Neutral Citation Number: [2025] EWHC 448 (Ch)

Case No: BL-2020-BHM-000040

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
BUSINESS LIST

Birmingham Civil Justice Centre,
Priory Courts, 33 Bull Street, Birmingham, B4 6DS

Date: 28/02/2025

Before :

THE HONOURABLE MR JUSTICE MICHAEL GREEN

- -

Between :

(1) NEIL LESLIE HUMPHREY
(2) FIONA MARY HUMPHREY **Claimants**

- and -

(1) PAUL CRAIG BENNETT
(2) THE ESTATE OF ALISON MURPHY (DECEASED)
(3) ESPRIT LAND LIMITED
(4) ESPRIT HOMES CONSTRUCTION LIMITED

Defendants

- -

Ben Smiley (instructed by **Newhall Solicitors LLP**) for the **Claimants**
Steven Reed and Harry Samuels (instructed by **Ansons Solicitors**) for the **First and Fourth Defendants**
The Third Defendant was not represented

Hearing date: 24 January 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Michael Green:

Introduction

1. These proceedings are a derivative claim by the Claimants, Neil and Fiona Humphrey, brought with the permission of the Court on behalf of the Third Defendant, Esprit Land Limited (the "**Company**") against the First and Second Defendants, Paul Bennett and the estate of Alison Murphy (she sadly died during the course of these proceedings) and their company, the Fourth Defendant, Esprit Homes Construction Limited ("**EHCL**"). The proceedings began as long ago as 1 June 2020, and they have still not reached their first CCMC. (When referring to the "**Defendants**" in this judgment, that does not include the Company.)

2. On 24 January 2025, I heard two applications in this matter:
   (i) An application dated 17 June 2024 by the Claimants for permission to re-re-amend their Particulars of Claim. The principal proposed amendments are to introduce four new causes of action, based on the same facts already pleaded. These are claims in: (a) unjust enrichment/restitution; (b) dishonest assistance; (c) unlawful means conspiracy; and (d) relief under ss. 190 and 195 of the Companies Act 2006 ("**CA 2006**").
   (ii) An application dated 18 June 2024 by EHCL to strike out the claims against it contained in paragraphs 13 to 27 of the Re-Amended Particulars of Claim. The strike out application was made following the Supreme Court decision in *Byers v Saudi National Bank* [2024] AC 1191 ("***Byers***") which held that for a claim in knowing receipt there had to be a continuing equitable interest in the relevant property. EHCL submitted that by the operation of s.29 of the Land Registration Act 2002 ("**LRA 2002**") the Company could not have had any continuing interest in the relevant property and therefore the claim against EHCL is unsustainable.

3. At the hearing, the applications were dealt with in that order. However, it seems to be the case that the Claimants sought to introduce the new causes of action because they were concerned about their existing cause of action in knowing receipt in the light of the *Byers* decision and EHCL's threat of issuing the strike out application. So even though that application was issued the day after the Claimant's permission to amend application, it is more logical to deal with the strike out first and that is what I propose to do. First however I will set out some of the background.

4. Mr Ben Smiley appeared for the Claimants; and Mr Steven Reed and Mr Harry Samuels on behalf of Mr Bennett and EHCL. I am grateful to them all for their helpful written and oral submissions.

Background

5. The Claimants, who are married, own and control a construction company. Over the years, they had become involved with various property development projects that Mr Bennett, together with his partner, Ms Murphy, had been carrying out through various companies including the Company. In 2015, Mr Bennett and Ms Murphy invited the Claimants to acquire a 49% shareholding in the Company, in exchange for an equity

investment of £500,000, and to join them as directors of it. Together with external finance arranged by Mr Bennett and Ms Murphy the plan was to acquire and develop sites using the Company and for the Claimants' construction company to provide production and building services.

6. The first project that they embarked upon through the Company was in relation to sites in Donington le Heath and Rugby (the "**Initial Developments**"). These were developed and have been sold off: the sales at the Rugby site took place from June 2016 to February 2017; the sales at the Donington le Heath site took place from May 2017 to 2019. There is a dispute between the parties as to the profitability of the Initial Developments and the use of the funds received: it is part of the claim that the Claimants allege that Mr Bennett and Ms Murphy misappropriated and/or diverted the Company's profits from the Initial Developments to themselves and/or their other companies, and/or that they have used them to pay for their own legal advice.

7. A further development opportunity arose at Ansty Road, Coventry. This comprised (1) land at 63-73 Ansty Road / Wyken Grange Road (the "**Wyken Grange Land**") which was (according to the Defendants) landlocked; and (2) land at 61Ansty Road (the "**Ansty Road Land**").

8. In June 2018, the Company purchased the Wyken Grange Land for £107,500, with a view to its development. In late 2018, a planning application was made on behalf of the Company for a development of both the Wyken Grange Land and the Ansty Road Land (together called the "**Ansty Road Project**"). On 13 December 2018, the Council, having decided in principle that it should be accepted, referred the planning application for acceptance subject to conditions. Mr Bennett then negotiated with the owner of the Ansty Road Land for the Company to acquire it for £450,000.

9. In April 2019, a meeting took place between the Claimants, Mr Bennett and Ms Murphy at Carluccio's Restaurant in Leamington Spa. This was about the proposed Ansty Road Project but the outcome of the discussions at that meeting and subsequently are at the heart of the present dispute. The Claimants say that additional investment should not have been necessary and continued to expect that the Company would acquire the Ansty Road Land and carry out the Ansty Road Project. According to the Defendants, Mr Bennett and Ms Murphy got the opposite impression, namely that the Claimants informed them that they did not wish to be involved in the Ansty Road Project.

