Neutral Citation Number: [2023] EWHC 571 (Ch).

Case No: BL-2022-000400

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: 14 March 2023

Before:

MASTER MCQUAIL

- -

Between:

(1) (1) COMPLETE FACILITIES SOLUTIONS LIMITED	**Claimants**
- and -	
(1) LIVINGSTONE CONSULTING LIMITED **(2) JAMES ESPIN** **(3) SIMON TRISTAN WETHERELL** **(4) CHRISOPHER VALLIS** **(5) NEIL ANTHONY BROMLEY** **(6) MARTIN MCCOLL LIMITED**	**Defendants**

- -

Robert Ewing in person for the **Claimant**
Tom Nixon (instructed by Preston Turnbull LLP) for the **Second Third and Fifth Defendants**
Hearing date: 18 January 2023

- -

Approved Judgment

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MASTER McQUAIL

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Master McQuail:

The Application

1. By application notice dated 29 June 2022, the second, third, and fifth defendants (**D2-3-5**) seek to strike out this claim brought against them by Complete Facilities Solutions Ltd (**CFS**), alternatively they ask for summary judgment.

2. CFS's claim was issued on 8 March 2022. The first defendant is Livingstone Consulting Limited (**Livingstone** or **LC**). James Espin is the second defendant (**D2**). Simon Wetherell is the third defendant (**D3**). Christopher Vallis is the fourth defendant (**D4**). Neil Bromley is the fifth defendant (**D5**). Martin McColl Limited is the sixth defendant (**MCL**).

3. At the material times MCL operated around 1000 retail premises across the United Kingdom. The premises periodically required reactive maintenance works, such as fixing electrical or plumbing issues.

4. Livingstone acted as a managing agent for MCL.

5. D2, D4 and D5 were at all material times directors of Livingstone.

6. D3 was formerly a consultant to, but at all material times a senior employee (but not a director) of, Livingstone.

7. The application is supported by witness statements all dated 28 June 2022 of Andrew Preston of Preston Turnbull who are D2-3-5's solicitors and by each of D2, D3 and D5.

8. CFS did not respond substantively to the application until, on 10 January 2023, Mr Robert Ewing, sole director of CFS, served upon D2-3-5 a Notice of Change of Legal Representative confirming that CFS's former solicitors had ceased to act, and that CFS would be acting in person. On 11 January 2023 Mr Ewing wrote to the Court requesting an adjournment. I refused that informal application. Mr Ewing renewed his application, having issued a form N244 supported by a witness statement signed by him, at the start of the hearing. I refused that application also. I noted, in particular, that it is Mr Ewing who signed the statement of truth verifying CFS's Particulars of Claim and Reply and therefore has knowledge of all the factual material on which the claim is based.

9. Exhibited to Mr Ewing's evidence in support of CFS's adjournment application was a statement of a Mr Clint DeSouza, a former regional facilities manager at Livingstone. The statement is dated 20 December 2021 and thus pre-dates the issue of the claim and therefore also D2-3-5's application. I permitted Mr Ewing to rely on its content at the hearing.

10. The witness statement of D2 sets out the history in some detail. D3 and D5's shorter witness statements agree with that which D2 says.

Background History

11. Livingstone and MCL entered into a contract dated 24 June 2020 (**the MCL Agreement**). The scheme of the MCL Agreement was that (a) a third party maintenance contractor would accept maintenance jobs at MCL premises via MCL's Mpro5 web portal; (b) the works would be performed by the contractor at an agreed price; (c) the contractor would send Livingstone its invoices and work sheets recording the works performed; (d) Livingstone would collate those documents into batches and, roughly once per month, pass those documents on to MCL; (e) MCL would undertake a review in a joint meeting with Livingstone and approve or reject the invoices and work sheets; (f) Livingstone would inform the contractor of the approvals and the contractor would then provide Livingstone with consolidated invoices for approved works; (g) Livingstone would re-invoice MCL (adding on Livingstone's management fee); (h) MCL would pay Livingstone's invoices; and (i) once Livingstone had received funds from MCL, it would pay the contractor in respect of the corresponding invoices (retaining its management fee).

12. CFS was one of the contractors who performed maintenance works at MCL's premises. After a period of working pursuant to orally agreed terms, Livingstone and CFS entered into a written contract dated 17 February 2021 (**the Livingstone Agreement**). At clause 1.1 of Schedule 4 the Livingstone Agreement states that:

> "Livingstone shall pay all valid invoices for charges … on the day following payment by [MCL] of Livingstone's corresponding invoice under the Terms of the [MCL Agreement]".

