estoppel or an issue estoppel.

    ii) The court has a discretion to strike out the new proceedings where the relevant allegation of fraud and evidence in support should have been raised in the earlier proceedings. The discretion exists as part of the court's procedural powers to curb abuses of process; and the test of *should* (have been raised) derives from the rule in *Henderson v Henderson*. But the rule is attenuated in such cases. As the party raising the allegation is entitled to assume honesty on the part of his opponent, *"[I]t follows that unless on the earlier occasion the claimant deliberately decided not to investigate a suspected fraud or rely on a known one, it cannot be said that he should have raised it*". See the judgment of Lord Sumption in *Takhar* at [62]-[63] (in the majority on this point, with Lord Kerr,

at [55], leaving his observations on the point open and the more flexible approach favoured by Lord Briggs not finding favour with the majority).

iii) If Mr Read is not caught by an issue estoppel or the rule in *Henderson v Henderson* then (by way of a summary of the persuasive burden upon him on the reverse summary judgment application) he needs to show that the Claim makes out a reasonably arguable case that the conclusion of the Possession Proceedings is vitiated by fraudulent misrepresentation by ECLG. To the extent any judgment in the Possession Proceedings can be said to have a vitality independent of the Tomlin Order (i.e. it rested upon reasoning which went beyond the fact that the parties had reached a compromise in August 2018 and addressed arguments raised by Mr Read in impugning that compromise) the merits of the Claim are to be considered against the test identified in *Takhar* (paragraph 66 above) which governs the substantive issue of fraud raised by the Claim, as opposed to the threshold test for bringing it (point (i) above).

81. So far as the first of the above points is concerned, I recognise that the Claim is strictly to be considered as resting upon a cause of action which is "independent" of the cause of action asserted in the Possession Proceedings; in the sense that Mr Read had no cause of action in the earlier proceedings. He was not a claimant in the Possession Proceedings but instead a post-Tomlin Order applicant. Mrs Takhar, by contrast, brought one claim, which was unsuccessful, and then another in which she alleged the judgment in the first had been obtained by fraud. However, the fraud exception (to the general finality of litigation) addressed in *Takhar* is concerned with the ability of the unsuccessful party under the earlier judgment to subsequently challenge it on the ground of fraud. When that is the ground of challenge one might expect the current claimant as often as not to have been a losing defendant under the earlier judgment. Whether that unsuccessful party was the claimant or the defendant in the earlier proceedings, to my mind the key question is whether or not the allegations of fraud made in his new claim are independent of the substantive issues decided against him in that judgment.

82. So far as the third point above is concerned, the test in *Takhar* (if it falls to be applied on proper analysis of any judicial determination in the Possession Proceedings) requiring "fresh evidence" showing that deceit was an operative cause of the entry of the judgment(s) now under challenge is one aimed at identifying evidence that was not deployed in the Possession Proceedings. The test does not require the evidence on that point to be "fresh" or "new" in the sense of being evidence that has only come to light since the judgment. This was explained in the judgment of Andrews LJ in *Park v CNH Industrial Capital Europe Ltd* [2021] EWCA Civ 1766, [54]-[61], on her analysis of the judgments of Lord Kerr and Lord Sumption. However, I would emphasise that it is because the claimant may be relying upon evidence which is better categorised as "stale" - in the sense that he knew about it in the first proceedings or, perhaps, suspected its existence but did not act on it - that there is scope for his claim to be caught by the rule in *Henderson v Henderson*.

83. Consideration of the history of the Possession Proceedings (summarised in paragraphs 33 to 49 above) reveals that, after the making of the Tomlin Order, Mr Read raised for consideration by the judges in the County Court allegations which went to the FSMA Point and the Repayments Point, the two points highlighted by Ms Barton QC in support of the submission that the Claim is a viable one which should be permitted to proceed.

84. In expressing myself that way I do not intend to suggest that Mr Read has already presented the FSMA Point and the Repayments Point in the form of an allegation that ECLG made *representations* on those points to both Mr Read and the court "*[b]efore the Tomlin Orders were made*": compare paragraph 44 of the PoC. As I have noted in paragraph 48(ix) above, he did not clearly present the points that way even when making the last of his County Court applications with the benefit of legal advice. I also recognise that because of the procedural misconception behind that last application, as now highlighted and relied upon by Ms Barton QC, it cannot be said that the order dated 23 June 2021 reflected a judicial determination of the issues, involving alleged fraud, underpinning the FSMA Point and the Repayments Point.

