Neutral Citation Number: [2025] EWHC 25 (Ch)

Case No: BL-2022-CDF-000019

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS IN WALES

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff CF10 1ET

Date: 10/01/2025

Before :

HIS HONOUR JUDGE JARMAN KC
Sitting as a judge of the High Court
Between :

ANDREW EDWARD MCCARTHY	**Claimant**
- and -	
GRAHAM BRIAN PROCTOR	**Defendant/Part 20 Claimant**
-and-	
WILLIAM ALLAN JONES	**Part 20 Defendant**

- -
- -

Mr Fraser Campbell (instructed by **Burges Salmon LLP**) for the **Part 20 Defendant**
Mr Mark Wassouf (instructed by **Acuity Law Limited**) for the **Part 20 Claimant**

Hearing date: 16 December 2024
- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE JARMAN KC

HHJ JARMAN KC:

1. By a Part 20 claim dated 4 July 2024, the Part 20 claimant, Mr Proctor, brings claims against the Part 20 defendant, Mr Jones, in debt and in restitution. These claims are made in litigation commenced by the claimant, Mr McCarthy, against Mr Proctor, following on from a judgment which I handed down in August 2022 in previous litigation between Mr Jones and Mr McCarthy. In that judgment, I held that Mr McCarthy was liable to pay to Mr Jones damages in the sum of €1,025,000 for breach of an agreement to sell to Mr Jones rights in a villa in Mallorca. In doing so, I rejected Mr McCarthy's defence that Mr Jones had transferred his rights in the villa to Mr Proctor in or around 2010, and that Mr Proctor had then sold the beneficial ownership back to Mr McCarthy in or around May 2016 for €950,000. Accordingly, my finding was that Mr McCarthy had not been entitled, as he claimed, then to sell the villa to a third party and to retain the proceeds. Mr Proctor was not a party or a witness in those proceedings and accordingly is not bound by those findings, with which he disagrees.

2. Mr Jones on 23 July 2024 filed an acknowledgement of service indicating an intention of defending all of Mr Proctor's claims against him but has not entered a defence. Instead, by an application dated 6 August 2024 Mr Jones applies to strike out Mr Proctor's claims against him, on the basis that these are barred by the Limitation Act 1980. Under CPR 3.4(2) the court has power to strike out a statement of case if it (a) discloses no reasonable grounds for bringing a claim or (b) is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings. Pursuant to CPR 24.3 the court may give summary judgment against a claimant on the whole of the claim or on an issue if (a) it considers that the claimant has no real prospect of succeeding on the claim or issue and (b) there is no other compelling reason why the case or issue should be disposed of at trial.

3. In his claim against Mr Jones, Mr Proctor pleads that by 2010 he acquired an apartment in Dubai together with Mr Jones, which was held in the former's name but with the latter owning a beneficial interest. Mr Proctor further pleads that by an oral agreement in 2011 to which he, Mr Jones and Mr McCarthy were parties, Mr Proctor agreed to transfer his beneficial interest in the Dubai apartment, which interest was valued at €520,949, and Mr Jones agreed to owe Mr Proctor that sum, and to secure that debt on his beneficial interest in the villa, or alternatively, to transfer title to his beneficial interest in the villa to Mr Proctor as security. The claim continues that the debt increased when from 2011 Mr Jones did not make monthly repayments of the mortgage secured on the villa as agreed, and Mr Proctor paid these and other expenses. Mr Proctor pleads that Mr Jones agreed that these sums should be added to the original debt, making a total of €1,076,101.00 with interest as at the end of March 2016. The date on which this further agreement was made is not pleaded, other than to say it was before the end of March 2016. Mr Proctor claims that when none of this was paid he exercised his security and sold the villa to Mr McCarthy for €950,000, which he applied to reduce Mr Jones' debt to €144,273. He claims this sum with interest.

4. Mr Proctor has indicated that he will give credit for the €950,000 which he received from Mr McCarthy in respect of the villa; but only if he successfully defends Mr McCarthy's claim in the main proceedings. His claim in restitution arises only if Mr McCarthy's claim against him succeeds. He puts this on the basis that he applied the €950,000 which he received from Mr McCarthy in respect of the villa towards Mr Jones' debt, which

enriched Mr Jones at Mr Proctor's expense, and did so without realising that his sale of the rights in the villa to Mr McCarthy might have been invalid, as Mr McCarthy contends in the main action. He pleads that the basis of such application of the €950,000 was the validity of his sale of the rights in the villa to Mr McCarthy, and if that sale is invalid, that basis has failed.

