

Neutral Citation Number: [2023] EWHC 442 (Ch)

Case No: BL-2022-000204

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: 1 March 2023

Before :

Deputy Master Scher

Between :

RAEL HODES

Claimant

- and -

(1) JACK FRANKEL

(2) JACOB DREYFUSS

Defendants

Ali Reza Sinai (instructed by **OGR Stock Denton**) for the **Claimant**
Duncan Heath (instructed by **Clarke Mairs Law Limited**) for the **Defendants**

Hearing date: 25 January 2023

Approved Judgment

I direct that this approved judgment, sent to the parties by email at 10am on 1 March 2023, shall be deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

Deputy Master Scher:

Introduction and background

1. This is my judgment on the Claimant's application for summary judgment, and/or to strike out the Defendants' Defence.
2. The Claimant is Rael Hodes, a high net worth individual resident in South Africa. The Defendants are Jack Frankel and Jacob Dreyfuss, individuals resident in England, in the business of property development.
3. The Defendants are directors of a company, Waterpeak Limited, and its sometime wholly owned subsidiary, Edgewater Hampshire Ltd (**the SPV**). The SPV was incorporated to purchase, develop and sell a commercial property (**the Property**) at the Bartley Wood Business Park, Bartley Way, Hook, Hampshire. According to Companies House records, the SPV had 100 shares of £1 each. Those were legally owned by Waterpeak Limited until 12 February 2021, when 50 were transferred to the First Defendant, and 50 to Rivka Dreyfuss.
4. In late 2016, the Defendants were attempting to raise money for the development project to be undertaken by the SPV. They travelled to South Africa to meet potential investors. They wanted to raise approximately £2.5m for the SPV's project.
5. They met the Claimant's representatives, Caleo Capital (Pty) Ltd (**Caleo**). They also met the Claimant himself.
6. The Defendants negotiated with Caleo. The First Defendant's evidence is that, while the negotiations continued, the SPV needed funds urgently, in order to purchase the Property.
7. In this context, the Claimant agreed to lend £650,000 to the Defendants personally, as an interim measure while the negotiations proceeded. The Claimant and the Defendants entered into a written personal loan agreement on 17 February 2017 (**the Personal Loan Agreement**).

The Personal Loan Agreement

8. Clause 2.1 of the Personal Loan Agreement provided that the Claimant would lend the Defendants the sum of £650,000.
9. Clause 2.2 provided that the Claimant would transfer the money loaned into the bank account of Clockwork Estates Limited, managing agent of the SPV. (It is common ground that this was, nonetheless, a loan by the Claimant to the Defendants.)

10. Clause 3.1 provided: *“The parties mutually covenant and agree that they will act in good faith towards the other parties and will use reasonable endeavours to satisfy the Condition.”*
11. The “Condition” had been defined in clause 1.1 as: *“the occurrence of all of the following: (a) a loan agreement between the Lender and Edgewater (Hampshire) Limited; (b) a supplemental waterfall agreement being entered into between the Lender and Edgewater (Hampshire) Limited; and (c) a shareholders’ agreement being entered into between, amongst others, the Lender, Waterpeak Limited and Edgewater (Hampshire) Limited.”*
12. Clause 3.2 provided: *“If the Condition is not satisfied on or before the date falling 14 days after the date of this agreement (Condition Satisfaction Date) then the Loan or any part of it as remains outstanding (together with any accrued but unpaid Interest) will become automatically due and payable to the Lender by the Borrowers in accordance with clause 5.”*
13. Clause 5.1 provided that the Loan would be repayable on the earlier of (relevantly): *“5.1.1. satisfaction of the Condition; 5.1.2 the date being on or before (sic) the date falling 14 days after the Condition Satisfaction Date.”*
14. The loan was drawn down on 20 February 2017. The Defendants say that they provided that money to the SPV, and that the SPV thus owed them £650,000.