85. Nevertheless, it is clear that Mr Read's application of 22 November 2019 raised both the alleged lack of FCA authorisation of ECLG (as previously flagged by his email of 24 February 2019) and the complaint that the rent from Porth Beach had not been applied in reduction of his borrowing. Each of these matters marks the beginning of the FMSA Point (now scaled down to apply to the first loan but not the second) and the Repayments Point respectively. Mr Read's applications of 4 March 2020 and 24 April 2020 also raised the issue of Porth Beach.

86. The fact that these points were in Mr Read's mind well before the commencement of the Claim is of potential significance in the application of the principle in *Henderson v Henderson* as well as to an assessment of their merits now that they have been raised as the basis of allegedly fraudulent misrepresentations made *prior to* the making of the Tomlin Order. That is so even if the situation is not one for the application of the test in *Takhar* governing the merits of the Claim because any subsequent judgment in the Possession Proceedings necessarily rested upon the validity of the Tomlin Order (see the submission noted at paragraph 68 above).

87. The position is not straightforward for the purposes of applying the reasoning in *Takhar* upon the threshold test for bringing the Claim. The Possession Proceedings did not involve allegedly fraudulent conduct leading up to and continuing at a trial which then resulted in a reasoned judgment, following trial, said to have been procured by that fraud. The Tomlin Order obviated the trial process and dispensed with the need for any such judgment. It follows that there is no judgment *following a trial* which might now be analysed for the purpose of establishing whether or not (at this summary judgment stage) the Claim appears to be reasonably arguable when considered against the test (also identified in *Takhar*) governing the substance of it.

88. Yet the Possession Proceedings were not concluded by the Tomlin Order when (allowing for its operation through a stay) a Tomlin order usually has the effect of disposing of proceedings. So far as further judicial input was concerned, the judges in the County Court were required to and did pass judgment on the various applications subsequently made by Mr Read as well as the one made by ECLG. In my judgment, and expressing myself very loosely, this situation of "post-'trial' litigation" in the Possession Proceedings does potentially expose Mr Read to the threshold and substantive tests identified in *Takhar*. Things are not quite as straightforward as suggested on behalf of Mr Read, which effectively involves stopping the clock with the making of the Tomlin Order (or even the Possession Order and its recital that the Tomlin Order had not been challenged) and assuming there was no reasoned judgment in the County Court to which the decision in *Takhar* has any application.

89. However, the analysis of the Claim from the viewpoint of *Takhar* is clouded not only by the absence a pre-'trial' defence identifying the issues between the parties in the Possession Proceedings but also the lack of transcripts of the judgments of District Judge Stone on 20 July 2020 and HHJ Gore QC on 2 November 2021 (and for whose benefit Mr Read had been directed to provide the earlier transcript). On the application to set aside the Tomlin order which was the subject matter of those judgments Mr Read had raised an argument relating to the Repayments Point but not (on that application as opposed to an earlier one to suspend the second warrant for possession) the argument underpinning the FSMA Point.

Conclusions

90. In the light of the above analysis, I have reached the following conclusions:

    i) that it cannot be said that Mr Read fails the threshold test in *Takhar* for bringing the Claim;

    ii) that the Claim is an abuse of process on *Henderson v Henderson* reasoning; and

    iii) even if it was not an abuse of process, the Claim does not have a real prospect of success.

91. The first conclusion reflects my decision that it cannot be said that Mr Read clearly raised the misrepresentation allegations in the Possession Proceedings. The second and third rest essentially upon my conclusions that he should have raised them and would have done so if they had any real substance.

92. So far as the threshold test in *Takhar* is concerned, I am not satisfied on this Application that Mr Read is caught by an issue estoppel on the basis that the fraudulent misrepresentation allegations advanced in support of the Claim cannot be said to be independent of allegations raised by him in the Possession Proceedings. Although I have identified the occasions in the Possession Proceedings when the basis of the FSMA Point and the Repayments Point surfaced in the context of his various applications, I have also noted that he was not advancing an allegation of pre-Tomlin Order misrepresentation by ECLG even by the date of the last of those applications.