5. Mr Jones' application was made under CPR 3.4(2)(a), supported by a witness statement of his solicitor. The basis of the application was set out in it and in the supporting witness statement, and that was that each of the claims brought by Mr Proctor against Mr Jones is time barred. Particulars were given, which may be summarised as follows. The debt is in respect of Mr Jones' acquisition of Mr Proctor's beneficial interest in the Dubai apartment in 2010. Any claim for unpaid sums in relation thereto would have accrued at the time of the acquisition in 2010 (said to be March or May). The limitation period for this claim expired in May 2016 at the latest. The mortgage payments relied on by Mr Proctor to base his further debt claim are said to have been made between 2011 and 2016. Any claim for unpaid sums in relation to those payments would have accrued by 2016, at the latest, and so the limitation period expired in May 2022 at the latest. The claim for restitution relates to the reduction by Mr Proctor of these debts, which reduction is said to have been made in May 2016, and so the limitation period for the alleged restitution claim expired in May 2022.

6. Several consent orders were made in the application dealing amongst other matters with filing of evidence and the listing of the application. Mr Proctor's solicitor has also filed a witness statement. In Mr Wassouf's skeleton argument dated 11 December on behalf of Mr Proctor opposing the strike out application, he took the point that it is well-established that if limitation is the sole basis for an application to strike out under CPR 3.4(2)(a), the application will be dismissed, relying on *Baroness Lawrence of Clarendon OBE v Associated Newspapers Limited* [2023] EWHC 2789 (KB), at [74]. Mr Campbell, for Mr Jones, in a supplemental skeleton argument filed on 12 December, conceded that point, but says the same test applies for granting summary judgment against Mr Proctor. As an alternative, he orally applied at the start of the hearing for permission to amend the application to rely also on CPR 3.4(2)(b). That was opposed and I heard each counsel on this point. It was agreed at the hearing that the application to amend would be dealt with in this judgment rather than at the outset of the hearing.

7. Mr Campbell properly acknowledges that for the purpose of the strike out application, the facts and matters pleaded by Mr Proctor against Mr Jones are assumed to be correct, whilst making no admissions as to the facts or their legal effect. Mr Campbell in his supplementary skeleton argument and in oral submissions put forward several reasons why he says the amendment to the application should be allowed.

8. Both counsel referred me to several authorities. Mr Campbell accepts that what was said in *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398 applies here to the application under CPR 3.4(2)(a). At 404D-E, Donaldson LJ said:

> "Authority apart, I would have thought that it was absurd to contend that a writ or third-party notice could be struck out as disclosing no cause of action, merely because the defendant may have a defence under the Limitation Acts. Whilst it is possible to have a contractual provision whereby the effluxion of time

> eliminates a cause of action and there are some provisions of foreign law which can have that effect, it is trite law that the English Limitation Acts bar the remedy and not the right; and furthermore that they do not even have this effect unless and until pleaded. Even when pleaded, they are subject to various exceptions, such as acknowledgment of a debt or concealed fraud which can be raised by way of reply."

9. At 404E-G, Donaldson LJ continued:

> "The matter is not in fact free from authority. It was considered in *Riches v. Director of Public Prosecutions*, (1973) 1 Weekly Law Reports, 1019, in which the earlier cases are reviewed. There the grounds put forward in support of the application to strike out included an allegation that the claim was frivolous and vexatious and an abuse of the process of the court. Accordingly, the court was able to consider evidence and it is understandable that the claim could be struck out."

10. And at 405A-B:

> "Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed."

11. Agreeing, Sir Sebag Shaw said at 407H-408B:

> "As to striking out a writ or other initiating process on the ground that it discloses no reasonable cause of action, I would regard this power as properly exercisable only when it is manifest that there is an answer immediately destructive of whatever claim to relief is made, and that such answer can and will be effectively made. In such a case it would, as I understand Lord Justice Stephenson will observe in the course of his judgment, be a waste of time and money to allow the matter to be pursued so as to give rise to what would be an abuse of the process of the court".

