Neutral Citation Number: [2021] EWHC 1578 (Comm)

Case No: CL-2020-000541

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2021

Before :

CHARLES HOLLANDER QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

(1) ANDORO TRADING CORP **(2) UROCO LIMITED**	**Claimants**
- and -	
(1) DOLFIN FINANCIAL (UK) LTD **(2) DOLFIN ASSET SERVICES LIMITED** **(3) ANKOR PRIVATE OFFICE LTD.** **(FORMERLY DOLFIN PRIVATE OFFICE LTD)** **(4) ROMAN JOUKOVSKI**	**Defendants**

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Richard Power (instructed by **Dentons**) for the **Claimants**
Christopher Parker QC (instructed by **Ingram Winter Green LLP**) for the **Defendants**

Hearing dates: 20 May 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHARLES HOLLANDER QC

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10 June 2021 at 10:00 am."

Charles Hollander QC :

1. The Defendants applied to strike out the Amended Particulars of Claim alternatively for summary judgment on all or part of the claim.

2. The Claimants are part of an investment management group known as GEM Capital (GEM). The first three Defendants are part of a group of companies. The first defendant (Dolfin UK) was formerly FCA regulated and are wealth managers. The second defendant is incorporated in Malta (Dolfin Malta). The third defendant is referred to as Dolfin DPO. The fourth defendant (Mr Joukovski) is a founder of the Dolfin Group.

Outline facts

3. Elements of the account set out below are taken from the Claimants' case. I recognise that at trial some of the matters set out will be in dispute.

4. In September 2018, Mr Paliy of GEM was introduced to Mr Joukovski and Mr Faller through Mr Garber. GEM were interested in an investment in the Vostok Fund, which was created for the first funding round of the Vostok Project, a blockchain project in which US$1bn cryptocurrency was to be issued as tokens (Vostok tokens). Mr Joukovski sent Mr Paliy a "Teaser Pack" which set out the terms of the first funding round. A meeting followed on 25 September 2018 at GEM's Moscow offices. Mr Bykhovskiy, who was the Claimants' main witness, was among those who attended as well as Mr Joukovski and Mr Faller. Mr Joukovski explained that if GEM invested the proposed investment would be "risk free" because the money would be safeguarded in Dolfin UK's client account, the funds would only be used for the purpose of evidencing to second round investors the investor interest in the project, and if the second round did not raise enough money to continue the project, the project would be discontinued and first round investors have their initial investment repaid in full.

5. GEM were interested in investing. On 3 January 2019 Mr Joukovski informed GEM that the first round funding had closed. A press release issued by Dolfin UK on 19 December with quotes from Mr Nagy of Dolfin UK stating that the first round funding had closed and suggested that it had been a success.

6. On 20 February 2019 Mr Joukovski messaged Mr Garber inviting GEM to invest US$28m in total, US$25m in Vostok Tokens and US$3m in Waves Tokens, the latter being another blockchain project. In the event this was more money than GEM wanted to invest. On 21 February a call took place. According to the Claimants, Mr Joukovski said that investment in Waves Tokens was a precondition of permitting GEM to invest in the first round of Vostok Tokens. As regards Waves Tokens, if an investment was made, Mr Faller would acquire Waves Tokens from the market and deliver them to the Claimants. The Claimants say this was said to involve no risk as if the price did not increase Mr Faller would return the invested funds. As regards Vostok Tokens, Mr Faller or one of his vehicles had a right to receive an allocation of Vostok Tokens and would sell them to GEM or its vehicle. Mr Joukovski is said to have made clear that the basis was the same as the first round scheme and spoke of the money being treated as "our money" or "family money" and made clear that Dolfin UK would safeguard the money. He also made statements about Mr Faller's ability to do this.

7. On 13 March 2019 Andoro entered into sale and purchase agreements with Tech Global Management Ltd (Tech Global), one in respect of Waves Tokens (the Waves CASPA), one in respect of Vostok tokens (the Vostok CASPA) with a guarantee provided by Mr Faller.