93. I rely upon the following in support of my second conclusion that the Claim is an abuse of process in that Mr Read should have raised the misrepresentation allegations in the course of the Possession Proceedings:

    i) Ms Barton QC emphasised that the allegations of fraudulent misrepresentation were not raised prior to the Tomlin Order but this provokes the counterblast "why not?" What is it about the nature of ECLG's claim in the Possession Proceedings that prompted Mr Read to contest it was a fraudulent one only after the making of the Tomlin Order and not in a defence served instead of a settlement? To my mind there is no satisfactory answer to this basic question.

    ii) And if not raised before the making of the Tomlin Order then why not later when he sought to challenge it and the Possession Order? It is clear from Mr Read's

email of 24 February 2019 that he had received legal advice that ECLG could not enter into a regulated mortgage contract. If he had been induced to enter into the Tomlin Order by a contrary representation then he would have been aware at that stage that (on his case) it was a false one. Instead of taking the point he entered into the variation of the settlement terms by the letters dated 14 March 2019 and 20 June 2019 which affirmed the validity of the Tomlin Order. Similarly, Mr Read's application of 22 November 2019 raised the point about Porth Beach. I do not understand how the Repayments Point translates into a legal challenge (as I explain in support of my third conclusion upon the merits of the Claim) but, to the extent Mr Read can be heard to say that ECLG had induced him into agreeing the Tomlin Order in the belief that the Porth Beach rental income had been applied in reduction of the loan, by this stage he must have realised he had been misled. The application also asserted that ECLG was not authorised by the FCA to conduct lending business.

iii) By no later than the November 2019 application, therefore, on his own case (in the Claim) Mr Read must have known, or at the very least suspected, that he had been deceived by ECLG (with the alleged collusion of X) on the FSMA Point and the Repayments Point. His subsequent failure to raise his allegations of fraud puts him on the wrong side of the rule in *Henderson v Henderson*, as explained by Lord Sumption in *Takhar* at [63].

94. In concluding that the Claim falls foul of the rule in *Henderson v Henderson* I should make clear that I have had well in mind the fact that the dismissal of the last of Mr Read's applications in the Possession Proceedings, on the same day the Claim was issued, reflected (so the parties told me) the District Judge's conclusion that it was procedurally misconceived. This has enabled his counsel to make the point, in hindsight, that the FSMA Point and the Repayments Point (as now formulated) *should not* have been raised in the earlier proceedings. However, in the unusual circumstances of this case (involving the so-called "post-'trial' litigation") I consider that the rule does apply when considered against the points taken and not taken in the Possession Proceedings.

95. The rule in *Henderson v Henderson* is aimed at avoiding parties litigating over the same issue in multiple proceedings. Mr Read had belatedly sought to make an issue over ECLG's claims of indebtedness and possession by his various applications; and it was recognised that his Application dated 24 April 2020, in particular, took what can fairly be described as a "kitchen sink" approach in its challenge to the Tomlin Order. In those, circumstances he was obliged to "*bring forward [his] whole case*" (per Wigram V-C) including the FSMA Point and the Repayments Point as now formulated in support of the misrepresentation plea. Although the rule in *Henderson v Henderson* is a procedural one, the substance of it should not in my judgment be unduly restricted by procedural niceties so long as the party relying upon it can point to the opponent having had an earlier and proper opportunity to litigate his whole case. This view is reinforced by the fact that, by his judgment dated 28 April 2020, District Judge Stone clearly proceeded on the basis that the application then before him raised issues potentially worthy of a trial or some further substantive determination in the Possession Proceedings (I assume his reference to CPR 40 was to the notes now found in the 2021 White Book at para. 40.6.3).