12. Stephenson LJ did then so observe at 408B-D:

> "There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out his claim as frivolous and vexatious and an abuse of the process of the court,

> on the ground that it is statute-barred. Then the plaintiff and the court know that the Statute of Limitation will be pleaded, the defendant can, if necessary, file evidence to that effect, the plaintiff can file evidence of an acknowledgment or concealed fraud or any matter which may show the court that his claim is not vexatious or an abuse of process and the court will be able to do in, I suspect most cases, what was done in Riches v. Director of Public Prosecutions, strike out the claim and dismiss the action."

13. In *Baroness Lawrence,* Nicklin J referred to that case and said at [75]:

> "*Ronex* recognises, at least in theory, that, if the claimant has no answer to an obviously well-founded limitation defence, the Court has jurisdiction to strike out the claim under what is now CPR 3.4(2)(b), but the more obvious route of challenge is a summary judgment application under CPR Part 24. I find it difficult to imagine circumstances in which a challenge based on limitation would have a different outcome depending on whether it was made under CPR 3.4(2)(b) or Part 24."

14. Mr Campbell points out that in the present case, Mr Jones has adduced evidence that limitation points are or will be taken in respect each of Mr Proctor's claims and the basis for doing so. Mr Proctor has responded with evidence as to why it is said that those points do not apply, including reliance upon acknowledgment and part payment on the part of Mr Jones, mistake, and that the agreements relied upon by Mr Proctor may be governed by Dubai law, which is said to have a more relaxed regime on limitation. Mr Campbell accordingly submits that the amendment he seeks relies on an additional CPR sub-rule and does not introduce any new points of substance, so there would be no unfairness in allowing the amendment. The alternatives are either that Mr Jones will make a fresh application based on the same evidence and arguments, or that Mr Jones will plead to a case which, as is clear, Mr Proctor no longer contends for. In particular, as to Mr Proctor's reliance, in opposing the strike out application, on Dubai law, no foreign law is pleaded against Mr Jones, and indeed Spanish law is pleaded as the applicable law by Mr Proctor in his defence to the main claim. The objection now relied on by Mr Proctor was not foreshadowed in correspondence or evidence prior to exchange of skeleton arguments but instead Mr Proctor has engaged with the substance of the application and has also failed to set out amendments to his pleadings to reflect his evidence on this application.

15. As for the tests to be applied, Coulson LJ in *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 at [20-21] referred to the test for exercising such powers:

> "20. The Appellant's application before the judge sought an order pursuant to r.3.4(2)(a) that the particulars of claim disclosed "no reasonable grounds" for bringing the claim and should be struck out and, in the alternative, a claim for summary judgment pursuant to r.24.2(a)(i) that the Respondent had no real prospect of succeeding on the claim. There can sometimes be procedural consequences if applications are made under the 'wrong' rule (which do not arise here) but, in a case like this (where the striking-out is based on the nature of the pleading, not

> a failure to comply with an order), there is no difference between the tests to be applied by the court under the two rules."
>
> 21. Accordingly, I do not agree with the judge's observation at [4] that somehow the test under r.24.2 is "less onerous from a defendant's perspective". In a case of this kind, the rules should be taken together, and a common test applied. If a defendant is entitled to summary judgment because the claimant has no realistic prospect of success, then the statement of claim discloses no reasonable grounds for bringing the claim and should be struck out: see *Global Asset Capital Inc v Aabar Block SARL [2017]* EWCA Civ 37 ; [2017] 4 WLR 16 at [27]."

16. Accordingly, Mr Campbell submits that the test is the same as that for summary judgment. The principles relating to summary judgment were set out by Lewison J, as he then was, in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. They may be summarised for present purpose as follows, so far as material. The court must be careful before giving summary judgment on a claim and must consider whether the claimant has a realistic, as opposed to a fanciful, chance of success, which is whether the claim is one that carries some degree of conviction and is more than merely arguable. The court must not conduct a mini-trial but must take into account not only the evidence actually placed before it on the application for summary judgment, but also evidence that can reasonably be expected to be available at trial. On the other hand it is not uncommon for an application under Part 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. 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. Those principles were applied by HHJ Saffman, sitting as a judge of the High Court, in *Dixon v Santander Asset Finance Plc* [2021] EWHC 1044 (Ch).

17. Mr Campbell submits that those principles should be applied in this case and that the issues of limitation here are shorts points of law which can and should be appropriately resolved on the evidence, given that the facts as pleaded by Mr Proctor are assumed for present purposes to be correct.