Thus Livingstone would be obliged to pay CFS shortly after it received payment for corresponding invoices from MCL. This arrangement is conveniently described as the obligation to "pay when paid".

13. During 2021, MCL faced cash flow difficulties. MCL started to refuse to pay Livingstone in respect of works that CFS (and others) had performed. It is Livingstone's position that it was therefore not obliged to, could not and did not pay CFS.

14. MCL has since gone into administration. MCL was Livingstone's biggest client, and MCL owed Livingstone a total of £2.28m at the time it entered administration. Livingstone has recently gone into liquidation.

15. CFS's claim against Livingstone is for a total of £672,281.68 for maintenance jobs that it claims to have performed for MCL but for which it was not paid. The claim is brought primarily in debt. The claim is premised on, amongst other things, the assertion that Livingstone did not "pay when paid". Livingstone defend the claim on the basis, amongst others, that it did "pay when paid", but MCL stopped paying Livingstone.

16. CFS also brings a claim against MCL directly for the same sums based on an alleged direct contract. MCL's defence does not include any assertion that it has already paid Livingstone sums owed in respect of CFS's invoices.

17. In addition to the claims in contract against Livingstone and MCL, CFS also brings a claim against D2-3-5 (and D4) personally. The claim is not a contractual one; there was no contract with D2-3-5. The claim is put in various ways which D2-3-5 say should be variously struck out under CPR r3.4(2)(a)/(b) and/or the court's inherent

jurisdiction or in respect of which summary judgment should be given pursuant to CPR 24.2(a)(i).

18. D2's evidence explains the difficulties that Livingstone had in dealing with MCL as MCL's cash flow problems increased. He says that MCL made spurious and unparticularised complaints about Livingstone in an attempt to avoid its contractual obligations. He says that at all material times, he and others at Livingstone worked to achieve a resolution that was for the benefit of CFS and the other contractors that were suffering as a result of MCL's insolvency. He says the reason why CFS was not paid is simply that MCL failed to pay Livingstone the relevant sums before going into administration and denies the allegations of personal wrongdoing.

19. The only witness evidence that possibly goes the other way are two brief extracts from Mr DeSouza's witness statement where he states: "I understand that [D5] would then hold back monies that should have gone to the Contractors" and "It was my understanding that MCL had paid LC in some of those cases.". The source of Mr De Souza's understanding is not explained. CFS have not taken the opportunity to file any answer to the evidence of D2-3-5.

The Claims against D2-3-5

20. The Particulars of Claim (**PoC**) are repetitive and contain unnecessary detail and narrative. The first eleven paragraphs recite the history and foreshadow the allegations to come. Included at paragraph 5 is the following:

> "CFS was not a party to the MCL Agreement, was never aware of its alleged terms, and pending disclosure or witness statements, has no direct knowledge of the irregularities or conduct complained of on the part of LC, or the truth or accuracy of the alleged irregularities complained of on the part of LC."

and at paragraph 11 the following:

> "Pending, disclosure, admissions or trial, CFS cannot confirm who of MCL and or LC and or Mr Espin and or Mr Wetherall and or Mr Vallis and or Mr Bromley is telling the truth, or responsible for non-payment to CFS."

21. It is alleged at paragraph 58(c) that D2-3-5:

> "each procured, and or was directly responsible for, and or was sufficiently bound up in, the said misconduct and breaches identified above in paragraph 54 and paragraph 55 and paragraph 56, and or abrogated their responsibilities as directors to others (including each other) to decide or consider material matters in connection with the said actions and misconduct conduct [sic] and or breaches on the part of LC".

Procuring breach of contract

22. Paragraph 54 sets out alleged contractual breaches of the Livingstone Agreement by Livingstone, primarily a failure to "pay when paid", but also wrongful use of monies received from MCL to pay for overheads, and in operating a "system of deliberate overcharging [MCL]" and a failure to act honestly in good faith.

23. The paragraph 58 allegation so far as it relies on paragraph 54 seems to be one of procuring a breach of contract.

Deceit

24. Paragraph 56 alleges that:

> "Further, or in the further alternative, LC made and continued and acted in breach of the said representations and assurances in paragraphs 26(b) and 32(b) above that CFS would be "paid when paid", knowing them to be false, alternatively recklessly, and not caring whether they were true or false, with the intent that CFS should rely on them."

