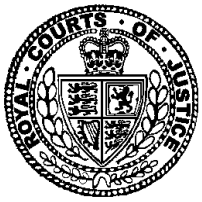

Neutral Citation Number: [2022] EWHC 641 (Ch)

Case No: BL-2020-000294

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

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

Date: 22nd March 2022

Before :

Ian Karet (sitting as a Deputy High Court Judge)

- -

Between :

TRAFALGAR MULTI ASSET TRADING COMPANY LIMITED (IN LIQUIDATION) — **Claimant**

- and –

(1) JAMES DAVID HADLEY
(2) THOMAS WILLIAM GORDON BIGGAR
(3) STUART NEIL CHAPMAN-CLARK
(4) ANDREW CHRISTOPHER JONES
(5) TITAN CAPITAL PARTNERS LIMITED
(6) CGROWTH CAPITAL BOND LIMITED
(7) WILLIAM MACFARLAND WRIGHT III
(8) PINNACLE BROKERS LIMITED (IN LIQUIDATION)
(9) MARK LLOYD
(10) VIVERE FORTI INTERNATIONAL FOUNDATION
(11) KIRSTY LOUISE PLATT
(12) PLATINUM PYRAMID LIMITED
(13) BENTLEY JARRARD THWAITE — **Defendants**

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- -

Justin Higgo QC and Belinda McRae (instructed by **Kingsley Napley LLP**) for the **Claimant**
David Scorey QC and Christopher Perry (instructed by **Rahman Ravelli**) for the **Twelfth and Thirteenth Defendants**
Barry Stancombe (instructed by **Rahman Ravelli**) for the **Sixth Defendant**
The **First Defendant** appeared **in person**

Hearing dates: 10 and 11 February 2022

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Approved Judgment

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

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Ian Karet

Ian Karet :

Introduction

1. This is an application by the Claimant for summary judgment on its claims of bribery against four Defendants. Those claims form part of a larger dispute.

2. The hearing took place over two days. Justin Higgo QC and Belinda McRae appeared for the Claimant ("Trafalgar"). David Scorey QC and Christopher Perry appeared for the Twelfth and Thirteenth Defendants ("PPL" and "Mr Thwaite" respectively). Barry Stancombe appeared for the Sixth Defendant ("CGrowth"). The First Defendant ("Mr Hadley") appeared as a litigant in person.

3. Trafalgar's evidence was provided by Mary Young, a partner at Kingsley Napley LLP. Ms Young exhibited a number of documents which were said to show circumstances surrounding the alleged bribes. There was no evidence from any individual on the Claimant's side who was involved in the events at the relevant time. Mr Thwaite and Mr Hadley provided witness statements. Mr Hadley's statement closely followed Mr Thwaite's and repeated verbatim a number of Mr Thwaite's points.

4. The application was commenced on the basis that the Defendants' pleaded defence to the claim showed that bribery had taken place because Mr Hadley was negotiating the sale of VAM to PPL while also negotiating with Mr Thwaite a transaction to acquire bonds for Trafalgar.

5. Mr Hadley has represented himself throughout the proceedings. Mr Thwaite acted for a period as a litigant in person. He was represented by solicitors at the time of the Amended Defence. Mr Scorey submitted that the pleadings have thus not contained the precision that one might otherwise expect. The Defendants have applied to amend their defences to correct the "own goal" that led to the application.

6. Mr Higgo said that the proposed amendments were recently recalled and self- serving. They were demonstrably inconsistent with the contemporaneous documents and that there is no realistic prospect that these assertions will be made out at trial. The Amended Particulars of Claim extend to 95 pages. I proceed on the basis that any litigant in person faced with a claim of fraud may not initially state their defence in the most effective way.

7. Trafalgar is a Cayman subsidiary of Trafalgar Multi Asset Fund Segregated Portfolio (the "Fund"). The Fund was created at Mr Hadley's request. The directors of Trafalgar included Dermot Butler and Kevin Caruana. They were also directors of Custom House.

8. Trafalgar carried out the primary trading activity of the Fund. The Fund is a segregated portfolio of the Nascent Fund SPC ("Nascent"), which is administrated by Custom House Global Fund Services Ltd ("Custom House"). Messrs Butler and Caruana were also directors of Custom House.

9. Victory Asset Management ("VAM") was the investment manager of the Fund. VAM was owned by Mr Hadley via Nominee Services Ltd as nominee shareholder of VAM on his behalf. At the relevant time the sole director of VAM was a Cayman company, Fides Limited.

10. CGrowth offers bonds to investors. PPL acted as consultant to CGrowth. Mr Thwaite is the sole director and shareholder of PPL.

11. The bribery claims arise within what Trafalgar contends is a substantial pension fraud orchestrated by Mr Hadley (and others) to misappropriate the pension funds invested in Trafalgar for his own benefit and for the benefit of the other Defendants. The trial of the remainder of the claim is due to take place in February 2023 and last four weeks.

12. This application is made against only four of the Defendants. Several of the Defendants are no longer active in the proceedings. Trafalgar has settled with the Second Defendant, Mr Biggar. Trafalgar has obtained default judgment against the Tenth Defendant, Vivere Forti and the Eleventh Defendant, Ms Kirsty Platt. The Eighth Defendant, Pinnacle Brokers Limited is in liquidation in Malta and has not participated in the proceedings. References to the Defendants in this judgment are where the context requires to the Defendants in this application.

13. In the alternative to its summary judgment application, Trafalgar applies under CPR Rule 3.4(2)(a) and the Court's inherent jurisdiction to strike out the defences of the CGrowth, Mr Thwaite and PPL to Trafalgar's bribery claims and enter judgment in that respect. An alternative order is not sought against Mr Hadley as he did not file an Amended Defence addressing the bribery claims.