96. My third conclusion that the Claim does not in any event make out a reasonably arguable case for the purpose of defeating the alternative summary judgment application is reinforced by Mr Read's failure to allege fraudulent misrepresentation in the Possession Proceedings when I have concluded he should have done. The fact that he did not do so, when he could have done, is an indication that the allegations are not sound. The following are further reasons (some overlapping with my conclusion on abuse of process) in support of that conclusion.

  i) The scantiness of the pleading of misrepresentation which I have already noted does not comply with the CPR. This is not a promising starting point for establishing the four ingredients of a deceit claim summarised in paragraph 70 above. This applies in particular to the first two ingredients, but the third and fourth (in the light of Ms Montezuma's evidence about the Tomlin Order providing a discount of £645,000 from the sum claimed in the Possession Proceedings) should not be overlooked.

  ii) Paragraph 44 of the PoC refers in vague terms to misrepresentations made to Mr Read and to the Court "*before the Tomlin Orders were made*". As Mr Gillett observed, this must refer to what was said in the Particulars of Claim and supporting evidence in the Possession Proceedings. Nothing was expressly said about the FSMA Point or the Repayments Point in those court documents. ECLG did obtain a warrant for possession in March 2019 (which I infer would have involved ECGL pointing to the default provisions of paragraphs 7 and 8 of the schedule to the Tomlin Order in relation to obtaining possession) but there is no evidence of, or pleading of a representation by ECLG on the FSMA Point in any further court documents before Mr Read agreed to the variation of the Tomlin Order by the letters dated 14 March 2019 and 20 June 2019.

  iii) The tenor of Mr Read's emajl of 24 February 2019 indicates that the FSMA Point was in fact one raised by him then, after the Tomlin Order, with the benefit of legal advice recently obtained ("*if we defend on that basis and the judge agrees* .....") rather than one which was the subject matter of a pre-Tomlin Order representation. In addressing the Claim above I have already noted that Mr Read's position in relation to the earlier points in time when the loans were made is that ECLG "*failed to mention*" that it was not authorised to make them. He has not pointed to any positive statement by ECLG on the point between May 2016 and August 2018.

  iv) Paragraph 44 of the PoC does not allege that any of the misrepresentations referred to were impliedly made. However, the averments in the Particulars of Claim in the Possession Proceedings that (a) ECLG was entitled to possession of the Property and (b) that there was an entitlement to interest and fees under the terms of the loans could be read as an implied representation that there was no issue over the enforceability of the loans so far as sections 19 and 26 of FSMA was concerned. That said, it is now accepted on behalf of Mr Read that there was no misrepresentation on the FSMA Point in relation to the second loan. On that basis the representation that ECLG was entitled to possession of the Property under the second mortgage, by reference to indebtedness under that loan identified by those particulars to be £392,502, was true. If, as I assume for the purposes of the Application, any such implied representation about the first

loan was untrue then the question arises as to whether Mr Read and the Court were deceived by it.

v) So far as the court is concerned, it made the Tomlin Order in the conventional terms which operated to stay the Possession Proceedings on the terms in the schedule agreed by the parties. It did not enter a money judgment in respect of either loan and neither did it make a possession order on that occasion, as District Judge Middleton highlighted by his order of 25 November 2019. In these circumstances, I have difficulty in seeing how the court can be said to have been induced to approve the Tomlin Order by an implied representation on the FSMA Point and the first loan.

vi) So far as any inducement of Mr Read to enter into those terms is concerned, his email of 24 February 2019 also clearly indicates that he had not been induced by any express or implied representation on the FSMA Point. On the issue of inducement, the email is revealing in demonstrating that he did not then cry foul by protesting that ECLG had deceived him on the question of FCA authorisation. Instead, he chose to double-down on the Tomlin Order (to use District Judge Stone's phrase) by agreeing variations of the repayment terms in March and June 2019. By doing so he expressly disclaimed any right to challenge the loans, charges or Tomlin Order. Again, I highlight the tentative way in which the email raised the FSMA Point. Mr Read recognised the basis of it remained to be established and, whether or not he was then advised it would not impact upon the second loan or upon ECLG's right to apply for discretionary relief under section 28 of FSMA even if section 19 had been contravened in relation to the first, I think it can fairly be assumed that he would realised he would have to return the principal sums advanced even if it was made good. Paragraphs 43 and 44 of the PoC proceed on the basis that the March and June 2019 variations were, in effect, further Tomlin orders. The case for saying that ECLG induced Mr Read's entry into those by a fraudulent misrepresentation on the FSMA Point, when he had received his own legal advice about it, is hopeless.