25. The paragraph 58 allegation so far as it relies on paragraph 56 seems to be one of personal responsibility for Livingstone's alleged deceit.

Conspiracy to Injure

26. Paragraph 59 pleads:

> "On a date or dates unknown, but believed to be during and including the period February 2021 to May 2021, [D2] and or [D3] and or [D4] and or [D5] and others unknown, combined together, and or each agreed, to mislead CFS, and cause LC, to breach the LC Agreement, and to injure CFC's [sic] interests in the LC Agreement, and cause LC not to comply with the representations, agreements duties and or obligations to and with CFS, and cause loss to CFC [CFS], by a conspiracy to injure with the intent to mislead and injure CFS by causing and procuring LC:
>
> (a) to act, or attempt to act, in breach of the LC Agreement; …"

together with a further list lettered (b) to (h) of alleged breaches by Livingstone.

27. Paragraph 60 pleads:

> "Pursuant to and in furtherance of the matters in paragraph 59 above, [D2] and or [D3] and or [D4] and or [D5], and others unknown, carried out or otherwise participated in a series of overt acts as identified above in paragraphs 59(a) to (g) or each of them, that had the foreseeable result of injuring or otherwise harming, or attempting to injure or harm CFS."

28. Finally paragraph 61 pleads:

> "Pending pending [sic] disclosure of documents, evidence, accounts and enquiries herein, CFS contends each of the acts above in paragraphs 59(a) to (h) [sic] or any of them, were done by each of [D2] and or [D3] and or [D4] and or [D5], and others unknown, in furtherance of the said conspiracy".

29. These paragraphs seem to comprise an allegation of conspiracy to injure by means of procuring a breach of contract.

Tortious duties

30. Paragraph 37 of the PoC lists obligations, said to comprise "tortious duties", owed by Livingstone and D2-3-5 to CFS:

> "(a) to act honestly and in good faith;

(b) to act in the interests of CFS;
(c) to comply with the terms and obligations of the LC Agreement;
(d) to comply with those matters, agreements, representations, duties and obligations identified above in paragraphs 26, 32 and 35, and each of them, of which they were aware, or are taken to be aware."

31. The cross references of paragraph 37(d) are to:

(i) Paragraph 26 and 35 which refer to an alleged *Quistclose* trust

(ii) Paragraph 32 which refers to representations made by Mr Aspin [sic] and a Mr Jerome Edwards that CFS would "be paid when paid" by MCL.

32. It appears that the allegation is that D2-3-5 owed a duty in tort to "comply" with those representations, because they were "aware" or are "taken to be aware" of them.

33. Paragraph 55 pleads that Livingstone breached tortious obligations owed to CFS in various respects.

34. Paragraph 58(e) pleads that D2-3-5:

"each assumed personal responsibility for the said misconduct and or breaches on the part of LC"

which seems to be an allegation of the existence of tortious obligations on the part of D2-3-5.

Joint Tortfeasorship

35. Paragraph 58(d) pleads that D2-3-5:

"each were joint tortfeasors with LC"

which appears to refer back to the tortious duties alleged to be owed to CFS by Livingstone in paragraph 37.

Fiduciary duties and Quistclose trust

36. Paragraph 37 refers to “fiduciary duties” in like terms to the tortious duties already referred to. These duties would appear to arise in the context of an alleged *Quistclose* trust.

37. Paragraph 26(c) pleads:

> “any monies received by LC from MCL towards payment or discharge of CFS’ invoices, in whole or in part, belonged to CFS, who was the beneficial owner of and entitled to payment or remission of the same”

38. Paragraph 26(d) pleads:

> “any monies received by LC from MCL towards payment or discharge of CFS’s invoices, in whole or in part, was known by LC and its directors to be for the purpose of paying CFS and subject to such obligation. Such monies were not, and nor was it intended by LC and CFS and or MCL, that any such monies be at the free disposal of LC or its directors, as part of LC’s general cash flow or to pay remuneration or overheads”

39. Paragraph 26(f) pleads:

> “any such monies received by LC from MCL towards payment or discharge of CFS’s invoices was subject to a “Quintclose [sic]Trust”

40. Paragraph 35 repeats the trust allegations.

41. Paragraph 55 pleads that Livingstone breached its obligations as a trustee in, amongst other things, treating monies received by MCL as part of Livingstone’s general cash flow.

