[2020] EWHC 3497 (QB)

Case No: QB-2020-001127

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17th December 2020

Before:

DEPUTY MASTER HILL QC

- -

Between:

STEPHEN JASON FREEAR

Claimant

-and-

DUNCAN EDWARD ANDREWS

Defendant

- -

James Pearce-Smith for the **Claimant**
John Beresford for the **Defendant**

Hearing date: 10th November 2020

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Approved Judgment

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 will be deemed to be 2.30 pm on 17th December 2020.

DEPUTY MASTER HILL QC:

Introduction

1. The Claimant brings claims in breach of contract, breach of trust and restitution. He seeks recovery of £1,342,407 which represents the sums that he advanced to the Defendant between 9 May 2014 to 2 July 2018 in respect of a proposed property investment. By two applications the Claimant seeks orders striking out the Defendant's Defence under CPR 3.4, or alternatively granting him summary judgment on his breach of contract and breach of trust claims under CPR 24.2. If summary judgment is granted on the breach of trust claim, the Claimant seeks an order for an interim payment under CPR 25.6 of £1,312,407.

The factual background

2. On 9 May 2014 the parties, who were at that time friends, entered into an oral agreement concerning an investment proposed by the Defendant relating to a property on Savernake Road in Hampstead.

3. The parties agree that the following terms were included within the agreement: (i) the Claimant would provide the money to the Defendant when requested by the latter; (ii) the Defendant would use the Claimant's monies for the purpose of purchasing the property; and (iii) pending the Claimant's monies being used for the purchase of the property, the Defendant would put the monies into an escrow account.

4. The Claimant's case is that the agreement also incorporated the following terms: (i) if the purchase of the property was not completed within a reasonable time, the Defendant would repay the Claimant; and (ii) the Claimant's money was repayable upon demand. The Defendant denies that the agreement incorporated these terms. It is his case that it was agreed that the Claimant would only be entitled to the return of his money if an alternative investor could be found to "*buy him out*".

5. The Defendant's position is that because the property was subject to probate, he advised the Claimant that it "*was difficult to predict timescale. It could take six months or six years*". In contrast, the Claimant says that the Defendant represented to him (before they entered into the agreement) that "*the purchase of the property would take approximately six months*". The Defendant denies this.

6. Between 9 May 2014 and 2 July 2018 the Claimant made 29 payments to the Defendant in accordance with the Agreement. The payments totalled £1,342,407 and were paid into an account nominated by the Defendant, in the name of ADM Properties.

7. On 7 February 2016, the Claimant emailed the Defendant saying:

> "…..*I really need this Savernake project to come to a conclusion. When I first embarked on this project in May 2014 I assumed I would only need*

> *to finance it for six months. However 22 months down the road and there are no signs of the project coming to the end.*
>
> *I feel I have been very patient and invested three times what we originally discussed in May 2014. I feel now is a fair time to set a date for this project to come to an end.*
>
> *Last summer we had a similar discussion and you were going to raise the finance to give me my money back as you have personally guaranteed this project... I now must give a deadline date that I must insist we adhere to. I think a fair time limit would be the 31st March. If we have not exchanged on Savernake Road by then I will expect my money back in full.*
>
> *You say the money is held in escrow so I would expect you to withdraw that money*".

8. The Defendant replied by email that same day saying "*Ok, agreed*".

9. The Claimant has made numerous demands for repayment of the sums paid by him. The Defendant has not repaid any of the money.

10. Between April and June 2016, the Defendant made three payments of interest to the Claimant which totalled £30,000. The Claimant's position is that this was pursuant to an agreement reached between the parties whereby the Claimant agreed to allow the Defendant time to repay in return for the Defendant making payments of interest. The Defendant's position is that he made the payments of interest as a gesture of goodwill to reflect the parties' personal relationship whilst an alternative investor was found (to enable the Claimant to be bought out).

11. The central issue between the parties is whether the time for repayment of the money has arisen. The Claimant contends that the money is repayable on demand, either as an express term of the agreement (as set out above) or else as a matter of law. The Defendant accepts that the money will be repayable at some point. However his position is that this point has not been reached.