10. There is no dispute as to what then happened in 2020.

    (1) On or around 21 January 2020, the Wyken Grange Land was transferred (without the Claimants' knowledge or consent) to EHCL for £107,500.

    (2) On 1 April 2020, Ms Murphy's nephew, Jack Harding, purchased the Ansty Road Land for £452,000 using loans provided by two of Mr Bennett and Ms Murphy's other companies.

    (3) Planning permission was formally granted to EHCL on 2 September 2020. Then on 7 January 2021, part of the Ansty Road Land was purchased by EHCL from Mr Harding. (Mr Bennett is the sole shareholder of EHCL and he and Ms Murphy were at the time its directors.)

(4) EHCL has developed (the Claimants say profitably) the land in the Ansty Road Project with 12 houses constructed, and 11 sold as at 17 June 2024. The profits are held by the Defendants' former solicitors, Blythe Liggins LLP.

11. In April 2020, the Claimants discovered what had happened and complained. Mr Bennett and Ms Murphy then unilaterally had the Claimants removed from being recorded as directors of the Company at Companies House (in May 2020), despite the fact that no proper steps had been taken to terminate their directorships under the Company's articles of association.

12. On 1 June 2020, the Claimants issued their Claim Form, which was initially against Mr Bennett and Ms Murphy as directors of the Company for alleged breaches of duty. The Claimants applied for permission under s.260 CA 2006 to continue their derivative claim on behalf of the Company.

Procedural History

13. Before the proposed amendments the Claimants' claims are as follows:

(1) Against Mr Bennett and Ms Murphy that they acted in breach of fiduciary, statutory and tortious duties to the Company, and are liable in respect of: (1) the Company's misappropriated/diverted profits from the Initial Developments; (2) the profits from the Ansty Road Project (an opportunity which was improperly diverted away from the Company); and (3) Mr Bennett's and Ms Murphy's legal costs which were paid from Company funds.

(2) Against EHCL that it is liable in respect of: (1) the Ansty Road Project, having received the Wyken Grange Land from the Company as a result of Mr Bennett's and Ms Murphy's breaches of duty, and knowing of those breaches of duty; and (2) in respect of £27,000 which its solicitors have admitted is held on trust for the Company from the Initial Developments.

14. By an order dated 17 December 2020, HHJ Williams granted the Claimants permission to continue the derivative claim with the benefit of an indemnity from the Company in respect of their costs.

15. On 5 February 2021, HHJ Williams granted a proprietary injunction in relation to the Wyken Grange Land and Ansty Road Land against EHCL and Mr Harding. There is currently an application to discharge or vary the proprietary injunction. On 1 June 2021, HHJ Rawlings granted a freezing injunction against Mr Bennett and Ms Murphy up to a value of £2million.

16. On 1 July 2021, the Claimants issued an application to strike out the Defence and/or grant summary judgment against Mr Bennett and Ms Murphy in relation to the Ansty Road Project. Nearly a year later, on 28 June 2022, HHJ Rawlings granted summary judgment against Mr Bennett on the basis that the sale of the Wyken Grange Land to EHCL was a breach of statutory/fiduciary duty by him with no real prospect of obtaining relief under s.1157 CA 2006. An account of profits was ordered. However on 5 October 2022, HHJ Rawlings refused to grant summary judgment against Ms

Murphy and allowed her to amend her Defence to include a claim for relief under s.1157 CA 2006.

17. On 16 November 2022, HHJ Rawlings gave permission to the Claimants to add EHCL as the Fourth Defendant and for the derivative claim to be continued against it. The Claimants amended their Particulars of Claim to include their claims against EHCL.

18. Following a hearing in the Court of Appeal on 12 to 13 July 2023, the Court of Appeal's judgment was handed down on 29 November 2023 – see *Humphrey v Bennett* [2023] EWCA Civ 1433. Snowden LJ gave the main judgment in which he allowed Mr Bennett's appeal against summary judgment and dismissed the Claimants' cross-appeal against the refusal of summary judgment in relation to Ms Murphy.

19. While the appeals were pending, the proceedings were stayed. This accounts for quite a lot of the delay in getting on with the proceedings. There was due to be a CCMC in June 2024, but this was superseded by the applications before me.

20. On 15 April 2024, HHJ Rawlings refused Mr Bennett's application to vary or set aside the freezing order against him. On 31 October 2024, Zacaroli LJ refused permission to appeal that order to the Court of Appeal.

The Strike Out Application

21. EHCL applies to strike out paragraphs 13 to 27 of the Re-Amended Particulars of Claim insofar as those paragraphs include claims against it (there are also claims against Mr Bennett and Ms Murphy in those paragraphs). Even though it is not clearly pleaded, the thrust of the claim against EHCL is in knowing receipt in relation to the profits of the Ansty Road Project which are said to be held on constructive trust for the Company.

22. Mr Reed, on behalf of EHCL, relied almost exclusively on the conclusive statement by the Supreme Court in *Byers* as to the requirement for there to be a continuing equitable interest in in the property transferred in order to found a claim in knowing receipt. He argued that the effect of s.29 LRA 2002 was to extinguish any equitable interest in registered land and that this was recognised and accepted by the Supreme Court in *Byers*. Accordingly, as the Wyken Grange Land and the Ansty Road Land were acquired by EHCL for valuable consideration, any equitable interest that the Company may have had in them would be overridden by the registered transfers to EHCL.