Further draft agreements

15. Negotiations then continued. By July 2017, there was a suite of draft agreements. These include a corporate loan agreement, but with Caleo (not the Claimant) as lender, and the SPV (not the Defendants) as borrower. This was signed by the SPV and (on a separate copy) by Caleo. The signed copies were not exchanged, however, or dated.
16. The parties also negotiated a shareholders’ agreement. Copies were signed by the SPV and by Caleo. Neither the Claimant nor Waterpeak Limited (the then current shareholder of the SPV) were intended parties. No other shareholders or intended shareholders signed. Moreover, the shareholders’ agreement referred to a business plan, certain departures from which required shareholder approval (clause 5.2). The business plan was not annexed to the shareholders’ agreement, or prepared at all.
17. There was also a draft waterfall agreement, again signed by (inter alia) Caleo and the SPV, but not by other proposed shareholders. Finally, there was a draft “side letter” concerning project management.
18. These draft agreements (**the Company Transactions**), taken together and if executed, would have provided as follows:

- i) Caleo would lend the SPV £648,440. That sum, with interest, would be repayable within six months of a demand. The earliest demand date would be five years after 17 February 2017.
 - ii) Caleo would subscribe for 1,560 shares of £1 each in the SPV, amounting to 15.6% of the entire issued share capital. The shares would be allotted to Caleo, or (if nominated by 30 June 2017) its nominee. Other shareholders (and not Waterpeak Limited) were named as the owners of the remaining 84.4% shares.
 - iii) The profits distributed to Caleo would be applied first to offset the interest accruing under the corporate loan agreement.
19. The Company Transactions were not entered into. They were only ever signed in draft, and not exchanged, and were not signed by proposed shareholders other than Caleo.
20. Nevertheless, Caleo and the Defendants thereafter appeared to have proceeded under the assumption that the shareholders' agreement had been signed.

Conduct from 2017-2020

21. On about 11 November 2017, the SPV declared its first dividend, some of which was paid to Mr Hodes and Caleo as if they were shareholders. This happened again in February 2018, and on other occasions.
22. On various occasions in 2018, Caleo requested from Mr Frankel that the shares in the SPV which should have been issued to Caleo be issued instead to Coastal Living Limited (a Seychelles company nominated by the Claimant). There had been correspondence about this request as early as September 2017.
23. On 4 December 2018, the First Defendant (Mr Frankel) stated in an email to (inter alia) Onicca Bopape of Caleo that "*All shares in this venture are held in Trust for the various parties*" and that "*The above is covered by a Trust Deed*". He said: "*if you require us to amend the Trust Document to show Coastal Living as opposed to Caleo, this can be done fairly simply. This would be the ideal way forward.*"
24. On 11 December 2018, Caleo instructed the First Defendant to proceed (urgently) with amending the trust document to replace Caleo with Coastal Living.
25. Drafts were circulated in March 2019. An error was identified and corrected. Signed declarations of trust, including the correction made in March 2019, were sent by the SPV's accountant to Caleo on 4 December 2019. The date under the First Defendant's signature on each trust deed was 1 July 2017, but they cannot have been signed earlier than March 2019.

26. In February and March 2020, Caleo sought information from the Defendants about the investment.
27. Also at around this time, according to the First Defendant, it was becoming clear that the project being undertaken by the SPV was facing very significant problems. The First Defendant gives evidence of the tenant exercising its break clause; opposition to the development from the local authority; and new regulations concerning the Covid pandemic.
28. On 8 May 2020, following an internal audit, Lloyd Priestman of Caleo emailed the First Defendant (and others). He referred to “*bad housekeeping*” on Caleo’s side, and sought to clarify the structure under which the shares were held. This email (like others) seems to be based on an assumption that 1,560 shares were being held for the benefit of one of the Claimant, Caleo, or Coastal Living Limited.
29. On 7 July 2020, Mr Blieden emailed the First Defendant, saying that Caleo wanted to rectify the deal documentation to be mutually consistent, and to reflect the commercial arrangements as they actually operated. Discussions of possible amendments to the Shareholders Agreement, Corporate Loan Agreement, and Waterfall Agreement followed.
30. On 16 July 2020, the First Defendant informed Caleo that there would be no further dividends, so as to build up the SPV’s cash reserves.
31. In July and August 2020, Caleo raised the possibility of relying on the Waterfall Agreement.
32. On 13 and 14 October 2020, Selwyn Blieden of Caleo emailed the First Defendant (and others), trying to identify and regularise the position. He asked whether there was a completely executed version of the shareholders’ agreement.
33. On 6 November 2020, Caleo took the position that there was a debt outstanding to the Claimant under the Personal Loan Agreement, and that the Company Transactions referred to in that agreement had not been entered into as expected.
34. On 13 November 2020, the First Defendant emailed Mr Blieden saying that “*Shareholder Agreements were entered into and signed by all parties.*” This was not correct, though, as the Defendants accept in paragraph 31 of their Defence.
35. After pre-action correspondence, the Claimant’s claim was issued on 3 February 2022.