14. There is also an application by the Defendants to amend their defences.

15. It was agreed that the hearing would deal with the bribery allegations (which include arguments of vicarious liability) and that the question of amendment should be dealt with thereafter.

Trafalgar's application - summary

16. Trafalgar's claim in summary is that:

    i) Mr Hadley was the beneficial owner of VAM. Mr Hadley was appointed as one of two signatories on Trafalgar's bank accounts, along with an associate, Thomas Biggar.

    ii) In late 2014 and during the course of 2015, Mr Hadley and Mr Biggar procured the transfer of Trafalgar's funds to companies that were owned and/or controlled by Mr Hadley and/or his associates. These included Mr Stuart Chapman-Clark, the Third Defendant.

    iii) The recipient companies (Quantum, Titan, Momentum and Shawcross) were each newly established companies that were owned and/or controlled by Mr Hadley and/or his associates. They were vehicles for misappropriation.

    iv) The investments in the recipient companies were in unsecured loan notes issued by the companies, or, on one occasion, through a purported subscription in the company's shares (Shawcross).

    v) Mr Hadley proceeded to procure that substantial amounts of the funds he had caused to be transferred to the recipient companies were transferred out to

benefit himself and his associates, including each of Mr Biggar and certain other Defendants.

vi) During the course of the audit of the Fund in December 2015, the Board of Trafalgar was alerted to a deficit of around £1.9 million in the transaction Mr Hadley had arranged in 2014 with one of the newly formed companies, Quantum. The Board suspended the net asset value of the Fund provided to investors ("NAV") whilst investigations were made to establish whether the Fund could recover this deficit.

vii) Although this was not known at the time, it now appears that the deficit was caused by a series of transfers out of Quantum unconnected with any genuine investment business to associates of Mr Hadley and certain other Defendants.

viii) In March 2016, whilst the NAV was suspended and whilst the Board was investigating Mr Hadley and Mr Biggar's other investments, Mr Hadley, acting without reference to the Board of Trafalgar (i) transferred monies belonging to Trafalgar to PPL as agent for CGrowth; and (ii) agreed to transfer the Quantum 'receivable' and the shares of Shawcross in exchange for bonds issued by CGrowth to Trafalgar. It is alleged this was done in an apparent effort to conceal the earlier transactions from the Board.

ix) In June 2016, again without reference to the Board of Trafalgar, Mr Hadley procured the transfer of further monies belonging to Trafalgar (on this occasion the monies he had caused to be transferred to Titan) to PPL, again acting as agent for CGrowth, in exchange for further bonds issued by CGrowth to Trafalgar.

17. Trafalgar's original claim was to set aside the CGrowth bond transactions as void for want of authority. Alternatively, it sought compensation for knowing receipt and/or dishonest assistance or damages for conspiracy to injure. Trafalgar relied on features of the transactions and conduct of the Defendants in support of these claims, including:

i) CGrowth issued bonds for sums well in excess of the monies received from Trafalgar;

ii) CGrowth were willing falsely to represent to Trafalgar that they had obtained full value for the face value of the bonds from the investments which Mr Hadley was seeking to conceal from Trafalgar; and

iii) CGrowth have, to date, failed to repay Trafalgar notwithstanding, on their own case, being indebted to Trafalgar for sums well in excess of the amounts claimed. That is simply not the conduct of the honest contractual counterparty that CGrowth claims to be.

18. Trafalgar alleges that the Defences, Amended Defences and disclosure of documents by PPL and Mr Thwaite together show that:

i) PPL (and Mr Thwaite) had been engaged to market the CGrowth bonds, and Mr Thwaite was responsible for negotiating the bond transactions with Mr Hadley on CGrowth's behalf.

ii) If Trafalgar invested in the bonds offered by CGrowth then PPL stood to receive 29% of all bond subscription monies paid by Trafalgar;

iii) PPL thus stood to benefit £1,189,000 from the initial investment by Mr Hadley of £4.1 million of Trafalgar's monies for CGrowth bonds in March 2016 and a further £394,400 from the investment of £1,360,000 for CGrowth bonds in June 2016;

iv) While carrying out his mandate for CGrowth to introduce Trafalgar as a bond subscriber in March 2016, Mr Thwaite agreed to buy VAM with whom he was negotiating the subscription for CGrowth bonds as investment manager to Trafalgar. The anticipated purchase price was £1,200,000;

v) PPL paid Mr Hadley £500,000 which Mr Thwaite says was by way of part payment for VAM. PPL made two payments. The first, of £100,000, was made on 21 March 2016, shortly after the transfer to PPL of bond subscription monies for the March CGrowth bonds. The second, of £400,000, was made on 6 June 2016, shortly following the transfer to PPL of bond subscription monies for the June (Titan) CGrowth bonds.

vi) The negotiation of the CGrowth bonds in March 2016 and the sale of VAM, proceeded without notice to Trafalgar, who only became aware of the outflow of Trafalgar's funds to CGrowth (via PPL) once the initial bond contract had been signed and the first £100,000 payment had been made.

19. Trafalgar says that these circumstances put Mr Hadley in a position of conflict between his fiduciary duty to Trafalgar and his personal interests in connection with the VAM sale, and that this engages the civil law of bribery.