23. Mr Smiley, on behalf of the Claimants, said that the high threshold for a strike out was not met in relation to this part of the case. Accepting, as he was bound to in the light of *Byers*, that the Claimants would have to prove a continuing equitable interest in the Lands acquired by EHCL to establish their claim in knowing receipt, he relied on the following:

    (1) The Company was in "*actual occupation*" of the Wyken Grange Land immediately prior to the transfer to EHCL and so its equitable interest was protected under s.29(2)(a)(ii) and Paragraph 2 of Schedule 3 to the LRA 2002;

(2) S.29 LRA 2002 only operates to postpone, not extinguish, equitable interests and *Byers* did not actually deal with the specific wording of s.29, as it was not concerned with a transfer of registered land;
(3) EHCL was not a purchaser in good faith and so cannot rely on s.29 LRA 2002;
(4) In any event the strike out application was too broad and covered claims that were not in knowing receipt;
(5) As this is a developing area of law, it should be left to trial and decided on the actual facts.

24. In my view, EHCL has not satisfied me that it is appropriate to strike out all of paragraphs 13 to 27 of the Re-Amended Particulars of Claim and the claims in knowing receipt should be allowed to proceed to trial. I have concluded this for the reasons set out below.

25. The principles in relation to the Court's power to strike out a claim are well-known and do not need to be set out in detail. I would however emphasise the following:

(1) It may be appropriate to decide a "*short point of law or construction*" (see *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), where Lewison J, as he then was, summarised the principles in relation to summary judgment under CPR 24.2, but which are equally applicable, it seems to me, for a strike out under CPR3.4(2));
(2) However, it may not be appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (see *Farah v British Airways,* The Times, 26 January 2000, CA referring to *Barrett v Enfield BC* [2001] 2 A.C. 550; [1989] 3 W.L.R. 79, HL). Jonathan Parker LJ in *Hudson v HM Treasury* [2003] EWCA Civ 1612 at [66] cautioned about taking this principle too far because "*claims that are plainly and obviously bad should generally be struck out.*"

(3) Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (see *Soo Kim v Youg* [2011] EWHC 1781 (QB)).

26. As I have said, *Byers* was not concerned with registered land; rather the Supreme Court was considering the transfer of shares and the effect of that under foreign law. As Saudi Arabian law governed the transfer and that law provided that any equitable proprietary interest in the shares would be extinguished or overridden by the transfer, that was fatal to the knowing receipt claim which required there to be a continuing equitable interest in the shares transferred.

27. Mr Reed submitted that Lord Briggs, who gave one of two lead judgments, dealt with s.29 LRA 2002 and held that a transfer of registered land for valuable consideration within s.29 would override any equitable interests in the land. He said that Lord Briggs considered s.29 LRA 2002 in [86] to [91] of *Byers* but I do not see that he did. In those paragraphs, Lord Briggs dealt with a Privy Council authority on a differently worded provision that had a proviso that does not appear in s.29 LRA 2002 – *Arthur v Attorney General of the Turks and Caicos Islands* [2012] UKPC 30. He then disapproved of a first instance authority of Henderson J, as he then was, in *Haque v Raja* [2016] EWHC 1950 (Ch) where, based on a concession, that Judge appeared to hold, albeit obiter,

that a claim in knowing receipt was not dependent on a continuing equitable interest. However there was no consideration of the wording in s.29 LRA 2002.

28. Mr Reed also said that Lord Briggs had endorsed Matthew Conaglen and Amy Goymour's chapter on *Knowing Receipt and Registered Land* in Charles Mitchell (Ed.), *Constructive and Resulting Trusts* (2010) which examined the effect of s.29 LRA 2002 on claims in knowing receipt and concluded that if a transferee was within s.29 LRA 2002 it would "*with one strike…wipe[] out both the beneficiaries' property rights, and also the personal claim in knowing receipt, as the personal claim is parasitic upon that property right*." However, in [88] of *Byers*, Lord Briggs referred to the chapter, without quoting from it, and said merely that it "*powerfully supported*" the conclusion reached by the Privy Council in the *Arthur* case, albeit that that conclusion was based on a concession. I do not see that Lord Briggs was thereby endorsing the whole of the chapter.

29. Indeed, I think that the Supreme Court in *Byers* specifically refrained from interpreting the meaning and effect of s.29 LRA 2002 as it was not in issue before them. At [174], Lord Burrows, who agreed in the dismissal of the appeal but by somewhat different reasoning to Lord Briggs, said:

> "I have derived no assistance from considering sections 26 and 29 of the Land Registration Act 2002. The question as to whether a knowing receipt claim can be brought where there has been registration of title under that Act ultimately turns on statutory interpretation of those particular provisions. Although our decision in this case will be of central relevance in answering that question, there is no need for us to go on to decide it in this case and, like the Court of Appeal … I therefore prefer to say nothing further about it."

30. It is important then to focus on the wording of s.29 LRA 2002. It says as follows (emphasis added):

> "(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration <u>has the effect of postponing to the interest under the disposition</u> any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.
>
> (2) For the purposes of subsection (1), the priority of an interest is protected—
>
> (a) in any case, if the interest—
>
> > (i) is a registered charge or the subject of a notice in the register,
> >
> > (ii) falls within any of the paragraphs of Schedule 3, or
> >
> > (iii) appears from the register to be excepted from the effect of registration, and
>
> (b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate.