42. Paragraphs 57-58 of PoC includes these fiduciary breaches within the complaint against D2-3-5.

Strike Out/Summary Judgment

43. As Flaux J (as he then was) explained in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3037 (Comm) at [12]:

> "CPR 3.4(2) gives the court power to strike out a statement of case which discloses no reasonable grounds for bringing or defending a claim or a statement of case which is an abuse of process. Where, on the material before the court, there are disputed issues of fact, the court should not strike out a claim unless certain it is bound to fail: see per Peter Gibson LJ at [22] in *Colin Richards & Co v Hughes* [2004] EWCA Civ 226 . The test is similar but not identical to that for summary judgment where the court will not grant summary judgment, here in favour of a defendant, unless the claim has no real prospect of success. It is well established that where it is clear that there are disputed issues of fact between the parties, the court should not engage in a mini-trial of the merits at an interlocutory stage: see *Civil Procedure* [3.4.2]."

Strike Out: Improper Pleading of Dishonesty and Deliberate Impropriety

44. Mr Nixon submitted that, where fraud is pleaded, the requirements of the rules and the law as to such a plea must be satisfied if the pleading is not to be struck out.

45. Mr Nixon relied upon the explanation of the Court of Appeal in *Sofer* v *Swissindependent Trustees SA* [2020] EWCA Civ 699 at [23]:

> "i) Fraud or dishonesty must be specifically alleged and sufficiently particularised, and will not be sufficiently particularised if the facts alleged are consistent with innocence: *Three Rivers District Council v Governor and Company of the Bank of England (No.3)* [2003] 2 AC 1.
> ii) Dishonesty can be inferred from primary facts, provided that those primary facts are themselves pleaded. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be pleaded: *Three Rivers* at [186] (Lord Millett).
> iii) The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence: *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [20]-[23]."

46. Mr Nixon also drew my attention to

(i) the following extract from *Playboy Club v Banca Nazionale* [2018] EWCA Civ 2025 at [46]:

> "Courts regard it as improper, and can react very adversely, where speculative claims in fraud are bandied about by a party to litigation without a solid foundation in the evidence";.and

(ii) the exposition of the underlying principles in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3037 (Comm) at [20]-[23].

47. It was Mr Nixon's submission that this pleading principle applies to:

(i) Deceit. Deceit being necessarily an allegation of fraud.

(ii) Procuring breach of contract. An allegation of procuring breach of contract requires a pleading that the defendant (D2-3-5) intended to cause the third party (Livingstone) to breach the contract (with CFS), see e.g. *Grant & Mumford*, *Civil Fraud* (1st edn) at [3-048 to 3-052]). The allegation of intention being one of deliberate impropriety or misconduct akin to fraud.

(iii) Conspiracy to injure. *JSC Bank of Moscow v Kekhman & Ors* [2015] EWHC 3073 at [14] and [24] is authority for the proposition that the pleading principle applies to a claim for conspiracy to injure.

(iv) Joint tortfeasorship. While CFS pleads (at paragraph 58(d)) that D2-3-5 "each were joint tortfeasors with LC", there is no actual plea of the necessary "common design" or "concerted action" to do, or secure the doing, of the acts constituting the tort (which the case of *Fish & Fish v Sea Shepherd UK* [2015] UKSC 10; [2015] AC 1229, makes clear is necessary at [12] and [21-22]). Were any "common design" element of the tort to be pleaded it would, being an element of deliberate impropriety or misconduct, be subject to the pleading principle.

48. Mr Nixon says that CFS has not pleaded in the PoC any primary facts in support of any of the allegations of deceit, conspiracy, procuring breach of contract or the common design element of the alleged joint tort. The only fact that has been pleaded and positively averred is that CFS did not get paid.