20. In particular, Trafalgar alleges:

i) Mr Hadley and Mr Thwaite started discussions in relation to the sale of VAM before Trafalgar was contractually committed to the March CGrowth bond transactions, so that took place in parallel with discussions about the bond transactions.

ii) None of Mr Hadley, PPL or Mr Thwaite disclosed to Trafalgar the nature of Mr Hadley's conflict. Trafalgar was not able to make an informed decision as to whether to proceed with or avoid the March or June CGrowth bond transactions.

iii) Mr Hadley and/or PPL would have had to inform the Board of Trafalgar (at least) that:

a) notwithstanding the suspension of the NAV, Mr Hadley was intending to commit Trafalgar to new bond contracts with CGrowth;

b) only 70% of the subscription monies was in fact going to the intended underlying borrowers; £1,189,000 from the initial cash investment of £4,100,000 of Trafalgar's monies was going to be paid to PPL; and

c) Mr Hadley was at the same time in the process of seeking to sell VAM to PPL for £1,200,000, so that PPL would become the owner of VAM in place of Mr Hadley.

iv) Neither Mr Hadley nor Mr Thwaite informed the Board of this.

v) The opportunity to purchase VAM only arose in the context of the negotiation of the CGrowth March bond transactions. PPL and Mr Thwaite were acting as introductory agents for CGrowth, whilst at the same time engaging in negotiations to purchase VAM.

vi) CGrowth is vicariously liable for PPL's conduct in placing Mr Hadley in a position of undisclosed conflict. CGrowth cannot insist on holding Trafalgar to contracts which have been legally procured by the bribery of CGrowth's introductory agent.

Trafalgar's bribery claims in more detail

21. It is necessary to describe the background to the claim in some more detail. I have taken the history from sources which include the evidence of Ms Young, Mr Hadley and Mr Thwaite. I was also referred to a Core Bundle of documents prepared by Trafalgar from the exhibits in the principal application bundle. The matters set out below are in some cases contested. I set them out for the purposes of my assessment of the application and do not decide them.

Establishment of Trafalgar and VAM

22. According to Mr Thwaite, the relationship between Mr Hadley and the Custom House Group started in 2013. Mr Hadley was first in contact with TMF Group Ltd, the parent of Custom House, in August 2013. He later discussed the creation of an offshore fund management company for a pension fund with Custom House. This led to Custom House setting up Trafalgar and VAM in 2014.

23. In January 2014 Custom House consulted Mr Hadley about the appointment of auditors to Trafalgar. In February 2014 Custom House confirmed that Mr Hadley and Mr Biggar would be signatories on the Trafalgar trading account with Barclays Bank. In March 2014 Mr Hadley was involved in the drafting of the investment management agreement between Nascent and VAM. VAM had the sole authority and responsibility for the investment and reinvestment of the assets of the Fund that were placed or held with the Broker (as defined in an Investment Management Agreement entered into by VAM and the Fund dated 28 March 2014), in accordance with specific trading policies set out in the Fund's Offering Supplement. The intention was to invest mainly in unlisted bonds, property and listed companies.

24. VAM had a nominee director, Fides Ltd, whose appointment was arranged by Custom House. Mr Hadley and Mr Biggar were agents for VAM. VAM had sole authority and responsibility for the investments by the Fund. Mr Hadley and Mr Biggar had authority to operate mandates on Trafalgar's bank and brokerage accounts.

25. Mr Hadley was familiar with directors of the Fund who included Mr Butler and Mr Caruana. Mr Butler was the founder and Chairman of Custom House, and Mr Caruana

was its Manging Director. Messrs Butler and Caruana were also directors of Nascent together with Richard Reinert.

Trafalgar's wider claim

26. Ms Young explained that the claim related to five primary transactions by which Mr Hadley caused Trafalgar's assets to be transferred away. The fifth is the subject of this application. The other four were as follows:

    i) the transfer of £9.5 million between October and December 2014 notionally to acquire unsecured bonds issued by Quantum Global Capital Limited ("Quantum");

    ii) the transfer of £1.5 million in May 2015 to acquire an unsecured bond issued by the Fifth Defendant ("Titan");

    iii) the transfer of £6 million in July 2015 to acquire unsecured bonds issued by Momentum Property Partners (1) Limited ("Momentum"); and

    iv) the transfer of £1.3 million in December 2015 to acquire the shares of a newly incorporated Gibraltar company, Shawcross Holdings Limited ("Shawcross").

27. Trafalgar says that Quantum, Titan, Momentum and Shawcross were newly established companies that were owned and/or controlled by Mr Hadley and/or his associates. They had no track record, no genuine basis to receive funds from Trafalgar by way of investment and/or no genuine commercial purpose. They were established and/or used to misappropriate Trafalgar's funds. Mr Hadley and Mr Biggar thus caused assets to be transferred out of Trafalgar without authority and in breach of the fiduciary duties that Mr Hadley and Mr Biggar owed as signatories on Trafalgar's bank accounts.

CGrowth and PPL

28. CGrowth is a company registered in England and Wales. It is wholly owned by a US Company and was established to offer bonds to investors to loan to three specific companies: (i) a company seeking to invest in oil in Wyoming, Powder Rivers Resources Inc; (ii) a company in Peru intending to mine minerals, SMRL Ana Paula Bebe; and (iii) a company in Peru intending to mine lime, Project Partners International SAC.

29. In November 2015 CGrowth sought investors by way of a bond issue. CGrowth's offer document dated 9 November 2015 contained a "Bond Purchase Agreement" by which CGrowth undertook to: "apply the proceeds of the issue of the Ten-Year Bonds only for the purpose, as outlined in Recital (II-V). Any significant application of the proceeds for any other purpose will constitute an event of default." The recitals provided that CGrowth: "lends monies to the Borrowing Companies by way of secured loan agreements with fixed and floating charges. The loan funds are lent by the Bond Issuer to the Borrowing Companies on a daily basis as Bond are sold. … The funds lent by [CGrowth] to the Borrowing Companies are for the benefit of the Borrowing Companies so as to further the development of the business including but not limited to the investment and infrastructure for the extraction of the resources in concert with other commercial activities …".

30. In November 2015 CGrowth and PPL entered into a Consultancy Agreement. CGrowth appointed PPL as "an authorised exclusive independent facilitator" of CGrowth's services. CGrowth agreed to pay commission to PPL of 30% of the face value of bonds covered by the agreement less 1% retained by CGrowth and 1% for administration of the bond. PPL was agreed to be an independent contractor.