18. Mr Wassouf also filed and served a supplementary skeleton argument dated 13 December 2024, in which he opposed any reliance on CPR 3.4(2)(b). In this and in his oral submissions, he submits that this proposes a fundamental change in the nature of the application facing Mr Proctor and requires consideration of whether the claim is an abuse of the court's process, which is a different test to the one raised by CPR 3.4(2)(a). He further submits that Mr Proctor may well have adduced different evidence on the issue of abuse, and as a matter of fairness if the court proceeds to deal with this issue it must proceed on the basis that it does not have the full evidence before it.

19. He also objects to the court treating the application as one for summary judgment, and points out that CPR 24.4(5) and 24.5 contain very specific requirements for the making of applications for summary judgment, including that parties must be given at least 14 days' notice of a hearing on summary judgment (CPR 24.4(5)); that an application for summary judgment must state as such on its face (CPR 24.5(a)); that there should be

written evidence in support of it (CPR 24.5(c)); and that it should make other confirmations set out at CPR 24.5(d)-(f). He accepts that in exceptional cases, the court may treat an application for strike out as if it were made under Part 24 even though the requirements of that rule have not been complied with but submits that the court should be very slow to pursue that course. He cites Chief Master Marsh in *Saeed v Ibrahim* [2018] EWHC 3 (Ch) at [9] as follows:

> "…the court should be slow to waive the express requirements of Part 24 and practice direction 24 and should proceed with the overriding objective firmly in mind… the respondent to an application is entitled to notice of the case that is to be put forward and to have a proper opportunity to prepare for the hearing with knowledge of the basis upon which it is said the court should summarily dispose of the claim."

20. I accept that the court should be slow to waive express requirements of CPR 24 and should keep the overriding objective firmly in mind, especially, in this case, fairness and proportionality.

21. In my judgment it is fair and proportionate on this strike out application for the court to consider and if appropriate apply CPR 3.4(2)(b) and CPR 24, for the following reasons:

a) The strike out application was made as long ago as 6 August 2024 together with supporting witness evidence.

b) Although reference was then made only to CPR 3.4(2)(a), the basis of the application was put on a clear basis, namely that Mr Proctor's claims are time barred for the detailed reasons then given.

c) That is the same basis relied upon in support of CPR 3.4(2)(b) (albeit in the context of abuse rather than lack of a reasonable cause of action) and in seeking summary judgment. In each case it must be assumed for these purposes that the facts set out by Mr Proctor in his claim are correct.

d) The application and supporting evidence have allowed Mr Proctor to raise in his evidence and argument issues such as acknowledgement, part payment, mistake and the applicability of Dubai law. Although Mr Wassouf submits that further evidence may have been adduced on issues of abuse of process and summary judgment, none was identified and it is very difficult to see what this may be, given that the basis remains the same. It is not appropriate to wait to see if something turns up.

e) Mr Campbell relies on no further points in his supplemental skeleton argument or in oral submissions (other than the procedural points arising on his application to amend) than contained in his original skeleton argument.

f) Although there was exchange of witness statements and correspondence between the parties' solicitors which engaged with the limitation points, the first procedural objection to the application on the basis of CPR 3.4(2)(a) was in Mr Wassouf's skeleton argument dated 11 December.

g) The limitation points in my judgment are short points of law.

22. With that, I now turn to consider the limitation points. Apart from the reference to Dubai law, which I shall deal with in due course, it was not positively asserted by Mr Wassouf that the primary limitation periods have not expired. Instead, he relies on exceptions set out in the 1980 Act. The time limit for actions founded on simple contract is set out in section 5:

> "An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued".

23. Acknowledgement or part payment are dealt with in sections 29 and 30:

> "
>
> 29
>
> …
>
> (5) Subject to subsection (6) below, where any right of action has accrued to recover—
>
> (a) any debt or other liquidated pecuniary claim; or
>
> (b) any claim to the personal estate of a deceased person or to any share or interest in any such estate;
>
> and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of the acknowledgment or payment.
>
> …
>
> (7) subject to subsection (6) above, a current period of limitation may be repeatedly extended under this section by further acknowledgments or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment.
>
> 30 Formal provisions as to acknowledgments and part payments.
>
> (1) To be effective for the purposes of section 29 of this Act, an acknowledgment must be in writing and signed by the person making it.
>
> (2) For the purposes of section 29, any acknowledgment or payment—
>
> (a) may be made by the agent of the person by whom it is required to be made under that section; and

> (b) shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made."