49. In addition to the terms of paragraphs 5 and 11 of the PoC referred to above, CFS's Reply pleads:

(i) at paragraph 13(iii), in answer to whether Livingstone failed to pay out sums received from MCL:

> "CFS requires the Defendants to strictly prove the funds LC received from MCL, and when and how they were paid out"

(ii) at paragraph 14(i):

> "pending disclosure and witness statements, CFS expressly takes issue with the assertion … that all sums received from MCL in respect of work performed by LC [sic] has been followed by a corresponding payment by LC to CFS"

(iii) at para 23(ii) in answer to all of the allegations of breach against D2-3-5:

> "pending disclosure and witness statements, it is denied the allegations are not based on any pleaded primary facts, embarrassing or bound to fail…"

(iv) at paragraph 24(ii) in respect of the conspiracy to injure:

> "pending disclosure and witness statements, it is denied the allegations are not based on any pleaded primary facts, embarrassing, constitute mere assertions, bound to fail, improperly advanced …"

50. These passages in the Reply appear to amount to acceptance by CFS

(i) that it has no material upon which to base any plea that Livingstone received money from MCL in respect of works carried out by CFS, which has not been paid to CFS; and

(ii) that the necessary primary facts are not pleaded.

51. As Cockerill J explained in *King v Steifel* [2021] EWHC 1045 (Comm) at [368]:

> "Where particulars are required it is not permissible to avoid the need for giving particulars by saying that particulars will be given at a later stage. Warby J in *Duchess of Sussex v Associated Newspapers* [2020] EWHC 1058 (Ch), [2020] EMLR 21 stated, at [59]:
>
> > "The suggestion, …. that particulars cannot be provided or should not be expected until after disclosure is contrary to the long-standing principle that a party alleging misconduct must give particulars before obtaining disclosure (see, for instance, *Zierenberg v Labouchere* [1893] 2 QB 183, 188 (Lord Esher MR)). It is also bad on the facts. The complaint has two aspects. The first is an allegation of improper conduct towards the claimant's father. Such allegations should not be made, if the claimant cannot give details of what was done and when."

52. At [477] in *King v Steifel* the Judge pointed out that an inference of fraud cannot:

> "be justified by lumping together a number of disparate allegations which bear no relation to the conspiracy, fraud or deceit which is said to sound in damages. One cannot ask the court to infer fraud against A in relation to a particular transaction because (for example) he once stole a sweet from a shop, or because he lied to get out of a dinner engagement."

53. D2-3-5 have now provided witness statements verified by statements of truth which confirm that Livingstone tried to obtain funds from MCL but was unable to do so.

54. By paragraphs 38-40 of the PoC CFS place reliance on a letter from MCL to Livingstone dated 18 May 2021, in which MCL made various allegations against Livingstone. The allegations are, in summary, that Livingstone had overcharged MCL in various respects. MCL therefore sought to terminate the MCL Agreement. To the extent CFS might argue that the contents of the letter amount to "primary facts" of the necessary type, Mr Nixon points out:

(i) the letter does not in terms allege dishonesty. The inference pleaded at paragraph 40(a) of PoC of

> "LC and its officers and senior management instigating a dishonest, system of deliberate overcharging"

has no basis. The offer by Livingstone to issue credit notes to MCL, which CFS acknowledges at paragraph 40(b) of the PoC, is consistent with an attempt to reach a correct accounting position with MCL and cannot be said to only be consistent with some form of dishonesty. Livingstone's detailed response to the letter on 20 May 2021 confirms that honest explanation for the issuing of credit notes;

(ii) the allegations made by MCL are different from CFS's allegations of wrongdoing by D2-3-5 essentially that they intentionally withheld payments to CFS;

(iii) CFS does not plead that the contents of the MCL letter are true. Rather it pleads at paragraph 5 of PoC:

> "no direct knowledge of the irregularities or conduct complained of on the part of LC, or the truth or accuracy of the alleged irregularities or conduct complained of on the part of LC"

and at paragraph 40(a) of PoC that the letter

> "if true, involve very serious allegations"

and in paragraph 18 of the Reply CFS acknowledges:

> "pending disclosure and witness statements, CFS is unable to say yet who of MCL and or LC… is telling the truth"

(iv) Livingstone denies the allegations of deliberate overcharging.

55. In his witness statement in support of his application to adjourn and in submissions made in Court Mr Ewing raised a number of matters from which he says the Court might be able to infer dishonesty or wrongdoing by D2-3-5:

(i) that the total amounts of the credit notes (c. £700,000) referred to in MCL's letter of 18 May 2021 must of itself indicate that blatant overcharging was taking place. This matter is raised at paragraph 38 of PoC;

(ii) the fact that D3, who was formerly employed by MCL, moved to work for Livingstone initially as a consultant and later as an employee and received substantial remuneration in both roles, although less as an employee than as consultant. This matter is raised at paragraph 30 of PoC;

(iii) the fact that D3 was responsible for agreeing an hourly rate with contractors and then agreed a reduction in that rate in a manner which enabled Livingstone to profit from the reduction at the expense of the contractors;

(iv) that on his analysis of Livingstone's accounts at 30 April 2020 it was insolvent;

(v) the estimated deficiency of £3.2 million shown by the Statement of Affairs of Livingstone dated 22 September 2022; and

(vi) the witness evidence of Mr DeSouza.