The statements of case

36. The Claimant’s claim is based solely on the Personal Loan Agreement. The Claimant argues that the Condition in clause 1.1 has not been satisfied: the entire amount of the

loan therefore became repayable on 17 March 2017, with interest accruing from 17 February 2017.

37. The Claimant acknowledges receipt of £93,600, pleading that these were “*wrongly characterised as dividends from the [SPV], but the Claimant will credit them against the [Personal Loan Agreement].*”
38. The Defendants plead that the parties had contemplated that the Claimant or his nominee would become the SPV’s creditor and shareholder, and that this is what happened. They say that since July 2017, the Claimant’s nominee has been treated as both beneficially entitled to shares in the SPV and a creditor. This (they say) means that the Personal Loan Agreement has been discharged.
39. The Defendants plead that the Company Transactions described in paragraphs 15 to 19 above “completed”. This position was abandoned at the hearing before me.
40. However, the Defendants continue to argue that:
 - i) The Defendants’ obligations under the Personal Loan Agreement have been discharged by consent.
 - ii) The Defendants funded the Claimant’s obligations under the Company Transactions by treating the funds advanced under the Personal Loan Agreement as payments made pursuant to the Company Transactions. The Defendants’ actions in this regard amounted to “repayment” of the sums advanced under the Personal Loan Agreement.
 - iii) The Claimant “accepted by conduct” that the obligations under the Personal Loan Agreement had been discharged by consent, alternatively that the sums advanced under the Personal Loan Agreement had been repaid by exercising rights under the Company Transactions.
41. The Defence lists numerous “confirmatory acts”, which are pleaded as representations by conduct that the sum due under the personal loan agreement had been repaid and treated as an investment to purchase shares; and that the Claimant was a beneficial shareholder in the SPV. I will not list all 18 of the “confirmatory acts” alleged, but they include:
 - i) the receipt by Caleo of dividends;
 - ii) the request by Caleo for shares to be held by Coastal Living Limited; and
 - iii) requests by Caleo to amend and/or rectify the Company Transaction documents.
42. The Defendants plead that they relied on these representations to their detriment, by:

- i) Not seeking (at least) £650,000 from an alternative investor, to purchase the 15.6% of the SPV's shares which they had treated as being beneficially owned by the Claimant's nominee; and
 - ii) Not then seeking repayment of £650,000 from the SPV (see paragraph 16 above), which they would have used to repay the personal loan.
43. Therefore, the Defendants plead, the Claimant is estopped from denying that the sums due under the Personal Loan Agreement have been repaid.
44. The Claimant pleads in reply that the Defendants were not entitled to rely on those alleged representations, since they knew at all times that the Company Transactions had not taken place.
45. Finally, the Defendants say that: *“the Claimant was at all times from 3 July 2017 put to an election between the alternate remedies of accepting Caleo's rights under the Company Transactions (and thereby affirming that the sums due and owing under the PLA had been repaid) or rejecting all such rights and procuring that the Company return to the Defendants all payments made on behalf of the Claimant or his nominee. By each of the Confirmatory Actions, the Claimant elected to affirm the Company Transactions and that the sums due under the PLA had been repaid.”*

Summary judgment and strike out application

46. By Application Notice dated 4 October 2022, the Claimant seeks summary judgment against the Defendants, and/or to strike out the Defence.
47. Rule 3.2(a) of the Civil Procedure Rules provides that the court *“may strike out a statement of case if it appears to the court... that the statement of case discloses no reasonable grounds for bringing or defending the claim”*.
48. Rule 24.2 provides:

The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—

(a) it considers that—

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

49. I have in mind the following principles derived from the authorities, formulated by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301 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 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.

50. The Claimant's application was supported by two witness statements of Selwyn Blieden (of Caleo) and a witness statement of Sam Tye (of Fladgate LLP). The Defendants rely on a witness statement of the First Defendant. The witness statements exhibited many contemporaneous documents, some of which I have summarised above.