24. Where the action is for relief from the consequences of a mistake, section 32 provides:

> "32 Postponement of limitation period in case of fraud, concealment or mistake.
>
> (1) …where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent."

25. Mr Proctor relies on several acknowledgments by Mr Jones of the debt and there are issues as to whether these amount to acknowledgments within the meaning of section 29 of the 1980 Act. As section 29(7) makes clear, an acknowledgment may extend the limitation period, but cannot revive a right of action once barred.

26. One such acknowledgment is an email on 14 March 2016 from Mr Jones in reply to an earlier email that day of Mr Proctor to him. Mr Proctor's email says, referring to the villa as 22 and the Dubai apartment as Saber:

> "Hi Al. Macarthy called to say he wants the mortgage on 22 payed off as he is buying a house in Mallorca .
>
> As u are aware u owe me £500k on Saber and approx 300k€ spent on 22
>
> the only option is for u to pay the mortgage off. Can u let me know if there is any other way
>
> Brian"

27. Mr Jones' reply says:

> "Hi Bri.

> The short answer is I need to sell the place. Otherwise, redeem the mortgage which would mean another mortgage to take this one out.
>
> I am away now but will be back in Cardiff on Thursday. Will have a look at the options then.
>
> Anyway we need to reconcile where you and I are with this. This is long overdue so I will have Andy pull everything together before I head for Dubai on Friday night.
>
> Al"

28. Mr Proctor says that this reply by Mr Jones amounts, or arguably amounts, to an acknowledgment of his indebtedness to Mr Proctor. Mr Jones disputes that and says that his remark that he needed to sell the villa was in response to Mr Proctor's statement that Mr McCarthy wanted the mortgage on the villa paid off. Mr Campbell relies upon *Good v Parry* [1963] 2 QB 418, where Lord Denning giving the lead judgment in the Court of Appeal, dealt with whether a letter amounted to an acknowledgment of rent due for the purposes of the predecessor of the 1980 Act, and said at 424:

> "I come back to the sentence in this case…which means "there may be some rent out-standing and it can be the subject of an agreement as soon as you present your account." Such being the meaning of it, I am quite satisfied that there is no acknowledgment, because there is no admission of any rent of a defined amount due, or of any amount that can be ascertained by calculation. The amount is uncertain altogether. Nor can I regard it as a promise to pay whatever amount may be due on taking an account. The tenant clearly reserves the right to examine it and not be bound except by separate agreement."

29. In my judgment, those observations apply neatly to the March 2016 email. Even if, which is doubtful, Mr Jones thereby accepts that something may be owing, there is no admission of a defined amount or of any that can be ascertained by calculation. Mr Jones' reference to the need for reconciliation is not a promise to pay whatever amount may be due on such reconciliation, except by separate agreement.

30. Other acknowledgments relied on relate to oral statements in cross examination made in July 2022. However those were clearly not made to Mr Proctor or his agent. It is also said that further acknowledgments were made in correspondence in 2023, but no particulars are given and the correspondence is not produced. Moreover, the debt is said to have arisen by the end of March 2016 and so even if these are acknowledgments, they will not avail Mr Proctor, as there were made after the limitation period had run. There is no realistic prospect that acknowledgements will be established which have the effect of extending the limitation periods for the purposes of the 1980 Act.

31. As for part payment by Mr Jones, Mr Proctor says that in May 2016 he told Mr Jones that he would apply the €950,000 proceeds of sale of the villa to the debt and Mr Jones did not object. Mr Wassouf submits that on those facts, Mr Jones ought to be taken to have made part payment such that the limitation period renews pursuant to section 29(5)

of the 1980 Act. He relies on *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 1 WLR 565, at 577.

32. In response, Mr Campbell submits that any such application of the €950,000 received from Mr McCarthy towards the debt, was not a payment within the meaning of section 29(5), because such must be made by the debtor (or under section 30(2) by their agent). It is not suggested that Mr Proctor was acting as Mr Jones' agent in this regard and could not realistically be so suggested. Any acquiescence on Mr Jones's part cannot retrospectively change that fact. Mr Campbell points out that in *Surrendra,* no part payment was found. Kerr J, as he then was, at 576 said:

> "A part-payment, like an acknowledgment, can only revive the cause of action and start time running afresh if it provides evidence in the form of an admission by the debtor that the debt remains due despite the passage of time. This is consonant with the authorities. In *Cottam v. Partridge* (1842) 4 Man. & G. 271 280 the doctrine of part-payment was in my view correctly described in the argument as "payment of money in part-payment of the whole debt, which is an acknowledgment of a debt being due, not in words, but by an act done." Tindal C.J. said, at p. 287: "
>
> > "The ground on which part-payment was previously held to take the case out of [the Limitation Act 1623] was, that a payment of a part was an admission of the rest by inference, and that, from such payment, a jury might conclude that the rest was due." "

33. In my judgment, the act done in this case was an act by Mr Proctor and not by Mr Jones. Silence on the latter's part cannot render an act of Mr Proctor an act of Mr Jones for the purposes of determining whether there was part payment by him within the meaning of the 1980 Act. There is no realistic prospect of Mr Proctor succeeding on this ground.

34. The next point taken on his behalf is that his claims are for the relief from the consequences of a mistake within the meaning of section 32(2)(c) of the 1980 Act so that time would not begin to run until Mr Proctor discovered the mistake or could have with reasonable diligence, discovered it. Mr Wassouf realistically accepts that for this point to succeed, mistake must be an element of the cause of action, and further accepts that Mr Proctor's claim in restitution is premised upon a failure of basis. Nevertheless, he submits that that claim is based on a mistake as to the beneficial rights in the villa.

35. In response Mr Campbell submits that it is not enough that there is a mistake in the background, it must be an element of the cause of action. He relies upon *Test Claimants in the FII Group Litigation v HMRC* [2012] UKSC 19; [2012] 2 AC 337. Mr Proctor's claim is not that he did not intend to transfer the villa to Mr McCarthy, but that he did so on a basis which did not in the event, on his case, transpire. I accept that submission, but even if there is a realistic prospect of reliance upon a mistake, the next question is whether and when Mr Proctor discovered the mistake or could have with reasonable diligence have discovered it.

36. In May 2016 there were further email exchanges between Mr Jones and Mr Proctor. Mr Campbell submits that Mr Jones clearly thereby told Mr Proctor that the villa was not Mr McCarthy's to sell, so any mistake was then discovered. Mr Wassouf submits that the proper construction of the emails was that Mr Jones was annoyed at the price agreed. The chain, in which both discuss the villa, the Dubai apartment and what was owed, included the following from Mr Jones on 6 May which refers to the villa:

> "This was never your house to sell from under me. The POA was put in your name to protect me against McCarthy which in turn was always going to protect your interest. McCarthy might be comfortable at €950k but I am not. The deal which we agreed was €1m and nothing less."

37. The exchange continued and on 9 May Mr Jones wrote "My thinking is that everything is up for discussion but it does revolve around my retaining the equity in no 22." By 15 December 2017 that year Mr Proctor instructed solicitors who wrote to Mr Jones demanding that the debt be repaid. Mr Jones wrote back in response saying that it was helpful that Mr Proctor acknowledged that the villa was owned by him, Mr Jones. He also stated that during a recent meeting Mr Proctor had acknowledged owing him money. The letter continued with a request for documents showing Mr Proctor's authority to sell the villa to Mr McCarthy, and by saying that without documentation he had no proposal to pay. It is not suggested by Mr Proctor that there was such documentation.

38. Mr Campbell submits that it is clear from the emails, with or without the December 2017 letter, that Mr Jones was disputing any debt and also disputing that the villa had been validly transferred to Mr McCarthy. At the least this was sufficient to show that by December 2017 at the latest Mr Proctor could, with reasonable diligence, have discovered the mistake upon which he now seeks to rely, that he had the right to transfer the villa.

39. I accept those submissions. In my judgment there is no realistic prospect of Mr Proctor establishing that his claims include relief from the consequence of mistake, or that he could not with reasonable diligence have discovered the mistake by December 2017 and that even with such a mistake, his claim was barred by December 2023.

40. All of this is as nothing if Mr Proctor has a realistic prospect of establishing that that his claims are governed by the laws of Dubai, where he says that the relevant limitation period is one of 15 years and that provisions in relation to such matters as acknowledgment are more lax than in England and Wales. Such a contention is not as straightforward as the other exceptions relied upon by Mr Proctor, as dealt with above, and has a somewhat curious background in these proceedings. At one point Mr Jones was asserting that Mr Proctor's claims were governed by Dubai law. In his defence in the main proceedings, Mr Proctor pleads that Spanish law is the appropriate law and does not plead otherwise in his particulars of claim against Mr Jones. He only asserts otherwise in the witness statements filed in this application. Mr Jones now says that Spanish law is appropriate.