8. Under the Waves CASPA Tech Global agreed to transfer 1.2 million Wave Tokens for US$3m. There was an option to sell the tokens back for the original price. If Tech Global failed to deliver within 2 days following receipt of the purchase price, they were to return the purchase price to Andoro.

9. Under the Vostok CASPA Tech Global agreed to transfer 5 million Vostok Tokens for US$3m. There was an option to sell the tokens back for the original price. If Tech Global failed to deliver within 2 days following receipt of the purchase price, they were to return the purchase price to Andoro. There was also an option to sell the Vostok Tokens back to Tech Global for the original price, exercisable up to 1 September 2019.

10. On 18 March 2019Andoro transferred US$6m to Dolfin Malta to what was said to be Tech Global's account.

11. Andoro entered into a further CASPA for 100,000 Waves Tokens on 5 April for US$250,000 on the same terms. The money was paid on 7 June 2019.

12. On 13 May 2019 the Waves CASPAs were amended to decrease the price of the Waves Tokens and increase the number of Waves Tokens. A further amendment dated 2 June 2019 involved Andoro increasing its investment by US$3m and a further price decrease.

13. On 7 June 2019 Uroco transferred US$3.25m to Dolfin UK's account. Andoro novated its rights to Uroco.

14. On 21 August 2019 Put Option Notices (PONAs) were signed by both Claimants exercising the Put Options in the CASPAs.

15. Neither Andoro nor Uroco have ever seen any money back nor any Waves Tokens or Vostok Tokens. They believe they have been the victims of a fraud.

The Claimants' case

16. 16. The Claimants plead a variety of causes of action against the Defendants. They rely on the discussions with the defendants to plead three representations: one in relation to the transaction being risk free on the basis that the funds would be protected, one to the effect that the first round funding had been successfully completed with outside investors, and a less important one in relation to the role of Mr Faller. They also plead that the payments made to Dolfin UK and Dolfin Malta were held on Quistclose trust. They plead fraudulent misrepresentation, breach of a duty of care, collateral contracts, breach of trust, dishonest assistance, knowing receipt, unlawful means conspiracy, and inducing breach of contract. They also plead that Tech Global was controlled by one or more of the Defendants and acted at all times on the instructions of the Defendants.

The Defendants' submissions

17. Mr Parker for the Defendants submitted the pleadings to a detailed criticism. His submission was that there might be a case to go to trial, but it was not for the Defendants

or the court to have to try to find it. A case should only be permitted to go to trial where an arguable case was properly pleaded and that was not the present case. The claim as pleaded should be struck out or summarily dismissed and if the claimants were able to plead a different case, they should seek to do so. I summarise his submissions below.

18. As to the misrepresentation case, of the three misrepresentations, only two are significant.

19. The "protected funds" representation is said by the Claimants to be to the effect that the funds invested would be safe and protected. But whilst this was envisaged when GEM sought to be involved in the first round funding, and would have involved GEM opening an account with Dolfin, the scheme for subsequent investments was of a quite different nature. The first round involved a term sheet dated 12 December 2008. Sharmel, another GEM company, became a client of Dolfin UK for this purpose but did not in the event invest in the first round. There was no question in the second round of the Claimants becoming clients of Dolfin, as was required for the first round funds to be protected, and the second round funding was on the terms of agreements with Tech Global with different GEM companies and which set out the (different) rights of the parties. The first stage protections were all effected by written documents, those relied on by the Claimants were not. Moreover, it is the Claimants' case that Mr Faller would acquire Waves Tokens from the market, so there was an entirely different arrangement and it makes no sense importing the first round arrangements into what happened. The claim made is not credible, the contractual offer allegedly made on 21 February was never accepted, the claim is based on breach of the CASPAs whereas the matter should be governed by the later PONAs, and the claim in respect of the Waves Tokens is not supported by the Claimants' evidence.