(3) Subsection (2)(a)(ii) does not apply to an interest which has been the subject of a notice in the register at any time since the coming into force of this section."

31. The notion of "*postponement*" of an interest is new. It did not appear in the predecessors of s.29 LRA 2002. There are no authorities on its meaning and effect. To my mind it imports the sense of the interest remaining in existence but not having any priority over the interest acquired by the transferee of a registered disposition. It certainly does not look like an extinguishment of the interest. It is possible that that means that there is an insufficient proprietary interest such that it would cut off any claim in knowing receipt. But I do not think that it is appropriate to decide that question on an application to strike out, particularly where there has not been full argument on that point. In *Byers*, the premise was that the proprietary equitable interest in the shares had been "*extinguished or overridden*" (see for instance Lord Hodge at [1]). As I have said, it may be that "*postponement*" has the same effect as an interest being "*overridden*" but now is not the time for that to be determined.

32. The other potential arguments that the Claimants have in relation to s.29 LRA 2002, namely that the Company was in "*actual occupation*" within the meaning of paragraph 2 of Schedule 3 of the LRA 2002 or that there is imported into s.29 a good faith requirement which EHCL might not satisfy, are further reasons why strike out would be inappropriate in this case. The Claimants adduced a witness statement from a Mr Dale Payne, the previous owner of 61 Ansty Road, and he gave evidence as to certain factors that might establish that the Company was in actual occupation of the Wyken Grange Land both before and after EHCL's purchase of it in January 2020. I cannot determine those factual matters on this application.

33. I will not therefore strike out the knowing receipt claim.

34. The Claimants drew my attention to the fact that within paragraphs 13 to 27 of the Re-Amended Particulars of Claim there were facts pleaded that went to support other claims against Mr Bennett and Ms Murphy and there was also an admitted claim against EHCL in relation to the £27,000 held by its former solicitors on trust for the Company (paragraph 26 of the Re-Amended Particulars of Claim). On any view these paragraphs should not be struck out.

35. I do however agree with Mr Reed that paragraphs 21 to 23 of the Re-Amended Particulars of Claim should not have been pleaded and should preferably be removed. They contain a summary of the decisions of HHJ Rawlings on the summary judgment application and criticism of the Court of Appeal judgment whereby he was overturned. These have no place in a pleading as they are submission rather than a summary of the facts upon which the Claimants rely to found their claims.

The application to re-re-amend the Particulars of Claim

36. The objective of EHCL is to extricate itself from these proceedings. But because of my decision above in relation to the knowing receipt claim against EHCL which will now be going to trial, the inclusion of the proposed new causes of action against it, based on the same facts, will not add greatly to the burdens at trial. Of course, if they

are bad in law and that can be determined at this stage, they should not be allowed to go ahead and be incorporated into the claim.

37. There are some typographical and uncontentious amendments that I do not need to deal with. The focus of the argument was all around proposed new paragraphs 26A to 26D of the draft Re-Re-Amended Particulars of Claim, whereby the Claimants seek to insert additional and/or alternative causes of action in relation to the Ansty Road Project. This was because of a fear over the plight of their knowing receipt claims in the light of *Byers*, and also as a result of the change in their counsel team.

38. As to the test to be applied in relation to amendments, both parties referred me to the decision of Lambert J in *Pearce v East and North Hertfordshire NHS Trust* [2020] EWHC 1504 (QB) at [10] where she set out the now familiar distinctions between "*late*" and "*very late*" amendments, the latter threatening a trial date and perhaps being subject to different considerations under the overriding objective. Even though the Claim Form was issued over four years ago and this is the fourth iteration of the Claimants' case, there has still not been a CCMC and no one was suggesting that these proposed amendments should be considered "*very late*". The Defendants will have every opportunity to deal with them should they be allowed to go forward.

39. The one area of slight dispute between the parties related to the extent to which the proposed amendments needed to be supported by some evidence to establish that the pleaded case has a credible factual basis. The Defendants referred to Popplewell LJ's judgment in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 ("***Kawasaki***") at [18] where he said as follows:

> "(1) It is not enough that the claim is merely arguable; it must carry some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at paragraph 8; *Global Asset Capital Inc v Aabar Block Sarl* [2017] EWCA Civ 37; [2017] 4 WLR 163 at paragraph 27(1).
> (2) The pleading must be coherent and properly particularised: *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204 at paragraph 42.
> (3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: *Elite Property* at paragraph 41."

Emphasis was placed on the last paragraph as the Defendants say that no such evidence has been adduced by the Claimants to support their proposed amendments.

40. The Claimants prefer to rely on what the Court of Appeal has since said in *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs* [2023] 1 WLR 4335 ("***CNM***"). There the majority consisting of Sir Geoffrey Vos MR and Newey LJ held that while permission should not be granted if the proposed claim would have no real prospect of success (see [69]-[70]), the Court should not conduct a mini-trial or attempt to evaluate the weight of the evidence that would be considered at trial. Instead the focus should be on the pleaded case and factual averments should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable (see [73], relying on *Okpabi* [2021] 1 WLR 1294). The general rule is that, save in respect of "*very late*"

amendments, the perceived strength of the case is not normally a factor to be taken into account (see [74]-[77]). Males LJ, who dissented, did not disagree with these principles (see [48]-[49]).