The legal framework

12. Under CPR 3.4(2)(a) the court may strike out a statement of case if it appears to the court that the statement of case discloses no reasonable grounds for bringing or defending the claim. Para. 1.4 of CPR PD3A provides examples of claims which might be struck out under this provision:

> "1.4 The following are examples of cases where the court may conclude that particulars of claim (whether contained in a claim form or filed separately) fall within rule 3.4(2)(a):
>
> (1) those which set out no facts indicating what the claim is about, for example 'Money owed £5000',

(2) those which are incoherent and make no sense,

(3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant."

13. Under CPR 24.2 the court may grant summary judgment to a Claimant on his claim or on a particular issue if (a) it considers that the Defendant has no real prospect of successfully defending the claim or issue, and (b) there is no other compelling reason why the case or issue should be disposed of at a trial. The principles applicable to a summary judgment application were summarised by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at para [15]:

"i) The court must consider whether the claimant has a "*realistic*" as opposed to a "*fanciful*" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

ii) A "*realistic*" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a "*mini-trial*": *Swain v Hillman;*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

> vii) 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".

14. The applicable principles were similarly summarised by Popplewell J in *Barclays Bank plc v Landgraf* [2015] 1 All ER (Comm) 720; [2014] EWHC 503 (Comm) at [26].

The Claimant's submissions

15. The Claimant's application in relation to the breach of contract claim is advanced in two ways.

16. First, it is said that there was an express term of the agreement that all monies invested by the Claimant would be repayable on demand. Reliance is placed on an email sent by the Defendant to the Claimant on 9 May 2014 which includes the words "*all monies invested by yourself will be returned in full .. upon demand*". The Claimant argues that the wording of the email of 9 May 2014 is clear and unambiguous, and that it is trite law that, in construing the terms of a contract, the court will consider the words used from an objective standpoint and will give them their usual meaning. The Claimant argues that if a party wishes to establish that contractual words do not mean what they appear to mean, the burden is on him to put forward a credible alternative construction, backed up with the necessary evidence. It is said that the Defendant cannot satisfy this burden, even for the purposes of a summary judgment application. His case is nothing more than a bare denial that the words used mean what they appear to mean. He has not put forward any alternative meaning, let alone any explanation or evidence (whether admissible or otherwise) in support of such an alternative.

17. Second, the Claimant argues that it was an implied term of the agreement that the money was repayable on demand. As a matter of law, it is argued that (i) where money is paid by A to B, the money is prima facie repayable by B to A and hence is a loan. The onus is on B to prove that the money is not repayable; and (ii) where money is lent without any stipulation as to the time for repayment, the money is repayable at once without any prior demand, although in some cases there is an implied term that the money is repayable on demand. Accordingly, it is argued that there was an implied term that the money was repayable (at latest) on demand, unless the Defendant can establish that there was an express agreement that the money was to be repayable on some other date or occasion (which has not yet passed). Reliance is placed on the fact that the Defendant has not pleaded that it was expressly agreed that the money was to be repayable on some other date or occasion. On that basis it is argued that the Defendant has no realistic prospect of successfully defending the contractual claim based on an implied term that the Claimant's money is repayable on demand.

18. The Claimant argues that the Defendant has hinted at, but not properly pleaded, a claim that the transaction is still ongoing "*until the agent who is dealing with the purchase on*

behalf of the Claimant and Defendant advises that the transaction cannot proceed". The Claimant argues that any claim that this was an express term would still have no realistic prospect of success because there is no evidence in support of such a term; (ii) it would be wholly unsupported by any of the contemporaneous correspondence which the Claimant has referred to in his Particulars of Claim; (iii) it would be directly contradicted by emails from the Defendant himself; and (iv) such a term would be far too vague and uncertain to have contractual effect.

19. The Claimant's application in relation to the breach of trust claim is advanced on the basis that the agreement included terms that (i) the Defendant would use the Claimant's money for the purpose of the purchase of the property; and (ii) pending the use of the Claimant's money for the purpose of the purchase of the property, the Defendant would place that money in an escrow account. The Claimant argues that these terms give rise to a classic example of a *Quistclose* trust under which money is advanced by A to B on terms that B is to use the money for a specific purpose. B holds the money on trust for A unless and until it is applied for that purpose or returned to A. The Claimant argues that the fact that the money is no longer held in the escrow account is a clear breach of the terms of the trust and the Defendant has no reasonable prospect of defending the claim on this basis.

The Defendant's submissions

20. It is the Defendant's broad position that both applications are fundamentally misconceived and ought to be dismissed as there are real issues to be tried between the parties, including heavily disputed factual matters. The Defendant has filed no evidence in response to the applications but relies upon his statements of case pursuant to CPR 32.6 (which includes his Reply to the Request for Further Information).