41. The Supreme Court confirmed in *FS Cairo (Nile Plaza) LLC v Brownlie* [2021] UKSC 45; [2022] AC 995 that each party may (but is not obliged to) choose whether to plead a case that a foreign system of law is applicable to the claim. If neither party does choose the court will apply its own law to the issues in dispute. The parties are entitled, if they choose, simply to rely on the presumption that the foreign law is materially similar to

English and Welsh law. If that default rule does not apply to the present proceedings, Mr Campbell submits that Spanish law would govern the debt claim which is founded on the 2011 agreement, which Mr Proctor pleads in his particulars of claim was an oral agreement, and there is no suggestion that the agreement identified the governing law.

42. Accordingly, Article 4 of Regulation (EC) No 593/2008 (Rome I) applies, which materially provides:

> "1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows: […]
>
> (c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated […]
>
> 2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.
>
> 3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.
>
> 4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected."

43. On Mr Proctor's pleaded case, by the 2011 agreement essentially Mr Jones agreed to acquire Mr Proctor's beneficial interest in the Dubai apartment and to transfer his rights in the villa to Mr Proctor, or, alternatively, to grant him security over the same; and to make the mortgage repayments in respect of the villa. Mr Proctor pleads that as part of this agreement Mr McCarthy agreed to hold the legal title to the villa, and that he, Mr Proctor, would apply any proceeds of sale to Mr Jones' debt.

44. Mr Campbell submits that the 2011 agreement in relation to the Dubai apartment is a subsidiary part of the agreement which principally dealt with the villa. Mr McCarthy had no connection with Dubai, but the villa is the common link between all three parties. Article 4(2) of Rome I does not apply because the 2011 agreement does not have a characteristic performance, but is a multi-party agreement with several distinct obligations, so that it is not possible to isolate an obligation on one of the parties which is peculiar to the type of agreement in issue, or which marks the nature of the agreement: see *BRG Noal GP Sarl v Kowski* [2022] EWHC 867 (Ch) at [61].

45. Mr Campbell also submits that Spain is the country most closely connected with the 2011 agreement because most of the obligations under the pleaded 2011 agreement related to

the villa. The obligation which related to the Dubai apartment, that Mr Jones would acquire Mr Proctor's interest in it, involved no continuing obligations. All continuing obligations related to the villa. Mr McCarthy has had no connection with the UAE. Although Mr Jones and Mr Proctor currently reside in Dubai, they both previously resided at various times in Mallorca.

46. Mr Wassouf submits that as the 2011 agreement related to the acquisition of an interest in the Dubai apartment, so Article 4(1)(c) of Rome I applies and the law of Dubai governs the agreement. There is currently disagreement in the witness statements as to whether that law would mean that the claims are time barred. However, assuming for present purposes that Dubai law is more favourable to Mr Proctor as he claims, the question remains whether there is a realistic prospect that such law will be held to govern the agreement. On that assumption, together with the assumption that the facts pleaded by Mr Proctor are correct, it is unlikely that any further evidence will come forward and this issue should be grappled with now.

47. The 2011 agreement concerned not just one property but two. I accept the submission that the majority of the obligations thereunder related to the villa, and that the continuing obligations all, or at least almost all, related to the villa. Both Mr Proctor and Mr Jones have at least some connections with Dubai and with Mallorca, but Mr McCarthy has none with Dubai. This is underlined by the fact that relevant discussions between the parties as to sums of money were expressed in Euros.

48. Mr Wassouf submits that it is arguable that Article 4(1)(c) of Rome I applies. However, in my judgment it is clear that the 2011 agreement as pleaded by Mr Proctor is manifestly more connected with Mallorca within the meaning of Article 4(3). It would be a waste of time and money to allow Mr Proctor's claims to proceed if none of them has a realistic prospect of success because of clear limitations defences on assumed facts. That is the case here in my judgment. It is fair and just to strike out his claims.

49. I am grateful to counsel for their thorough yet focused submissions. They helpfully indicated that any consequential matters which cannot be agreed can be dealt with on the basis of written submissions. A draft order should be filed within 14 days of hand down of this judgment, together with any such submissions if necessary.