41. Mr Smiley said that it was significant that *Kawasaki* was not referred to in *CNM,* indicating that it did not represent the current state of the law. However *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204 at [42] was referred to with apparent approval in both *Kawasaki* and *CNM,* in particular where it said that an amended pleading must be coherent and contain the properly particularised elements of the cause of action relied upon.

42. This does not strike me as a very fruitful debate. It is accepted that the proposed new causes of action must have a real prospect of success to be allowed to go forward. In some cases that may require an applicant to adduce evidence to show that factual averments have a credible basis. In this case however, the Claimants are essentially using the existing facts pleaded in their current Re-Amended Particulars of Claim as the basis for their new causes of action. In those circumstances, it seems to me that it is appropriate to accept that those facts are in play at the trial and the only question on this application is whether the new causes of action are adequately pleaded and have legal coherence. (The Defendants have not sought any further information in relation to the proposed amendments, probably because their case is that they are not sustainable as a matter of law.)

43. There is one further general point that the Defendants rely on. That is that this is a derivative claim and that therefore permission is also required under s.263 CA 2006 in order to proceed with the new causes of action on behalf of the Company. That would therefore involve the question as to whether a person acting in accordance with their director's duties under s.172 CA 2006 would seek to continue such a claim. If they would not, permission <u>must</u> be refused: s. 263(2)(a) CA 2006. However, it is unlikely, it seems to me, that if a cause of action gets past the real prospect of success threshold, and there is permission already granted to take the existing claim to trial, that permission will not be granted under s.263 CA 2006.

(1) Paragraph 26A – Restitution/unjust enrichment

44. The proposed new paragraph 26A in the draft Re-Re-Amended Particulars of Claim reads as follows:

> "Further or alternatively, [EHCL] was unjustly enriched at the expense of the [Company]. The transfer of the legal title to 63-73 Ansty Road was void or voidable, for want of authority, as the said transfer was made in breach of fiduciary duty for the reasons pleaded at paragraph 19 above. The [Company] seeks and is entitled to restitution from [EHCL] of the benefits received from that transfer. Those benefits include the profits realised from the Ansty Road Project."

45. There is no doubt that this is a compressed plea of unjust enrichment and that it lacks particularisation. It does refer back to paragraph 19 in which the Claimants' core factual case on the breach of fiduciary duties by Mr Bennett and Ms Murphy in relation to the Ansty Road Project is set out. Insofar as the Defendants are now complaining about a

lack of particularisation, Mr Smiley said that they could have sought to engage further on the proposed amendments and requested further information, instead of just refusing to agree them and fighting this application. He further maintained that the requisite elements of an unjust enrichment claim – that: (a) EHCL was enriched; (b) at the expense of the Company; (c) the enrichment was unjust; and (d) there is no relevant defence – were adequately pleaded.

46. Mr Samuels made submissions on this part of the application on behalf of the Defendants and he articulated the basis of their opposition to this plea of unjust enrichment. He divided his submissions into four issues:

    (i) Inadequate pleading;
    (ii) Doubtful legal basis for the claim;
    (iii) Defences that will plainly defeat the claim; and
    (iv) Lack of evidence.

47. As to the pleading itself, Mr Samuels said that there was a bare plea of enrichment that did not specify what the "*benefits received from the transfer*" are alleged to be. The Claimants seemed to be saying that those benefits included the profits from the Ansty Road Project but they do not plead unjust enrichment in relation to the Ansty Road Land which was an integral part of the development to produce those profits. Furthermore Mr Samuels said that there are no details as to the alleged enrichment being "*at the expense of*" the Company and that this is significant as EHCL apparently paid full market value for the Wyken Grange Land.

48. Mr Samuels' submissions on the law of unjust enrichment concentrated on two aspects: (1) that a claim in unjust enrichment based on want of authority in the context of a disposition of registered land has been doubted in the authorities; and (2) that an account of profits is not a remedy for unjust enrichment.

49. As to want of authority, Mr Samuels referred to some doubts expressed in *Goff & Jones: The Law of Unjust Enrichment (10th Ed)* ("***Goff & Jones***") (see for instance paras. 8-47 and 8-48) as to whether a personal unjust enrichment claim based on want of authority would be available as against the transferee of a registered disposition of land. But even *Goff & Jones* accepted that this has yet to be tested and there are other passages referred to by Mr Smiley that acknowledge that this is a developing area of law – see for instance paragraphs 8-120 to 8-138 dealing with a strict liability personal claim in unjust enrichment against a recipient of misapplied trust assets. Unsurprisingly Mr Smiley pointed out that there was a whole chapter in *Goff & Jones* on "*Lack of Consent and Want of Authority*" indicating the unsuitability of resolving these complicated legal issues on a summary basis. Mr Smiley also referred to: *Relfo Ltd (In Liquidation) v Varsani* [2012] EWHC 2168 (Ch), Sales J as then was at [86] to [88]; and *Clegg v Pache* [2017] EWCA Civ 256 at [82]-[91], both of which built on what Lord Nicholls said in [4] of *Criterion Properties v Stratford UK Properties* [2004] 1 WLR 1846. In *Byers*, Lord Burrows expressly left open the possibility of an unjust enrichment claim as an alternative to the knowing receipt claim (see [199]-[200]).

50. Mr Samuels argued that if an unjust enrichment claim is available in this situation, it would cut across the established principles of the knowing receipt fault-based liability cases and also the careful balance struck for registered land in the LRA 2002.