56. Mr Ewing also submitted that the case should not be determined without full disclosure being given by MCL and Livingstone, in order that an analysis of the treatment of monies received by Livingstone might be undertaken. He referred, in particular, to the treatment of a sum of £176,000 for planned preventative maintenance works as opposed to the works which are the subject of CFS's claim.

Conclusion on Strike Out: Improper Pleading of Dishonesty

57. I accept Mr Nixon's submission that each of the allegations of procuring breach of contract, deceit, conspiracy to injure and joint tortfeasorship require the pleading of

primary facts from which an inference of the relevant dishonesty or wrongdoing may be made.

58. The PoC do not plead and positively aver any relevant primary fact which goes further than the bare fact that CFS was not paid the sums the subject of the claim by Livingstone.

59. To the extent that the matters upon which Mr Ewing sought to rely are currently pleaded they are not primary facts sufficient to satisfy the necessary test in relation to any wrongdoing by D2-3-5 in relation to the sums which are the subject of CFS's claim.

60. None of the raising of credit notes, D3's movement between employers, the amount of D3's remuneration or his re-negotiation of the charging structure mean dishonesty is a more likely inference than one of innocence or negligence in connection with the sums the subject matter of the claim.

61. Even if those matters currently not pleaded were pleaded, they would not be primary facts sufficient to pass the necessary hurdle. A company's subsequent insolvency does not mean that a company's directors or employees may be inferred to have been more likely to be dishonest than innocent or negligent in any particular respect.

62. Mr De Souza's witness evidence is not, in terms, unequivocal that sums the subject matter of CFS's claim were wrongly withheld by Livingstone. It is in any event contradicted by the terms of paragraphs 5 and 11 of the PoC which post-date it and

which disavow direct knowledge on the part of CFS of and the truth or accuracy of the irregularities complained of on the part of Livingstone or of which of the Defendants is telling the truth or was responsible for non-payment to CFS.

63. The PoC do not plead any primary facts from which an inference of dishonesty or wrongdoing by D2-3-5 in relation to the pleas of deceit, procuring breach of contract, conspiracy to injure or joint tortfeasorship in relation to the invoiced sums which are the subject of CFS's claim is more likely than one of innocence or negligence. There is therefore nothing capable of tilting any balance on the question of dishonesty or wrongdoing.

64. Accordingly, I conclude that the allegations of procuring breach of contract, deceit, conspiracy to injure and joint tortfeasorship must all be struck out against D2-3-5 pursuant to CPR 3.4(2)(a)/(b) or under the inherent jurisdiction. The pleading in these respects discloses no grounds for bringing the claims and amounts to an abuse of the court's process likely to obstruct the just disposal of the proceedings.

Strike Out: No legal basis for claim

65. Mr Nixon also contends that the claims of procuring breach of contract, breach of tortious duties, joint tortfeasorship and conspiracy to injure advanced by CFS against D2-3-5 have not been completely pleaded or do not amount to claims recognised by the law.

Procuring breach of contract

66. The circumstances in which a director can be liable for procuring a company's breach of contract are tightly circumscribed, otherwise the principles of separate legal personality and privity of contract would be substantially undermined.

67. A director can only be liable for procuring a breach of contract of their company if the director is acting outside the scope of their duties to the company: *Said v Butt* [1920] 3 K.B. 497 and *Civil Fraud* at paragraphs 3-040 to 3-043.

68. I agree with Mr Nixon's submission, which is supported by the terms of paragraph 3-042 of *Civil Fraud*, that as a matter of logic and consistency, this principle must also apply to an employee, such as D3, otherwise a director would receive greater protection than an employee.

69. The closest the PoC gets to an allegation that D2-3-5 were acting outside the scope of their duties to the company is paragraph 58(c) which pleads that D2-3-5:

> "abrogated their responsibilities as directors or senior officers to others (including each other) to decide or consider material matters in connection with the said actions"

On analysis this passage does not positively allege any form of acting by D2-3-5 at all. The plea makes no allegation of any act having occurred whether outside of the scope of D2-3-5's duties to the company or at all.