21. In respect of the application in relation to the breach of contract claim, the Defendant points to the fundamental dispute between the parties as to whether it was a term of the agreement that the monies were repayable upon demand. The Defendant advances three reasons why the Court should not enter summary judgment in the Claimant's favour in respect of this claim.

22. First, the Defendant argues that there is a classic dispute of fact as to the existence of the term that can only be answered following a trial where the Court has heard oral evidence from the parties. He submits that the email which the Claimant relies upon is an insufficient basis for the Court to enter summary judgment against the Defendant because (i) such a term would be wholly inconsistent with commercial common sense; and (ii) the payments represented the capital which the Claimant introduced to finance the parties' investment in the property and it was intended that the Claimant would be 'paid' for the introduction of this capital from the profit of the venture as opposed to by way of interest. He makes various further points in relation to the emails in which repayment was discussed, the 9 May 2014 email and a letter the Defendant wrote to the Claimant's employer in support of his argument in relation to the nature of the alleged term.

23. Second, the Defendant takes issues with various elements of the Claimant's own case on the alleged term. He argues that (i) it is unclear whether the alleged term is said to arise

orally between the parties or by necessary implication (and it cannot be both); (ii) to the extent that the Claimant relies upon necessary implication, he cannot meet the high legal thresholds for the same which involve consideration of the express terms, commercial common sense (including the business efficacy to the contract) and the facts known to both parties at the time the contract was made (see *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, per Lord Neuberger at [14]-[32]).

24. Third, the Defendant argues that the Claimant is in breach of para. 7.4 of CPR PD 16, which provides that "Where a claim is based upon an oral agreement, the particulars of claim should set out the contractual words used and state by whom, to whom, when and where they were spoken".

25. As to the application in relation to the breach of trust claim, the Defendant argues that the Claimant has not pleaded the basis of the trust; and that the application for summary judgment is premised on the Defendant being in breach of trust by reason of the monies no longer being in the account to which they were paid whereas a different basis for the claim has been pleaded, namely that the Defendant has used the Claimant's money for his own purposes.

Analysis and decision

26. Although the applications were advanced under both CPR 3.4 and CPR 24.2 in truth the Claimant's arguments focussed on the summary judgment application. In my view that was the correct emphasis: it is clear from the pleadings that the Defendant has advanced a factual and legal defence and this is not a defence that can be characterised as one which is incoherent and makes no sense. For these reasons I do not consider it appropriate to strike out the Defence under CPR 3.4 as it cannot be said that the Defence discloses no reasonable grounds for bringing or defending the claim.

27. In respect of the application for summary judgment under CPR 24 I have given careful regard to the legal principles as set out above. In summary I need to determine whether the Defendant has a "*realistic*" (as opposed to merely arguable) prospect of success in his defence; I must not conduct a "*mini-trial*"; I need to assess whether statements before the court are contradicted by contemporaneous documents; and I must have regard to evidence that can reasonably be expected to be available at trial.

28. Having applied those principles I am not persuaded that summary judgment is appropriate on either of the Claimant's claims. Overall, I prefer the submissions advanced by the Defendant in respect of both claims.

29. In respect of the breach of contract claim I consider that the issue of whether there was an express or implied term as to repayment of the monies on demand is not one I can determine on a summary basis: rather, in my view it is the sort of factual dispute that can only be answered following a trial where the Court has considered all the evidence, including oral evidence from the parties. In my view it is only at that point that the key factual sub-issues relating to (i) whether the term arose, if at all, from oral exchanges or documentation; (ii) the "commercial common sense" argument; (iii) the parties' understanding of the use to which the monies would be put; (iv) whether it was properly

to be characterised as a loan or capital investment; and (v) the meaning and context of the various contemporaneous emails (in particular the crucial email sent by the Defendant to the Claimant on 9 May 2014) and other documents can be determined. It is only when those factual issues have been resolved that a proper legal assessment of whether the term was express or implied into the contract can be reached.

30. In respect of the breach of trust claim, I am not prepared to grant summary judgment for the reasons given by the Defendant. Further it seems to me that determining the basis of the trust and the nature of any breach of it both require a full assessment of the facts, including consideration of the sort of sub-issues that are referred to above in respect of the breach of contract claim, which can only be done after trial.

31. For these reasons the Claimant's applications are dismissed.