Furthermore he said that it would disrespect the distinction drawn in the authorities between a misuse of power and acting in excess of power. The former might only render a transaction voidable – see for example, *Pitt v Holt* [2013] 2 AC 108 – and in this case that was all that was being alleged and it would therefore be insufficient to show "*want of authority*".

51. I do not think that the Defendants can show at this stage that the proposed unjust enrichment claim is unarguable as a matter of law. It is a somewhat untested and clearly developing area of law on which there has been much academic discussion. Mr Smiley commented that the in-depth analysis that Mr Samuels performed on this claim, while admirable, only went to show that it is wholly unsuitable for determination at this stage of the proceedings. It seems to me that any decision as to whether such a claim exists should be based on the actual facts as found at a trial.

52. As indicated above, Mr Samuels also questioned whether it is possible to claim profits on a restitutionary claim, but it seems to me that the prayer for relief includes "*damages or equitable compensation or an indemnity*" and that the appropriate and available remedy if the claim succeeds should be determined at or after the trial.

53. Paragraph 26A is thinly pleaded but the necessary elements of an unjust enrichment claim are there and what the Claimants are alleging is reasonably clear. Mr Bennett and Ms Murphy effectively transferred the Ansty Road Project from the Company to their own company EHCL, thus depriving the Company of the opportunity of pursuing the Ansty Road Project. That is hotly disputed on the facts but it seems to me that it is properly arguable that, on those facts, EHCL has been unjustly enriched at the expense of the Company, which has lost the possibility of making profits from exploiting the Ansty Road Project. If there are matters that the Defendants are unclear about, they can ask for further information.

54. Plainly EHCL will raise defences to the claim and two have been identified at this stage: the impossibility of counter-restitution; and change of position. The former is a little difficult to understand as most of the development has been sold on to third parties and there can presumably be no question of the land itself being restored to the Company. As to the latter, EHCL will certainly be able to plead change of position by way of its Defence, but this will no doubt be met in due course by the Claimants' Reply containing their answer to this defence. It is clearly premature to determine anything in relation to that defence and it cannot be said that the Claimants have no real prospect of successfully overcoming such a defence.

55. The final matter concerns the lack of evidence in support of this claim. As I have said above, this relies on the existing factual averments pleaded in the Re-Amended Particulars of Claim, and given that it is accepted that those facts are sufficiently pleaded to be able to take them to trial, it would be odd to require the Claimants to provide any evidence in support of them for the purposes of pleading this claim.

56. Accordingly I am satisfied that there is a real prospect of the Claimants succeeding on their proposed unjust enrichment claim and that it is adequately pleaded. I give permission for them to amend in this respect.

(2) Paragraph 26B – Dishonest Assistance

57. The new cause of action in dishonest assistance is pleaded in proposed paragraph 26B. The claim is based on EHCL's alleged dishonest assistance of Mr Bennett and Ms Murphy's breaches of fiduciary duties owed to the Company.

58. The Claimants rely on certain other paragraphs of the Re-Amended Particulars of Claim in support of this claim, such as the breaches of fiduciary duties by Mr Bennett and Ms Murphy in paragraph 19 and the allegation of a diversion of the Company's opportunity to develop the Ansty Road Project in paragraph 11. Particulars of EHCL's alleged dishonesty are given in paragraph 26B(iii). This includes that Mr Bennett and Ms Murphy's knowledge, which is attributable to EHCL, was that: (a) the Claimants had not consented to the transfer of the Wyken Grange Land; (b) that transfer was for below market value; (c) the transfer was not in the Company's interests; and (d) the transfer was in their own interests (as shareholders of EHCL). Mr Smiley submitted that while those allegations may be disputed as a matter of fact, they can only be decided at a trial which is going to take place anyway.

59. The Defendants' attack on this claim focussed on the adequacy of the pleading of dishonesty. More particularly, Mr Reed, on behalf of the Defendants, submitted that the allegation that the Claimants "*had not consented*" to the transfer of the Wyken Grange Land necessarily depends on an allegation that not only was the Claimants' consent required but also that EHCL knew that it was required and acted deliberately contrary to that requirement. He said that those other allegations had not been pleaded and therefore it was defective in some way.

60. In my view this is not a fatal objection to the pleading as it stands. It is at least implicit in the allegation of a lack of consent that such consent was required. Furthermore the allegation is that the transfer was effected "*despite that knowledge of the Claimants' lack of consent*" which carries with it the allegation that EHCL, through the attribution of Mr Bennett and Ms Murphy's knowledge, knew that consent was required and yet it acted in the specific knowledge that such consent had not been given. I do not think that such a pleading is consistent with mere negligence, rather than dishonesty, on the part of EHCL.

61. Mr Reed also submitted that the Claimants make no allegation in relation to the Ansty Road Land but they are claiming an account of the profits of the entire Ansty Road Project which could only have been achieved with the benefit of the Ansty Road Land that provided the access to the development site. However, as I said above, the Claimants do refer to the exploitation of the Ansty Road Project opportunity that they allege was owned by the Company – see paragraphs 11 and 26B(iii)(g) of the draft Re-Re-Amended Particulars of Claim. While, as I said during the hearing, this is a crisp pleading of dishonesty, in my view it is adequate at this stage as a matter of law and particularisation to be allowed.

62. One further point raised by Mr Reed is as to the remedy claimed by the Claimants for dishonest assistance. He said that the remedy for dishonest assistance is not a proprietary remedy or for any sort of constructive trust. I think this is accepted but I am not sure what he was driving at. If the Claimants succeed on this claim they may be entitled to an account of profits made by EHCL arising from its dishonest assistance or

they could receive equitable compensation. I do not think that the Claimants are claiming a proprietary remedy.