Suspension of the Fund

31. On 15 December 2015 Nascent notified investors that the Fund's auditors had challenged the Fund's valuation of its investments and further investigations were required.

32. On 14 January 2016 Nascent notified investors that its Board, together with VAM as investment manager and counsel, had been investigating the position. The Board of the Fund had resolved to suspend the determination of the NAV. No redemption proceeds would be paid to investors while the suspension was in place. The letter was signed by Dermot Butler as a director of the Fund, and he directed questions to Kevin Caruana.

Mr Hadley's relationship with Custom House and PPL

33. Mr Thwaite says that Mr Hadley's evidence is that from at least October 2015 Mr Hadley was unhappy with the Custom House structure and was looking for an exit from that. Trafalgar were also unhappy and were encouraging Mr Hadley to move on. Mr Hadley and Trafalgar discussed options including a restructuring of Trafalgar, Trafalgar withdrawing from the structure or alternatively a restructuring of VAM.

34. Mr Hadley held further discussions in November or December 2015 with Custom House about this. In December 2015 Mr Hadley contacted David Barry, who had been at Custom House at the time the setting up of Trafalgar was first discussed, about the possibility of changing the Fund Administrator from Custom House. Mr Barry was by then with Portcullis Asset Management.

35. In January 2016 Mr Hadley discussed leaving with Dermot Butler. Mr Butler said that Nascent had not been as successful as he had hoped, and Mr Hadley asked whether the board would consider selling Nascent. There had thus been discussions between Mr Hadley, Mr Butler and Custom House about a range of options which included a sale of VAM. At the Board Meeting of 3 March 2016 there were further discussions of options.

36. On 11 March 2016 Mr Barry emailed Mr Hadley to say that Portcullis would not be taking over the Nascent structure. Mr Barry suggested that Mr Hadley speak to Custom House about taking over the structure himself.

37. Mr Hadley's evidence is that between the 11 March email from Mr Barry and 23 March 2016 "it is inconceivable that Dermot Butler and Custom House were not aware of the potential, likely sale of VAM and that I had not notified them of such intentions".

38. Mr Thwaite says that around 16 March Mr Hadley spoke to Mr Butler and told him that he was looking to sell VAM and was about to agree heads of terms for a sale to PPL which was associated with CGrowth. He mentioned that a deposit would be paid for the purchase, and Mr Butler raised no objections or concerns about this.

Trafalgar's first purchase of CGrowth bonds

39. On 7 March 2016 VAM wrote a "Letter of Intent" to CGrowth confirming VAM's "intent, subject to contract, insurance and terms" to subscribe for a CGrowth bond with a face value £5million. The purchase price was £3.1million plus a loan receivable known as "Quantum". VAM additionally indicated that it might intend to purchase a second bond with a face value of £2.3 million. The purchase price for that was ££1million plus the assignment of shares in Shawcross.

40. Mr Thwaite emailed Mr Hadley the same day to say that he expected to be able to confirm acceptance of the letter of intent terms "in the next few hours". It appears that insurance was still under discussion, and Mr Thwaite was waiting to hear if VAM wanted one or both bonds.

41. Later that day Mr Thwaite confirmed by email that CGrowth had accepted the terms.

42. On 9 March 2016 Mr Thwaite asked Mr Hadley to confirm that Trafalgar would be the bond purchaser.

43. On 10 March 2016 Aon Risk Solutions wrote to CGrowth and Trafalgar to say that they had "developed and placed an insurance risk management program" for CGrowth's oil operations in the US and two mines in Peru. They attached a draft certificate of insurance. It is not clear whether Trafalgar received the communication.

44. On 11 March 2016 CGrowth wrote to Trafalgar to set out the terms of the proposed bonds and "confirm the exclusive special conditions below". These included insurance as set out in Aon's letter of 10 March. CGrowth enclosed completed subscription forms with certain matters, including signature, to be completed by Trafalgar.

45. On 15 March 2016 Mr Hadley emailed Mr Thwaite to confirm his signing authority for Trafalgar.

46. On 16 March 2016 Mr Hadley and Mr Wright signed an agreement for Trafalgar's purchase of £7.3million bonds. The agreement contained a number of manuscript amendments including a change to the value of the Quantum receivable. The agreement provided that it came into force on the date it was signed.

47. PPL received payments in respect of the bonds on 18 and 24 March 2016 of £158,924.90 and £197,248.54 respectively. CGrowth issued bonds on 21 and 24 March 2016 for an aggregate value of £7.3million.

48. On 22 March 2016, a Junior Legal Officer at Custom House emailed Investec, copied to Messers Caruana, Butler and Reinert. She noted the suspension of the NAV of the Fund and asked Investec to suspend the "current authorised signatory" for Trafalgar and to seek approval of the directors for any transaction. On 24 March Custom House wrote similarly to Barclays Bank.

PPL and VAM

49. On 19 February 2016 Mr Thwaite emailed Mr Hadley about a "few points". Trafalgar suggests that this may note the opening of their discussion about PPL's acquisition of VAM, but that is not clear. Mr Thwaite discussed the offer of a CGrowth bond.

50. On 17 March 2016 Mr Thwaite emailed Mr Hadley concerning the "Sale and purchase of "Victory and certain rights and privileges" for £1.2 million. He proposed signing heads of terms from 21 to 23 March, with a deposit on that of £500,000. The final contract was to be executed by 30 March. The email sets out further matters to be addressed in the heads of terms, including "Momentum wind down" and "Titan encouraged deployment allocations". Trafalgar says that the inclusion of these terms indicates that the terms must have been discussed before 17 March. Mr Scorey responds that business matters may have been discussed between the Defendants without reaching a threshold of significance that gave rise to a conflict of interests.