vii) As I have already noted in explaining the nature of the Repayments Point in my summary of the Claim, the allegation of an actionable misrepresentation on that point does not appear to make sense. The PoC aver that he knew in 2016 that the rental income from Porth Beach had not been applied in reduction of the first loan. The issue of the Possession Proceedings, supported by Particulars of Claim and evidence asserting that the redemption figure for both loans was over £2.3m and that Mr Read had made no payments under the first loan, as varied, and none under the second loan, was also completely at odds with a pre-Tomlin Order representation on the Repayments Point. The PoC do not make out a credible case so far as any of the four ingredients of a fraudulent misrepresentation claim on that point are concerned.

viii) So far as its challenge to the validity of the Possession Order and warrants for possession (the last form of declaratory relief sought) are concerned, the Claim's prospects of success on the summary judgment application are to be measured against the test governing the substantive claim approved in *Takhar* at [56]. As appears from my reasons in support of the Claim being an abuse of process and from those immediately above, it is not reasonably arguable that Mr Read will be able to establish that ECLG was guilty of conscious or deliberate dishonesty

in bringing the Possession Proceedings or that the alleged dishonesty was material to the court's decisions to make and later uphold the Possession Order. As Lord Sumption observed in *Takhar*, at [64], the standard of proof for fraud in this context is high, and rightly so. The making of the Tomlin Order meant that the only *judgment* given by the Court (for *Takhar* purposes) was the Possession Order. Quite apart from Mr Read formally confirming in March and June 2019 that ECLG would be able to apply for possession under the terms of the Tomlin Order, the County Court was entitled to grant possession in ECLG's favour by reference to the second loan alone. As I have explained in paragraphs 19 and 26 above, neither the FSMA Point nor the Repayments Point relate to the second loan.

97. As for Mr Read's reliance upon CPR Part 24.2(b), there is no basis for saying that the issues raised by the Claim should go to trial when the reasons underpinning my conclusion it is an abuse of process are built upon the point that Mr Read spurned the opportunity for such a trial in the Possession Proceedings.

98. For completeness, I should add that if I had instead concluded that the issues over the setting aside the Tomlin Order and Possession Order should proceed to trial I would nevertheless have struck out those elements of the prayer that are not material to the determination of those issues. There are many matters included with the prayer, such as declarations about the validity of the assignment by Clydesdale to ECLG and the terms of the loans, which would only fall to be litigated in further proceedings between the parties in the event of the Claim to set aside the Tomlin Order being successful. In my judgment the inclusion of matters which would belong to the underlying dispute between the parties would (for the purposes of CPR 3.4(2)(b)) obstruct the just disposal of the proceedings to decide firstly whether that dispute should be re-activated.

99. The striking out of the Claim prompts consideration of the question of whether it should be recorded as being totally without merit for the purposes of CPR 3.4(6) and, if so, whether it is appropriate to make a civil restraint order. ECLG urges me to do both and to make an extended CRO, alternatively a limited one.

100. However, I am not persuaded that the Claim can be described as devoid of merit when rational arguments were presented on behalf of Mr Read, even though ultimately unsuccessful, and amongst the many points on which I have had to reflect at some length were those founded upon the impact of the RAO on the first loan and the inapplicability of the tests in *Takhar* on a challenge to the Tomlin Order (on the basis that was the only domino he really needed to topple). I also observe that the last branding of Mr Read's position as wholly unmeritorious (by DJ Stone on 23 June 2021) can be construed as indirect encouragement to bring the Claim.

Disposal

101. For the reasons set out above I therefore strike out the Claim Form and the PoC on the ground they are an abuse of the court's process.

102. I have handed down this judgment remotely by email circulation to the parties. If not resolved by agreement between the parties, I will determine the consequential issue of costs on the basis of brief written submissions to be filed by 4pm on 1 February 2022.

103. Mr Read's position in relation to any application for permission to appeal will be preserved by me adjourning the handing down for the limited purpose of him making such an application. If he wishes to do so, the application for permission to appeal should be filed and served by 4pm on 1 February 2022 with ECLG making any submissions in response by 4pm on 8 February 2022. I will determine the application on the papers, in the absence of any further direction to the contrary, and in my decision I will specify the time for the filing of an appellant's notice in accordance with CPR 52.12(2)(a).

104. The filing by the parties of a minute of order disposing of the Application should await resolution of these consequential matters.