Application of the test

51. I am grateful to Mr Sinai and Mr Heath for their helpful submissions at the hearing on 25 January 2023. I reserved judgment, and have since considered again their skeleton arguments, the witness statements, and the contemporaneous documents in the bundle.
52. The First Defendant's evidence, set out in his first witness statement, is that at all times after 3 July 2017, the Defendants and the SPV treated the amount which the SPV owed the Defendants as having been applied to Caleo's purchase of shares and the Corporate Loan Agreement. He says that from 3 July 2017, Waterpeak held 15.6% of the shares in the SPV on behalf of Mr Hodes and his nominee. He says he had always understood that the Claimant's/Caleo's rights as shareholder, and as creditor under the Corporate Loan Agreement, were in substitution for the Claimant's rights under the Personal Loan Agreement.
53. There is much contemporaneous evidence which supports that position, including:
- i) Emails from November 2017 and later, evidencing payments made as "dividends";
 - ii) Caleo's requests for an amended declaration of trust;
 - iii) Mr Blieden's email of 7 July 2020, requesting that the deal documentation be rectified to "reflect the commercial arrangements as they actually operate"; and
 - iv) The First Defendant's email of 13 November 2020, asserting (incorrectly) that shareholders' agreements had been entered into and signed by all parties.

54. On the basis of this evidence, and other consistent contemporaneous correspondence, there appears to be a real prospect of the Defendants successfully proving that the parties were proceeding on the common assumption that Caleo and the Claimant (or his nominee) had made an investment in the SPV, and/or that Caleo made representations to that effect.
55. The Claimant argues that the Defendants knew at all times that the Company Transactions had not taken place (Reply, para 20). However, there is much correspondence suggesting that they lost sight of that fact. I cannot resolve the issue of the Defendants' knowledge on a summary basis on the evidence I have seen.
56. There is also a real prospect that the Defendants will prove that they relied on the common assumption (or representations) to their detriment, by not seeking an alternative investor to make a similar investment into the SPV, which would have funded repayment of the Claimant. The First Defendant's evidence is that a particular named individual, Mr Bude, was likely to have made a similar investment, and was "put out" when he was told that the investment opportunity was no longer available (having been taken by the Claimant). The First Defendant also refers to the Defendants' more general success in obtaining investments for similar projects.
57. For these reasons, in my judgment the Defendants have a real prospect of successfully defending the claim on the basis of an estoppel by convention and/or representation.
58. I note that Mr Heath has argued that the facts pleaded in the Defence support the defence of estoppel by convention, and that, strictly speaking, the Defence need not expressly plead estoppel by convention. I do not share that latter view. An estoppel by convention is a reason why the Defendants deny the allegation that they are liable under the Personal Loan Agreement, and so it should be pleaded in accordance with CPR r16.5(2)(a). The Defence should be amended if the Defendants wish to rely on estoppel by convention at trial.
59. The Defendants rely on similar alleged facts, supported by similar evidence, for their defence of discharge, or (perhaps more correctly) release. There is a real prospect of success on this defence also. The question of whether there has been an accord (agreement) and satisfaction (consideration) is one of fact. The accord can be inferred from conduct. I have seen enough evidence, summarised above, to persuade me that the defence of release has a real prospect of success.
60. However, two of the pleaded defences have no real prospect of success:
 - i) First, the allegation that the Company Transactions were "completed". They clearly were not. They were not dated or exchanged. There is evidence from Mr Tye of Fladgate LLP to that effect. Later, signed copies of the corporate loan agreement appear to have been sent between the First Defendant and a person associated with the Claimant's nominee in Mauritius, but the

correspondence makes it clear that this was for due diligence reasons. Indeed, at the hearing before me, Mr Heath did not pursue the defence that the Company Transactions completed. I will therefore grant summary judgment against it.

- ii) Secondly, the defence of election and affirmation summarised in paragraph 45 above. The Company Transactions were not completed. In such circumstances, there is no real prospect of the Defendant successfully arguing that the Claimant was “put to an election” between Caleo’s rights under those transactions, and the personal loan. I give summary judgment against the Defendant on that issue too.

- 61. For these reasons, apart from the two limited issues identified above, I am dismissing the application for summary judgment and strike out. The Defence has a real prospect of success, and discloses reasonable grounds for defending the claim.

Disposal

- 62. I grant summary judgment to the Claimant on only the narrow issues of whether the Company Transactions “completed”, and on “election/affirmation”. The Claimant’s application is otherwise dismissed.