51. On 20 March 2016 Mr Thwaite emailed Mr Hadley attaching the "main body" of draft heads of terms for the purchase and noted that he was working on the schedules.

52. On 21 March 2016 PPL paid £100,000 to a company owned by Mr Hadley. Trafalgar says that this was the first bribe.

53. On 24 March Mr Hadley and PPL signed non-binding heads of terms for the sale of VAM for £1.2 million.

54. On 28 March 2016 the Head of Funds Administration at Custom House emailed Mr Hadley noting that there had been transfers from Trafalgar's Barclays account on 18 and 24 March. She asked Mr Hadley to "advise on the nature of these transfers" and to provide the supporting documentation. Mr Hadley replied the same day that he was happy to provide documentation "when back in the office". He asked for a copy of correspondence with Investec and others who might have been contacted without his knowledge. He noted he had asked Custom House for that already.

55. Mr Caruana responded to Mr Hadley's email to say that he instructed there be no reply. He explained what the banks had been told and accepted that he should probably have told Mr Hadley beforehand. He added "Given the fund is suspended I thought there wouldn't be any activity anyway". He noted that with the fund suspended "it is imperative that the Board is shown as doing its utmost to safeguard the Fund's assets and liquidity".

56. On 29 March 2016 Mr Hadley sent Mr Caruana the CGrowth subscription documents. Mr Caruana replied to thank him for the information and their earlier conversation. He had updated Mr Butler and would review the documents. The Defendants say that the correspondence is consistent with their position.

57. Trafalgar had scheduled a Board meeting on 29 March 2016. Mr Hadley says that he recalls discussing various scenarios and of course the sale of VAM at or around that time. Trafalgar pointed out that Mr Hadley had not been able to join the meeting, but his evidence was not that the discussions were at the meeting.

58. In April 2016 a draft Share Purchase Agreement for the sale of VAM was prepared.

59. On 12 April 2016 PPL instructed BDO LLP, a firm of accountants, to prepare a report on the balance sheet of the Fund. Mr Thwaite says that this was part of PPL's due diligence on VAM, and that Trafalgar made information available for that so showing Trafalgar's knowledge of the proposed transaction. There is a disagreement about what Trafalgar knew about the BDO report.

60. On 19 May 2016 CGrowth replied to a request from Mr Caruana setting out details about the bonds issued to Trafalgar and providing certified copies of the bond certificates.

61. On 1 June 2016 following discussions with Mr Thwaite about the Titan transaction, Mr Hadley signed two further forms for the purchase of CGrowth bonds for £1,360,000 and £230,493.15. CGrowth issued bonds on 3 and 7 June 2016.

62. On 6 June 2016 PPL paid Mr Hadley £400,000. Trafalgar alleges that this is the second bribe.

63. On 22 June 2016 Mr Hadley and Mr Wright, the Sixth Defendant and director of CGrowth signed a contract for a bond for £2,527,674. There was to be a cash deposit of £50,000 and consideration based on the sale of a number of properties and the redemption of a CGrowth bond. It is not clear which bond this is.

64. Trafalgar says that no interest has been paid on any of the bonds. CGrowth has issued bonds in exchange for £5.46 million which Trafalgar says are its funds.

65. On 2 June 2016 BDO completed their final report on Trafalgar. Mr Thwaite sent this to Mr Hadley who sent it to Custom House.

66. On 3 June 2016 Mr Hadley entered into a Share Purchase Agreement with a new company Victory Asset Management CI Ltd agreeing to sell VAM. The agreement provided that there had been a deposit paid of £100,000 with 'Initial Cash Consideration' of £400,000 to be paid. The total agreed price was £2.9 million.

67. Mr Hadley says that on 3 June 2016 following his return to Manchester to complete on the transaction, he recalls a further call to Dermot Butler where he discussed the completion of the sale of VAM to Victory Asset Management CI Ltd. This conversation was subsequently followed up in an email.

68. Between 13 and 27 June 2016 there was email correspondence between Mr Hadley and Messrs Butler and Caruana about ratifying the position of VAM, Mr Hadley's position at VAM and compensation. Mr Hadley appeared keen to see the suspension of the NAV lifted.

69. I was shown an undated and untitled report which is said by Ms Young to have been prepared by Custom House on 21 July 2016. It sets out a chronology of events and makes no reference to Mr Butler having been informed of the sale of VAM. Trafalgar says that this shows that Mr Butler was not aware of the sale of VAM at the time. The Defendants say that it is not clear what this document should cover.

70. On 23 August 2016 Messrs Hadley and Thwaite agreed an Addendum to the Share Purchase Agreement of 3 June 2016. That recited that the Share Purchase Agreement was assigned by Victory Asset Management CI Ltd (UK) to Victory Asset Management CI Ltd a Bahamian corporation of which Mr Lightfoot is the sole director.

71. On 25 August 2016 VAM wrote to Trafalgar's solicitors Campbells Legal. Trafalgar says that this was the first time that its Board was informed that Mr Hadley had sold VAM and had resigned as a director (several months after completion on 3 June 2016

and after the SPA addendum dated 23 August 2016). This was confirmed in email exchanges between the Board, Custom House, the solicitors and others.

72. On 26 August 2016, Mr Walsh (of Custom House) asked Mr Butler and Mr Reinert whether this was the first time they had been advised that a new investment manager has been appointed via the acquisition by Mr Lightfoot and Mr Hadley's resignation. On 31 August 2016, Mr Butler confirmed it was and that he had never known of an investment manager being acquired without keeping the actual advisor/manager. Trafalgar says that this shows their side were not aware of the sale. The Defendants say that this does not address the question of ownership of VAM but goes to a different matter.