63. I will therefore give permission to amend to include the dishonest assistance claim set out in paragraph 26B.

(3) Paragraph 26C – Unlawful Means Conspiracy

64. Like the previous two causes of action, paragraph 26C, which asserts a claim in unlawful means conspiracy, relies on the factual averments that have already been pleaded and which underpin all of the claims that are made. The further elements of unlawful means conspiracy are a combination or agreement between EHCL and one or more other parties to injure the Company together with an intention on their part to injure the Company. Mr Reed submitted that these elements are inadequately pleaded such that they should effectively be struck out.

65. As to the alleged combination or agreement between the Defendants, Mr Reed said that this was pleaded in the most generalised way and that it was not supported by evidence. Similarly he said that the pleading of the Defendants' intention to injure the Company purely builds on the allegation of a combination or agreement to injure the Company and the unlawful means deployed, namely by the breaches of fiduciary duties by Mr Bennett and Ms Murphy in relation to the Ansty Road Project.

66. Even though the pleading is again rather thin, I think there is enough there to allow it to go forward. The case is reasonably clear and I do not think that the Defendants can fairly say that they do not understand the case they have to meet. The Claimants are saying that Mr Bennett and Ms Murphy conspired together with their company, EHCL, to injure the Company by transferring the Wyken Grange Land without seeking the consent of the Claimants, at an undervalue, and thereby depriving the Company of the opportunity of taking to fruition the development of the Ansty Road Project. I do not consider that any more evidence is required to be adduced by the Claimants in this regard at this stage.

67. Accordingly I give permission to the Claimants to amend in relation to the unlawful conspiracy claim.

(4) Paragraph 26D – Section 190 CA 2006

68. This claim is somewhat different to the others. It is based on ss.190 and 195 CA 2006. S.190 CA 2006 is headed "*Substantial property transactions: requirement of members' approval*". It relevantly provides as follows:

> "(1) A company may not enter into an arrangement under which–
>
> (a) a director of the company or of its holding company, or a person connected with such a director, acquires or is to acquire from the company (directly or indirectly) a substantial non-cash asset, or

(b) the company acquires or is to acquire a substantial non-cash asset (directly or indirectly) from such a director or a person so connected,

unless the arrangement has been approved by a resolution of the members of the company or is conditional on such approval being obtained. For the meaning of "substantial non-cash asset" see section 191."

69. A "*substantial non-cash asset*" is defined in s.191 CA 2006 as one whose value exceeds 10% of the company's asset base and is more than £5,000, or exceeds £100,000. There is no dispute that the Wyken Grange Land satisfies that definition.

70. EHCL was a "*person connected with*" a director of the Company since Mr Bennett was at the material time the sole shareholder of EHCL. This satisfies the definition which is set out in s.254(2) CA 2006.

71. Sections 192 to 194 CA 2006 set out certain exceptions to s.190, but none are applicable in this case. Accordingly the transfer of the Wyken Grange Land from the Company to EHCL required the prior approval of the members of the Company. As this was not obtained, the transaction was effected in breach of s.190 CA 2006.

72. The consequences of such a breach are provided for in s.195 CA 2006 as follows:

"(1) This section applies where a company enters into an arrangement in contravention of section 190 (requirement of members' approval for substantial property transactions).

(2) The arrangement, and any transaction entered into in pursuance of the arrangement (whether by the company or any other person) is voidable at the instance of the company, unless –

(a) restitution of any money or other asset that was the subject matter of the arrangement or transaction is no longer possible,

(b) the company has been indemnified in pursuance of this section by any other person for the loss or damage suffered by it, or

(c) rights acquired in good faith, for value and without actual notice of the contravention by a person who is not a party to the arrangement or transaction would be affected by the avoidance.

(3) Whether or not the arrangement or any such transaction has been avoided, each of the persons specified in subsection (4) is liable–

(a) to account to the company for any gain that he has made directly or indirectly by the arrangement or transaction, and

(b) (jointly and severally with any other person so liable under this section) to indemnify the company for any loss or damage resulting from the arrangement or transaction.

(4) The persons so liable are–

(a) any director of the company or of its holding company with whom the company entered into the arrangement in contravention of section 190,

(b) any person with whom the company entered into the arrangement in contravention of that section who is connected with a director of the company or of its holding company,

(c) the director of the company or of its holding company with whom any such person is connected, and

(d) any other director of the company who authorised the arrangement or any transaction entered into in pursuance of such an arrangement.

(5) Subsections (3) and (4) are subject to the following two subsections.

(6) In the case of an arrangement entered into by a company in contravention of section 190 with a person connected with a director of the company or of its holding company, that director is not liable by virtue of subsection (4)(c) if he shows that he took all reasonable steps to secure the company's compliance with that section.

(7) In any case–

(a) a person so connected is not liable by virtue of subsection (4)(b), and

(b) a director is not liable by virtue of subsection (4)(d),

if he shows that, at the time the arrangement was entered into, he did not know the relevant circumstances constituting the contravention.

(8) Nothing in this section shall be read as excluding the operation of any other enactment or rule of law by virtue of which the arrangement or transaction may be called in question or any liability to the company may arise."