Tortious Duties

70. Paragraph 37 of PoC lists the alleged duties owed by D2-3-5 said to arise in tort.

71. Paragraph 58(e) claims that D2-3-5:

> "each assumed personal responsibility for the said misconduct and or breaches on the part of LC"

72. This seems to be an attempt to impose a *Hedley Byrne* type duty of care on D2-3-5. However, the basis of the assumption of any personal responsibility for "misconduct" or "breaches" by D2-3-5 is not pleaded.

Joint Tortfeasorship

73. Paragraph 58(d) of PoC pleads baldly that that D2-3-5 are "joint tortfeasors" with Livingstone.

74. A director cannot be a joint tortfeasor with their company if they do no more than carry out their constitutional role in its governance. As explained by Chadwick LJ in *MCA Records Inc v Charly Records Ltd* [2001] EWCA Civ 1441; [2002] B.C.C. 650 at [49]:

> "a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company – that is to say, by voting at board meetings. That, I think, is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person. Nor, as it seems to me, will it be right to hold a controlling shareholder liable as a joint tortfeasor if he does no more than exercise his power of control through the constitutional organs of the company – for example by voting at general meetings and by exercising the powers to appoint directors. Aldous LJ suggested, in *Standard Chartered Bank v Pakistan National Shipping Corp (No. 2)* [2000] CLC 133 at p. 154 (para. 21) – in a passage to which I have referred – that there are good reasons to conclude that the carrying out of the duties of a director would never be sufficient to make a director liable. For my part, I would hesitate to use the word 'never' in this field; but I would accept that, if all that a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed.

75. There is no pleaded case that D2-3-5 acted outside their constitutional roles within Livingstone.

Conspiracy to Injure

76. A director's liability for conspiring with their company will also only arise if the director acted outside their constitutional role in the company: *Digicel (St Lucia) Ltd v Cable & Wireless plc* [2010] EWHC 774 (Ch), Annex I [78].

77. No acting out is pleaded.

Conclusion Strike Out: No Legal Basis

78. I accept Mr Nixon's submissions in these respects. The claims for procuring breach of contract, joint tortfeasorship and conspiracy to injure are not pleaded as complete causes of action, as the necessary element of D2-3-5 acting outside their duties or role is missing. The claim for breach of tortious duty is also not completely pleaded, as the basis of any assumption of personal responsibility is missing.

79. These claims should therefore be struck out pursuant to CPR 3.4(2)(a) as disclosing no real grounds for bringing the claim and/or pursuant to the court's inherent jurisdiction.

Summary Judgment

80. If any of the claims for procuring breach of contract, joint tortfeasorship and conspiracy or breach of tortious duty survive the strike out application, contrary to my conclusions explained, would those causes of action and the claim for breaches of fiduciary duty in connection with an alleged Quistclose trust survive the application for

summary judgment. On the facts and the law are there more than merely fanciful prospects of them succeeding or is there any other reason for them to proceed to trial?

Deceit

81. This cause of action is premised on an assertion that D2-3-5 are personally responsible for untrue assurances that Livingstone would “pay when paid”.

82. The contractual position is that Livingstone agreed with CFS that Livingstone would pay CFS when paid corresponding sums by MCL.

83. For there to have been a deceit it would need to be established that at least one of D2-3-5 made a false statement that Livingstone would pay when paid. D3’s evidence, with which D2 and D5 agree, is that Livingstone did pay CFS when paid by MCL, but they were not paid by MCL in relation to the sums now claimed in the proceedings. This is consistent with the terms of MCL’s Defence which does not argue that the sums claimed have been paid to Livingstone.

84. The statement that Livingstone would “pay when paid” is one of future intention not one of present fact. It would only be capable of being a misrepresentation if its maker had no honest intention of “paying when paid” at the time it was made; *Chitty on Contracts* (34th edn) [9-008], [9-010]. There is no evidential basis for suggesting that any such statement was not made honestly.

85. It is also not possible to say that any such misrepresentation was the cause of any loss suffered by CFS. Loss was caused because MCL did not pay Livingstone.

Procuring Breach of Contract

86. As to the allegation that D2-3-5 procured a breach of contract by Livingstone, the first step would be to establish a breach by Livingstone of the LC Agreement in not paying when paid.