The Defendants' response

73. The Defendants' response to the application has been to apply to amend their defences. They now say:

    i) Mr Hadley had agreed to commit Trafalgar to the March CGrowth bond transactions by 7 March 2016 and any dealings after that time were administrative only;

    ii) discussions about the sale of VAM to PPL between Mr Hadley and Mr Thwaite commenced after that date;

    iii) Mr Hadley was not therefore in a position of conflict before having agreed to commit Trafalgar to the March CGrowth bond transactions;

    iv) At some time between 11 March and 23 March 2016 Mr Hadley notified Trafalgar of the potential sale to PPL and that a deposit was to be paid;

    v) Mr Hadley discussed the sale of VAM around the time of a Trafalgar Board meeting scheduled on 29 March 2016;

    vi) Mr Hadley discussed the completion of the sale (to a different company: Victory Asset Management CI Ltd) with Mr Butler, a director of Trafalgar, on 2 and 3 June 2016;

    vii) there were other instances where PPL's involvement in the purchase of VAM was discussed with Trafalgar and Custom House in the run up to the disposal; and

    viii) Trafalgar did not object to or raise any concerns about the sale.

74. It was agreed the question of amendment should be considered following this judgment.

The Law

Summary Judgment

75. CPR Part 24 provides that the court may grant summary judgment on the whole or part of a claim if it considers that the defendant has no real prospect of successfully

defending a claim or issue and there is no other compelling reason why the case should be disposed of at trial (CPR r.24.2(a)(ii) and 24.2(b)).

76. The White Book summarises at paragraph 24.2.3 the principles as stated by Lewison J in *Easyair Limited v. Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15], approved subsequently (among others) by Etherton LJ in *A C Ward & Son v. Caitlin (Five) limited* [2009] EWCA Civ 1098 at [24]:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All E.R. 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available able at trial: *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] F.S.R. 3;

vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist

> and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

77. In *King v Steifel* [2021] EWHC 1045 (Comm) Cockerill J said:

> "21. The authorities … make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that - even bearing well in mind all of those points – it would be contrary to principle for a case to proceed to trial. …
>
> 24. The reality is that while the court will be very cautious about granting summary judgment in fraud cases, it will do so in suitable circumstances, and there are numerous cases of the court doing so. This is particularly the case where there is a point of law; but summary judgment may be granted in a fraud case even on the facts….
>
> 25. In terms of the approach to summary judgment in fraud claims Primekings commended to my attention the judgment of Stuart Smith J in *Portland Stone Firms Ltd v Barclays Bank plc* [2018] EWHC 2341 (QB) at [25] – [29], in the context of the approach to be taken when faced with an application to strike out a claim in fraud. In summary:
>
> > i) The Court should bear in mind that cogent evidence is required to justify a finding of fraud or other discreditable conduct, reflecting the court's conventional perception that it is generally not likely that people will engage in such conduct.
> >
> > ii) Pleadings of fraud should be subjected to close scrutiny and it is not possible to infer dishonesty from facts that are equally consistent with honesty.
> >
> > iii) However, in view of the common feature of fraud claims that the Defendant will, if the underlying allegation is true, have tried to shroud his conduct in secrecy, the Court should adopt a "generous" approach to pleadings."

78. As the White Book notes at 24.2.4, in *Iliffe v Feltham Construction Ltd* [2015] EWCA Civ 715 summary judgment for the claimant against the first defendant was held to be inappropriate where similar issues remained to be determined at a trial as between the first defendant and other parties. In all the circumstances in that case that constituted a "compelling reason" not to enter summary judgment.

79. In *Saunders v Chief Constable of Sussex* [2009] EWCA Civ 87 summary judgment was refused on the basis that two claims were closely interlinked and there would be no saving in case management terms by giving summary judgment.

80. In *BFS Group Limited (t/a Bidvest Logistics) v Foley* [2017] EWHC 2799 (QB), Foskett J reviewed the approach to summary judgment in a fraud claim and said at [16]:

> "I am therefore required to assess the pleadings and evidence at this stage to decide whether C has established as against each of the defendants to this application that there is no real prospect of succeeding in their defence at trial in relation to the particular claims identified in the application. In doing that I should avoid conducting a mini-trial and avoid deciding uncertain propositions of law on assumed facts. At the end of the day, the question of whether to grant summary judgment is a discretionary one: see *per* Lord Hobhouse [in *Three Rivers DE Bank of England (No. 3)* [2003] 2 AC 1]".

Bribery

81. In *Prince Eze v Conway* [2019] EWCA Civ 88 the Court of Appeal cited Christopher Clarke J (as he then was) in *Novoship (UK) Limited v Mikhaylyuk* [2012] EWHC 3586 (Comm) at [104] as follows:

> "*Bribery*
>
> 104. In *Industries and General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573 Slade J defined a bribe as follows (at page 575): 'For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent.'
>
> 105. A bribe was defined even more succinctly by Leggatt J, as he then was, in *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries* [1990] 1 Lloyd's Rep 167 at 171, as: 'A commission or other inducement which is given by a third party to an agent as such, and which is secret from his principal.'
>
> 106. The essential character of a bribe is, thus, that it is a secret payment or inducement that gives rise to a realistic prospect of a conflict between the agent's personal interest and that of his principal. The bribe may have been offered by the payer or sought by the agent. There is no need to establish dishonesty or corrupt motives. This is irrebuttably presumed - *Re A Debtor* [1927] 2 Ch 367 at 376 (*per* Scrutton LJ – "the court ought to presume fraud in such circumstances")...."

82. It is not necessary for the claimant to prove that the defendant knew they were committing a legal wrong. It will be presumed that the payer intended to influence the agent. It does not matter whether the recipient's mind has been affected. The offer of a payment or benefit, even if it is not paid, is sufficient.