20. The "Vostok Funding" representations were based on an alleged representation that there had been commitments by third parties unassociated with Mr Ivanov and Mr Faller to invest $120m in the press release, which on analysis was vague as to how the $120m had been raised, and a statement allegedly made by Mr Joukovski to Mr Garber of GEM that the first funding round had closed. All that could mean was that the $120m was in place, not how it arose. The representation was not made by a party to the relevant contract, so a claim under the Misrepresentation Act does not arise. The wrong person was alleged to have relied on the statement (see for example *Peek v Gurney* 1873 LR 6 HL 377). There was in any event no plea of reliance.

21. On 2 June 2019 the March CASPA was rewritten and recorded that ownership of 1.5m Waves Tokens had already passed to Andoro, thereby fulfilling Tech Global's delivery obligation under the March CASPA and showing that the March CASPA was treated by both sides as having been completed. This states by Clause 4.1:

> "*The Parties…acknowledge …that 1.5m Wave Tokens are currently held by the Seller on trust for the benefit of the Buyer*."

Mr Parker pointed out that each CASPA had an "Entire Agreement" clause.

22. As with the previous 1.5m, the additional 2.666m Waves Tokens were treated as having been delivered by being held by Tech Global on trust.

23. By the PONA dated 21 August 2019 Uroco exercised the Put Option in respect of all 4,166,667 Waves Tokens. Clause 2.1 stated that:

> "*the Seller and the Buyer have agreed that the price to be paid by the Seller to the Buyer under the Put Option shall be US$6.875m*,"

This was not drafted on the basis that there was US$6.875m held on trust for the Claimants was to be returned. The document was signed by Uroco, Andoro and Tech Global. Clause 3.2 was in the following terms:

> "*If no Waves Tokens have been delivered to the Buyer by the Seller….in addition to the 1,500,000 Waves Tokens already held on trust for the Buyer the remaining amount of the Crypto Assets (being 2,666,667 Waves Tokens) shall be deemed to be held on trust until the Put Price is received…*"

Thus Uroco, Andoro and Tech Global reiterated that the original 1.5m Waves Tokens under the March Agreement were deemed delivered and stated that all 4,166,667 Waves Tokens were deemed to be held on trust for Uroco until such time as Tech Global paid Uroco $6.875m.

24. As to the Vostok Tokens, by the CASPA dated 11 March 2019 Andoro agreed to buy 5m Vostok Tokens for $3m. The Vostok Tokens were to be delivered as soon as reasonably practicable after 1 September 2019 unless the parties agreed otherwise.

25. By a Put Option Notice dated 21 August 2019 Andoro exercised the Put Option in respect of the 5m Vostok Tokens. Clause 2.1 stated that "*the Seller and the Buyer have agreed that the price to be paid by the Seller to the Buyer under the Put Option shall be USD 3,000,000 (the "Put Price")*". Thus, the PONA was not drafted on the basis that there was $3m already held on trust for Andoro that was to be returned. The document was signed by Andoro and Tech Global. Clause 3.2 was in the following terms:

> "*If no Vostok Tokens have been delivered to the Buyer by the Seller….then the Crypto Assets (being 5,000,000 Vostok Tokens) shall be deemed to be held on trust until the Put Price is received.*"

Thus, as with the Waves Tokens, all 5m Vostok Tokens were deemed to be held on trust for Andoro until such time as Tech Global paid Andoro $3m.

26. The Quistclose case was hopeless. The first round arrangements were, as explained above, different. The monies were paid into Tech Global's accounts with Dolfin UK and Dolfin Malta, there was no arrangement whereby the Claimants would become clients of Dolfin nor were duties ever imposed on Dolfin. The arrangements were under the CASPAs which were not consistent with the funds being protected in this way. It was unclear how the alleged trust would work. The fact that Mr Faller was acquiring Waves Tokens from market made it even more unworkable.

27. As there was no basis for a trust, the claim in dishonest assistance, which lacked an evidential basis, must also fail.

28. Even if there could have been a trust at the outset, it must have been exhausted and come to an end by the arrangements under the CASPAs and the PONAs.

29. The pleading relied upon Mr Joukovski as having authority to act for the Dolfin companies but no proper basis for that was pleaded. Mr Joukovski did not have authority to bind the other defendants.