87. Mr Espin explains at paragraphs 12 to 14 of his Witness Statement that Livingstone did not breach the LC Agreement in any material respect. They did "pay when paid". If there was no breach there can have been no procurement.

88. An allegation of procuring a breach of contract against a director (or employee) would require establishing that the director was acting outside the scope of their duties to the company. There is no pleaded allegation to that effect and no evidential basis for such an allegation as Mr Espin explains in his Witness Statement.

89. An allegation of procuring breach of contract would require CFS to prove an intention to breach a contract. Mr Espin explains in his Witness Statement that he and others at Livingstone expended significant resources in resolving the dispute with MCL for the benefit of the contractors, including CFS. Further, Livingstone later put CFS directly in contact with MCL, with a view to assisting them in resolving the dispute (as CFS admits at paragraph 52 of PoC). D2-3-5 sought to protect CFS's interests not to harm them.

90. CFS's various allegations of other implied obligations owed by Livingstone in contract going beyond the "pay when paid" obligation in paragraph 54(d)-(f) are incoherent, do not amount to implied terms and have no evidential basis for their breach.

Conspiracy to injure and joint tortfeasorship

91. The allegation of conspiracy to injure or a "common design" to commit a tort has no plausible factual or evidential foundation.

92. For an allegation of conspiracy or joint tortfeasorship to be established against one or more of D2-3-5 it would need to be shown that they acted outside their constitutional role within Livingstone.

93. Again the alleged conspiracy or joint tort cannot plausibly have caused CFS loss. That loss was caused by MCL's failure to pay Livingstone.

Mr De Souza's Evidence

94. Even if Mr De Souza's evidence at trial were established to its fullest relevant extent, that is that Livingstone did receive payment from MCL in relation to sums the subject of CFS's claim, it does not give a reasonable prospect of success to any of the causes of action. In the case of the deceit claim and the conspiracy and joint tort claim because of an inability to establish loss and in the case of the procuring breach of contract, the conspiracy and joint tort claim because of the lack of any realistic prospect of establishing that D2-3-5 acted outside their roles.

Tortious duties

95. The tortious duties alleged at paragraph 37 of the PoC, even if they could be argued to exist in law, have no basis on the facts here. It would require very unusual facts for the directors of a company to assume tortious duties to their company's contractual counterpart and nothing that is pleaded or that appears from the evidence takes this situation outside the ordinary.

***Quistclose* Trust**

96. CFS's claim is that money received from MCL by Livingstone that related to work performed by CFS was subject to a *Quistclose* trust.

97. The first difficulty with this claim is that if it is correct that Livingstone did not receive any money from MCL in relation to the sums now claimed there is no relevant trust property.

98. Nowhere in the evidence of the commercial dealings between Livingstone and MCL can there be found any indication of an intention to create a trust. A *Quistclose* trust will arise when one party transfers property to another with the objective intention that the property must only be used for a particular purpose and that a trust is the intended mechanism to protect the property: see *Snell's Equity (34th edn)* at paragraph 25-033 and *Bieber v Teathers (In Liquidation)* [2012] EWCA Civ 1466 at [14]-[16]. There must be a communicated intention from transferor to transferee that the property may not be freely disposed and is to be subject to a trust; *Snell's Equity (34th edn)* at paragraph 25-034. Additionally there will usually be an intention that the property be segregated from other property.

99. There is no basis here for inferring such an objective intention from MCL's dealings with Livingstone or for inferring any obligation to segregate.

100. Oral assurances that Livingstone would "pay when paid" made by Livingstone to CFS, not by MCL to Livingstone do not amount to assurances that any particular funds would be segregated or used for a particular purpose or be subject to a trust. Such assurances were as to the timing of payments. There is nothing to suggest that CFS ever expressed concern which monies were used to pay it or whether sums received from MCL were segregated in any way. There is no express obligation to segregate in the LC Agreement.

101. Even if a *Quistclose* trust existed here, for the claim against D2-3-5 to succeed it would have to be shown that D2-3-5 agreed to be trustees personally. Such an allegation has no evidential basis at all.

Summary Judgment: Conclusion

102. To the extent that deceit, procuring breach of contract, conspiracy joint tortfeasorship and breach of tortious duty are adequately pleaded and survive strike-out and to the extent obligations arising under a Quistclose Trust found a claimed cause of action, none of these claims have more than merely fanciful prospects of success on the law and the facts and there are no other compelling reasons for the allegations to proceed to trial.