83. It is a defence to a claim of bribery that the alleged bribe was not kept secret from the principal. The agent must tell the principal all the material facts and make a full disclosure so that the principal can give informed consent. This means more than putting the principal on inquiry as to the circumstances - *Dunne v English* (1874) LR 18 Eq 524 per Sir George Jessel MR. More recent cases have applied a standard requiring full disclosure of all of the material facts. Bowstead & Reynolds on Agency, 22nd Edition puts it as follows (omitting citations):

> "…to free the agent from liability, the disclosure must be such as to enable the principal to understand the implications of the arrangement: thus a partial disclosure may be insufficient. That the principal (including an appropriate other agent of the principal) is aware that the agent is receiving some sort of commission from the third party is likely to preclude the principal from rescinding the transaction with the third party as of right. However, in such circumstances, rescission may still be granted in the court's discretion, and otherwise the principal will retain remedies against the agent. Where the contract between agent and principal provides that the agent may receive commission or other remuneration from the third party and states that where that happens the amount will be disclosed, it is likely to be misleading conduct for the agent not to disclose the actual receipt of commission since the principal may make the assumption that none has been paid."

84. There is also a question whether there is a realistic conflict between the agent's duty to his principal and his own interests.

85. The Law of Rescission 2nd Ed. at §8.55 notes that "One key to determining whether or not a payment constitutes a bribe is whether it puts the fiduciary in a position where his duty and his interest may realistically conflict. It is accordingly necessary that at the time the payment is made there is an open question whether the principal will deal with the pain or and or on what terms… A gratuity given after the matter has been concluded will not constitute a bribe provided there was no earlier indication that it would be given."

86. In *Prince Eze v Conway* (ibid.) a "sales agent" was found to have provided only "ministerial" services in a transaction between the parties and so was not affected by the law of bribery and secret commissions.

Independent transaction

87. A payment or promise of the same pursuant to a genuine separate commercial arrangement that is wholly unconnected to the agent's duties to the principal may not amount to a bribe. In *National Grid Electricity Transmissions plc v McKenzie* [2009] EWHC 1817 (Ch) at [34], Norris J said:

> "34. On the 9th August 2004 Grimston transferred £10,000 to Mr McKenzie's Jersey account. This was followed by a further payment of £20,000 on 16th December 2004, another £20,000 on 11th July 2005 and a final transfer of £30,000 on the 27th September 2005. Mr McKenzie did not (and could not) deny receipt of these sums. He said they were consultancy payments for the development of two projects in which he was involved with Grimston. If there existed a genuine separate commercial arrangement between Mr McKenzie and Grimston under

> which sums were transferred a different light might be cast upon the payments, and National Grid's claim would have to be put upon some footing other than mere fact of payment. But I do not accept this evidence."

88. In *Airbus Operations Limited v Withey* [2014] EWHC 1126 (QB) at [143], HHJ Havelock-Allan QC explained the above statement of Norris J in the following terms:

> "143. Norris J was in my view making an obvious point which was that receipt by a fiduciary of a payment under a transaction wholly unconnected with his duties to his principal would not fall to be treated as a bribe. It would not do so because there would be no real possibility of a conflict of interest even if the separate transaction happened to be one entered into with a third party who was seeking to do business with the principal. However, the separation of the two (the transaction and the fiduciary duty) would need to be complete and unmistakeable if any inference of the possibility of a conflict of interest was to be dispelled. It was on this issue, the separation between the arrangement between the three defendants and the functions which Mr Withey and Mr Wells were performing in the procurement process, that a good deal of time was spent at the trial explaining what the payments were for and whether they related in any way to profit from work for Airbus UK."

89. It is critical that the transactions are wholly separate. Otherwise, as noted in *Airbus* at [92], if the payment was made in connection with a transaction which the supplier hoped to enter into with the principal, it is one that ought to be disclosed.

Knowledge

90. A payment cannot amount to a bribe if it was disclosed to the principal. In *Airbus Operations* at [116] HHJ Havelock-Allan QC described secrecy as a "critical component of the wrong." Whether there has been sufficient disclosure to dispel secrecy will "depend upon the facts of each case given that the requirement is for the principal's informed consent to his agent acting with a potential conflict of interest."

91. In *BFS Group Limited (t/a Bidvest Logistics) v Foley* [2017] EWHC 2799 (QB), Foskett J held that questions as to the principal's level of knowledge in the bribery case before him were "obviously matters for decision on the basis of the evidence adduced at trial".

92. In *Jafari-Fini v Skillglass Ltd (In Administration)* [2007] EWCA Civ 261 at [98], Moore-Bick LJ found that disclosure to one director of the principal may be sufficient.

Vicarious Liability

93. The general principles of vicarious liability apply in the case of bribery. Where a bribe may have been agreed or paid to a principal's agent by a third party's agent it is established that the third party may be liable if the third party's agent has paid or agreed to pay the bribe in the course of his agency. If the act was done by the agent in the course of their given authority the principal will be vicariously liable: *Hamlyn v John Houston* [1903]1KB 81, at 85, and In *Petrotrade v Smith* [2000] 1 Lloyd's Rep 486 at [21]. The third party's liability will arise irrespective of whether it authorised the bribe or whether it knew or even should have known about it. The entity which has paid or agreed to pay the bribe is unable to avoid liability by showing that the person(s)

responsible acted outside of their actual or ostensible authority; see Civil Fraud, 1st Ed. (2018) at 7-039/40.

Discussion

94. I start by bearing in mind the test for summary judgment set out in the cases above and referred to in the White Book. I note the approach taken by Foskett J in *BFS Group*.

95. I proceed on the basis that VAM was the agent of Trafalgar in subscribing for the CGrowth bonds and that the transactions set out above could give rise to bribery as alleged. My assessment is whether the proposed amended defences are sufficient to defeat the application for summary judgment. If they are, that does not indicate that the defences will succeed at trial but merely that they are sufficient at this stage.