30. There was no legitimate basis for the collateral contract pleas and no assumption of responsibility such as would give rise to a duty of care.

The Claimants' submissions

31. The Claimants obtained a Norwich Pharmacal order against Barclays with whom Dolfin UK and Dolfin Malta held the accounts into which the Claimants' monies had been paid. Mr Joukovski and Mr Nagy served affidavits as to what had happened to the payments. These revealed that the monies had pretty much all been used to make transfers to a wide variety of organisations, including substantial payments to Dolfin UK. Many of these entities appear to be controlled by Mr Faller.

32. Apart from a transfer of US$500,000 to Brown Cedar Ltd, which the Claimants say is controlled by Mr Joukovski's wife, the most striking is that immediately after payment of US$3.25m in June 2019, there is a transfer of US$1.5m to Castlebrook Associates Ltd, which is controlled by Mr Joukovski's family trust. This is particularly significant in the light of Mr Joukovski's evidence on this application:

> "In or about June, I became aware that GEM paid more money to TGM in connection with the CASPA deals, and also that there was a novation agreement. At the time it was all very much background noise and not something to which I paid any attention, because I did not consider it any of my business. I was not aware of the terms of the novation agreement and I do not recall being aware of the name Uroco Ltd or of it being the new party. There was never any suggestion that any protective arrangement was being extended to Uroco."

Mr Joukovski's statement that he paid no attention to this is hard to countenance given that a large part of the money received from Uroco was immediately transferred to his family trust.

33. The Press Release of 19 December 2018 issued under the auspices of Dolfin refers to the Waves Platform having secured $120m funding to launch the Vostok project. It suggested that it was necessary to select investors who had particular experience and motivation (i.e. there were so many investors wanting to subscribe that it was necessary to select those most suitable) and contains information and quotes from Dolfin UK. It is obvious that it was intended to give the impression that the first round funding had been a great success and to use that as an encouragement for later investors to part with their money.

34. It was not quite like that. Mr Joukovski says in his witness statement that because the fund raising went badly, Mr Faller and Mr Ivanov agreed to provide the money personally to make up the $120m.

35. Further, Mr Bykhovskiy explains that in October 2019 Mr Ivanov told him he received an email from Outcrop Capital Ltd, a Cayman company requesting the return of the consideration paid by it for 155,416,948 Vostok Tokens. This consideration is expressed in a purchase contract dated 29 March 2019 between Outcrop Capital Ltd and Vostok Ltd, another Cayman company, to be US$ 93,250,168.80 and was satisfied by the transfer by Outcrop Capital Ltd of a bond issued by Promstar with a nominal value of EUR 79,844,000. In fact the financial statements of Promstar for the year ending 2018 (and approved on 10 May 2019) show that Promstar's balance sheet value is less than EUR 105,000 and that the bonds are illiquid. Andreas Nagy is the founder of Promstar and the father of Denis Nagy, the then CEO of Dolfin UK. The purchase contract states that the bond is listed on the Irish Stock Exchange. In fact the bond was listed on 27 May 2017, but on 21 November 2017 it was delisted. Such delisting was over 16 months before the purchase contract was signed so there is no reasonable basis for the statement in the purchase contract; and Dolfin UK was the arranger of the listing of the bonds.

36. The Outcrop Capital purchase agreement was not signed until 29 March 2019 and seems to have been a fraudulent device. Outcrop Capital Ltd received $303,063.05 of the monies paid by Andoro almost immediately after they were paid into Dolfin Malta's account.

37. Contrary to what Mr Faller and Mr Joukovski said on 21 February 2019 the Claimants say Mr Faller did not have any right to an allocation of Vostok Tokens. Mr Ivanov has told Mr Bykhovskiy that he controlled the allocation and transfer of Vostok Tokens and no allocation of them has ever been made to Mr Faller and neither Mr Joukovski nor Mr Faller had the authority to allocate any. 50,000,000 Vostok Tokens were allocated to Mr Joukovski pursuant to an agreement between Vostok Ltd. and Glenmere Invest Ltd dated 23 May 2019 in respect of certain services to be provided to Vostok Ltd and the Vostok Project. Mr Ivanov says that as far as he is aware Mr Joukovski and Mr Faller had no Vostok Tokens, no contractual right to Vostok Tokens and had not themselves subscribed for shares in the Vostok Fund.