73. So this is what is pleaded in paragraph 26D of the draft Re-Re-Amended Particulars of Claim. The Claimants, on behalf of the Company, are seeking to hold the Defendants to account under s.195(3) and (4) CA 2006 "*for any gains made directly or indirectly by the transfer of the [Wyken Grange Land], which includes the profits resulting from the Ansty Road Project and…to indemnify the [Company] for any losses suffered*."

74. The Defendants object to this claim but not on the grounds that it is inadequately pleaded. Instead Mr Reed argued as follows:

(a) That a claim under s.195(3) CA 2006 cannot be brought by way of derivative action because it is not based on a breach of duty by the directors of the Company;

(b) That the transaction has in any event been affirmed by the members of the Company by a resolution purportedly passed on 8 January 2025; and

(c) That the remedy being sought is wrong in law.

75. Taking each in turn, Mr Reed relied on the wording of s.260(3) CA 2006 for his proposition that this claim cannot be brought by way of derivative action. Section 260(3) CA 2006 states that a derivative claim may only be brought in respect of *"a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company"*. He maintained that a claim under s.195(3) CA 2006 arises under statute because a company has entered into a transaction in breach of s.190 CA 2006, and not because its directors have acted in breach of duty or are in default or have misconducted themselves.

76. However I think it is at least arguable that s.260(3) CA 2006 should be construed broadly. Indeed it specifically covers not only breaches of duty, but also any default by the directors. In failing to cause the Company to obtain the members' prior consent to the transaction, the directors involved in the transaction with a potential conflict in benefitting themselves at the expense of the Company are likely to be in breach of their duties or in default in putting the Company in breach of s.190 CA 2006. It also seems to me that s.195(3) CA 2006 contemplates the Company, or its liquidator or administrator, as the only claimant for such an account or indemnity. Where the allegedly wrongdoing Defendants are the majority of the members of the Company, such a claim can only be brought by way of derivative action, or possibly by way of an unfair prejudice petition under s.994 CA 2006. Furthermore, subsections 195(5)-(7) CA 2006 make liability on the directors fault-based, thus indicating that there has to have been some default or breach within s.260(3) CA 2006.

77. Therefore I cannot rule out this claim at this stage on the basis that there is no real prospect of the Claimants successfully arguing that a claim under s.195(3) CA 2006 can be brought by way of derivative action.

78. Mr Reed's second point was that the transaction had been affirmed by purported resolutions passed on 8 January 2025. There was a meeting on that day at which the Claimants were represented by their solicitor, Mr Michael Baxendale, who held a proxy for each of them. The first two resolutions were for the removal of the Claimants as directors of the Company. The fourth resolution was to approve the transfer by the Company of the Wyken Grange Land to EHCL that had taken place 5 years earlier on 23 January 2020. I queried whether these resolutions had even been validly passed as the voting was recorded to be on a show of hands, not a poll. Arguably there would then have been an equality of votes, 2 for and 2 against, and so no majority in favour of the resolution.

79. In any event, I do not see that these resolutions can change anything and certainly not for the purposes of the application to amend. They are, of course, wholly self-serving and it is arguable that, with his conflict of interest, Mr Bennett should not have his vote counted at all. But specifically in relation to the claim under ss.190 and 195(3) CA 2006, s.196 CA 2006 becomes highly relevant. It states as follows:

> "Where a transaction or arrangement is entered into by a company in contravention of section 190 (requirement of members' approval) but, within a reasonable period, it is affirmed–
>
> (a) in the case of a contravention of subsection (1) of that section, by resolution of the members of the company, …

the transaction or arrangement may no longer be avoided under section 195."

80. This then makes clear that, even if the resolution is valid, it would only prevent the Company from avoiding the transaction under s.195(2) CA 2006. On the face of it, such a resolution does not affect the remedies under s.195(3) CA 2006. Furthermore, as Mr Smiley pointed out, it can only have any effect if it takes place within a reasonable period of time from the transaction, but in this case there has been a delay of several years.

81. Accordingly I do not think that the 8 January 2025 resolutions can affect whether the claim ought to be allowed to proceed. It is also unnecessary to deal with the authorities I was taken to on whether certain conflicted members would be allowed to vote on such a resolution. I am not ruling out the Defendants' reliance on the resolutions at trial. But they have no significance to the issues I need to decide on this application.

82. The final point is as to the remedy the Claimants are seeking. Mr Reed submitted that the remedy sought wrongly conflates s.195(3)(a) and (b) when they are quite different. He also said that it was wrong for the Claimants to be seeking an account of "*the profits from the Ansty Road Project*" as s.195(3)(a) talks of "*any gain…made…by the transaction*" and the transaction relied on was the transfer of the Wyken Grange Land. But again, this can be argued at trial and is not such a fundamental objection to this claim that I should not allow it to go forward.

83. Accordingly I will allow the claim under ss.190 and 195 CA 2006 to go ahead and permit the relevant amendments to be made.

Conclusion

84. For the reasons I have set out above:
    (1) I allow the Claimants' proposed amendments to the Re-Amended Particulars of Claim as pleaded in the draft Re-Re-Amended Particulars of Claim attached to the application notice; I also grant permission as necessary under s.263 CA 2006 to continue those claims as derivative claims on behalf of the Company on the same terms as previously ordered by the Court;
    (2) I dismiss the Defendants' application to strike out paragraphs 13 to 27 of the Re-Amended Particulars of Claim.

85. I would ask the parties to agree a suitable form of order to reflect the above disposition of the applications. If there are any consequential matters that cannot be agreed, I would suggest that these would best be dealt with in writing with short written submission.