96. The bribery claims appear to depend on what happened in March and June 2016. The first agreement was made for the purchase of CGrowth bonds in March and Mr Hadley says that he then told Mr Butler about the sale of VAM.

97. The Defendants say that two matters in particular support their defence to the application.

98. The first is that negotiations for the sale of VAM were subsequent to VAM's advice to Trafalgar to purchase CGrowth bonds and that there was thus no conflict of interest. The Defendants called this the "Timing" defence.

99. The second is that Trafalgar was aware of the proposed sale, or that when Trafalgar became aware it continued with the purchase of the bonds and so affirmed Mr Hadley's actions. The Defendants called this the "Knowledge" defence.

100. I start with the Knowledge defence. The Defendants say that Trafalgar was aware of the discussions to sell VAM in early 2016 and the purchase in mid-2016. It is said that Trafalgar did not complain about the sale and that Messrs Butler and Caruana expressed their proposed satisfaction with the sale to PPL.

101. The key points in support of this argument are Mr Hadley's evidence that he notified Mr Butler of the likely sale in March 2016 and that a deposit would be paid. The BDO report was subsequently provided to Trafalgar, and the sale was discussed in early June 2016 around the time it took place.

102. The March notification was said to have been to Mr Butler. Applying *Jafari-Fini* a disclosure to him may have been sufficient to inform Trafalgar as a company.

103. Trafalgar's position is that the documents show that this is not the case. Trafalgar relied on *ICI Chemicals* to support an argument that Trafalgar had produced documents that supported its case while the Defendants had not produced anything to respond to them. The defence was thus criticised for being an exercise in waiting for something to turn up in disclosure or later evidence.

104. Further, Trafalgar says that the Defendants would have had to give Trafalgar full details of the CGrowth bonds, including the all the financial details and commissions, as well as full details of the sale of VAM in order to allow Trafalgar to make an informed decision about them, and it is clear that this did not occur.

105. I have carefully considered the documents on which Trafalgar relies. In my assessment the documents taken together do not directly contradict the Defendants' position. Some of those documents appear to address different points or intended to deal with other matters. They can be read alongside the Defendants' argument and understood to be concentrating on other matters. That is not a surprise, because it may be that it turns out that Trafalgar was not in fact aware of the position and it clearly had on its mind the suspension of the NAV as a key issue. But that is different from the documents alone providing the direct indication that would be needed to say that the defence is fanciful.

106. I note that the correspondence between the key actors does not give an impression of the tensions that might have been expected to be displayed if Trafalgar was unhappy with Mr Hadley. Custom House appears to have delayed in telling him him some things, but does not appear to have been hostile towards him or consider him as an opponent. The impression from the documents which I have reviewed is that the individuals knew each other and were used to some informality in their communication. It is possible that in this situation enough disclosure may have taken place and that this may not have been documented. That is something that may be explored in cross-examination.

107. Bearing in mind the discussion in *Airbus Operations* and *BFS Group*, I conclude that this defence is suitable to be examined at trial. Trafalgar encouraged me to treat the Defendants' evidence with very great caution. But in order to come the contrary conclusion and find for Trafalgar that there is no realistic defence to the application I would have had to conduct a mini-trial of the issues.

108. I note that there was no direct statement from Mr Butler or Mr Caruana on the issue and that Ms Young's evidence based the matter as one to be taken from the documents rather than what she had been told by the witnesses. Had there been a conflict of witness evidence that would more than likely have indicated that the matter should be resolved at trial.

109. The Timing defence is that VAM's advice concerning CGrowth transaction had been provided to and agreed by Trafalgar on or before 7 March 2016, and that following that date Mr Hadley's role was "purely ministerial". In response to this Mr Higgo pointed to the significant matters that remained to be resolved on 7 March, which included insurance, the identity of the purchaser and the precise price.

110. The Defendants rely on the analysis in *Prince Eze* that a person involved in a transaction can have a "ministerial" role. This case is somewhat different. In *Prince Eze* a distinction was drawn between a person acting as an agent on one hand and having a role that was "purely ministerial" on the other. Here the suggestion is that the agent moved to acting in a ministerial capacity once the basic form of a transaction had been agreed. Mr Scorey suggested that what might be a ministerial action in a transaction would depend on the nature of the transaction. I accept that this might be possible, but it seems unlikely that the agent in this case ceased to have that role while the deal was still subject to contract with certain terms yet to be resolved.

111. Accordingly, although Mr Hadley and Mr Thwaite may have considered the March 2016 CGrowth bond a done deal, there it seems clear that there was further work to do. There might be a situation in which an arrangement to transact is by custom sufficiently binding such that the agents agreeing it then move into a different role to finalise the

legal obligations between them, but the evidence at this point does not appear to show that was the case here.

112. It is possible that the position might be assessed differently at different dates between 7 and 16 March 2016, and this might be significant given findings yet to be made about communications between Mr Hadley and Trafalgar which are part of the Knowledge defence.

113. The Timing argument seems unlikely to succeed on its own, but when it is coupled with the Knowledge defence (which I have already concluded should go to trial) it is sufficient also to proceed to trial.

114. It follows that I do not need to decide the issue of the vicarious liability of CGrowth for the actions of PPL. That matter should be addressed at trial.

Conclusion

115. The application for summary judgment fails. The issues raised are complex and in my discretion should be dealt with as part of the trial of the allegations of fraud described above. As a matter of case management it seems unlikely that these issues will have a significant impact on the preparation of the case or the time the case will take at trial.

116. The parties should liaise on a form of order and should address in particular whether Trafalgar continues to oppose the Defendants' proposed amendments to their defences.