38. The Claimants' solicitors made enquiries of Mr Alan Cole, one of the directors of Tech Global, who said in response:

> "*…I can advise you that all actions were taken by us on the instruction or direction of Dolfin, which can be proven from emails etc.*"

39. The Claimants plead that Tech Global was controlled by Dolfin and acted on their instructions. The message from Mr Cole raises questions as to whether and to what extent Tech Global have an existence independent of Dolfin. Why were the Claimants asked to pay into an account of Dolfin with Barclays although they were apparently contracting with Tech Global? Whilst the Defendants say that this was Tech Global's account with Dolfin, that does not really answer the question. Why on the Defendants' case did the payments not go directly to Tech Global? The extraordinary schedule of

payments in relation to the money provided by the Claimants from that account which arose as a result of the Norwich Pharmacal order raises many further questions.

40. The Claimants allege that Mr Joukovski told Mr Garber on 3 January that the first round funding had closed, and although this is not accepted by Mr Joukovski, there is a voicenote which provides support for Mr Joukovski having said this. That begs questions as to why he would make such a statement given that it was not correct, on his case, and the first round funding had not been a success?

Discussion

41. On the material before me, the matters set out in the above section "the Claimants' submissions" give rise to at least a good arguable case that the Defendants were involved in a conspiracy to defraud the Claimants. So far as can presently be seen, there is a case to be made that the dealings which the Claimants had in relation to the purchase of Waves Tokens and Vostok Tokens were a fraud whereby money was misappropriated from the Claimants. It is not clear whether Tech Global in fact had any existence independent from the Defendants and the dealings which the Defendants had with the Claimants raise very considerable suspicion as to their involvement in a fraud. At present it is wholly unclear what occurred, the facts are confusing and by the time matters reach trial the position may look very different. However, it is fair to say that the Defendants' fingerprints are all over this. It may be that at trial Mr Joukovski, Mr Nagy and others are able to satisfy the judge that such a conclusion is misconceived. That is not a matter for me.

42. On that basis, this case looks an unlikely candidate for summary judgment in favour of the defendants or a strike out.

43. The principles to be adopted in determining applications to strike out or summary judgment are well known and I do not repeat them here. However, on any view, this is a claim that needs to go to trial. The Claimants are seeking to piece together what happened in circumstances where they had virtually no information at the outset and are gradually acquiring information. The facts are complex and difficult to follow. The summary judgment hearing was listed for 4 hours and involved submissions which traversed a vast range of material and it was often difficult to follow the factual detail. At this relatively early stage, there are many questions which need answering. No doubt significantly more information will be available after disclosure. It is not surprising that at this stage the claimants have pleaded the case in a wide variety of ways to give them as many options as possible. There is not much point in striking out individual causes of action only to find that they seek to reinstate them in the light of additional information after disclosure. Thus, whilst I must obviously examine the complaints about the pleaded case made by the Defendants, I would be reluctant to strike out individual causes of action unless either clearly bad or likely to add significantly to the disclosure or trial preparation.

44. Where the defendant seeks summary judgment, the court has power under CPR 24.2 to give summary judgment on the whole of the claim or on a particular issue if it considers:

    a. 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 a trial.

45. In the present case I have reached the conclusion that:

a. There is a seriously arguable case of conspiracy to defraud against the defendants

b. The matter will therefore go to trial in any event

c. The Claimants are under the disadvantage that they have limited sight as to what occurred and are trying to put the pieces together as matters continue; through no fault of their own their case is developing as they obtain further information

d. The one important piece of disclosure provided so far, information from the *Norwich Pharmacal* order, has significantly strengthened their case and raised many important questions in relation to the Defendants.

e. There is thus reason to believe that the Claimants' case may look rather different after disclosure

f. The factual basis of the case will therefore go to trial in any event and the issues are interwoven; it is not as though a large part of the case can be separated so that the trial will be significantly shortened if some limited parts are the subject of summary judgment.

46. I consider that in the light of the above this case falls squarely within the "*other compelling reason why the case should be disposed of at a trial*" head.

47. The other part of the Defendants' application is a strike-out. However, unlike the position on a summary judgment application, evidence is not usually admissible on a strike out application and therefore the hurdle for the Defendants to overcome is higher.

48. I recognise that parts of the currently pleaded case look difficult and at times incoherent in the light of the witness evidence before me and in the light of some of the criticisms levelled by Mr Parker. Some of the parts will probably need amending in due course. Nevertheless, I need to consider the criticisms he levelled. Given that it is a summary judgment application, I do so relatively briefly.

49. First, [39] and [41] of the Particulars of Claim plead the alleged control of Tech Global by the Defendants and the plea of conspiracy to misappropriate the purchase monies by unlawful means. Those pleas reflect the arguable case to which I have referred above and should go to trial.

50. Second, the plea of inducing breach of contract and interference with contractual rights at [34] should also go to trial as there is plainly an arguable case in this regard.

51. The case based on the Protected Funds representation is that the Defendants made it clear that the Claimants' money would be kept safe until the tokens were purchased or their money refunded. The Claimants say that this can be derived from (i) the first round arrangements and the representations in respect thereof (ii) the 21 February conversation (iii) the payments being made to Dolfin (iv) the issues as to whether there

was a genuine distinction between Dolfin and Tech Global. For the reasons given by Mr Parker, there are significant problems with a cause of action based on these allegations, but the statements alleged to have been made as to the money being safe on 21 February give rise to an arguable case in misrepresentation when seen in the context of the first round arrangements and the fact that payments were actually requested to be made, and were made, to Dolfin. Mr Bykhovskiy's evidence is that he was assured that the level of security would be the same as in the first round, as supported by his message to Mr Paliy on 6 March 2019 "*We enter Vostok on the same terms*." He says his understanding in relation to the Waves Tokens was to similar effect in the light of the discussions he had had. Whatever the difficulties in this plea, I do not think this is suitable for summary judgment, or strike out, and the collateral contract claim is related to it and must stand also.

52. There are problems too with the Vostok Funding representation, which combines the Press Release with an alleged statement from Mr Joukovski that the first funding round had closed. But the Press Release under the auspices of the Defendants appears a thoroughly misleading document, and it is not unrealistic to think that the Claimants relied on this representation too. The collateral contract allegation goes with the representation case. As to whether these allegations are claims under the Misrepresentation Act or in deceit does not seem to me important at this stage.

53. I am not impressed with the suggestion that the authority of Mr Joukovski is a matter than can be dealt with on a summary judgment application. On the face of it, as the founder and key individual, it can be inferred pending disclosure that he had authority on behalf of the Defendants to commit them.

54. That leaves the claim for a *Quistclose* trust, and the knowing receipt, dishonest assistance and other causes of action which are said to follow from it. This really derives from the Protected Funds representation. The Defendants say it does not work because, apart from the initial factual problems which are concerned with the representation and which I have considered above, any such trust would have come to an end once the CASPAs had been entered into and the subsequent dealings, or apparent dealings, between Tech Global and the Claimants. I see the force of these comments, but if, as I consider, there is an arguable case in relation to the Protected Funds representation, when money was paid into a Dolfin account, there is an arguable trust claim and the subsequent dealings with Tech Global (if Tech Global indeed had an independent existence from the Defendants) are too unclear to be the subject of a summary judgment application.

55. As for the PONAs, it is entirely unclear whether those agreements remained in escrow (and thus had no effect) or were delivered to Tech Global and I am not prepared to reach conclusions about them at this stage.

56. It follows that I am not prepared to accede to the Defendants' application for summary judgment, both because I cannot say there is no real prospect of the Claimants succeeding at trial and because of the "*other compelling reason*" ground and am not prepared to strike out any elements of the Claimants' claim.

Disposition

57. In the event I dismiss these applications.