Neutral Citation Number: [2024] EW Misc 15 (CC)

Case No: 27 of 2020

IN THE COUNTY COURT AT BRISTOL
BUSINESS AND PROPERTY WORK

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 5 April 2024

Before :

HHJ PAUL MATTHEWS

- -

Between :

TRACEY ANN TAYLOR	**Applicant**
- and -	
(1) OLGA SAVIK	**Respondents**
(2) PHILIP RYLE	

- -
- -

Hateema Zia (instructed by **Irwin Mitchell**) for the **Applicant**
The Second Respondent in person
The First Respondent was not present or prepresented

Hearing dates: 25 March 2024
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this revised version as handed down may be treated as authentic.

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email. The date and time for hand-down is deemed to be 12 noon on 5 April 2024.

HHJ Paul Matthews :

Introduction

1. This is my judgment on an ordinary application by the second respondent by notice in form N244, dated 10 February 2024. His application is for an order that that the county court trial of this Insolvency Act application (which I will shortly describe) be conducted before a judge and jury, instead of before a judge alone. The second respondent is a litigant in person, and an as yet undischarged bankrupt. The application for trial by jury is opposed by the applicant (who is the second respondent's trustee in bankruptcy, and who is legally represented), but the first respondent (the second respondent's former wife, who is also legally represented) is neutral, and took no part in the hearing.

2. As I have said, the ordinary application is made in the context of an Insolvency Act application by notice dated 12 January 2022 by the predecessors of the trustee in bankruptcy of the second respondent. The present applicant is the successor of the original trustees in bankruptcy. The Insolvency Act application seeks a declaration that a residential property known as The Grange, Parklands Road, Bower Ashton, Bristol BS3 2JW ("The Grange"), registered at HM Land Registry in the sole name of the first respondent, and subject to a mortgage dated 3 October 2014 in favour of HSBC Bank, is held by the first respondent on trust for the second respondent, and accordingly is an asset available for distribution amongst his creditors. The matter is currently listed for trial in the week commencing 20 May 2024. A pre-trial review is listed for 8 April 2024.

Background

3. The background to this matter is as follows. Before being adjudicated bankrupt, the second respondent was a dealer in stamps and related products, both on his own account and through companies. In 2012, the first respondent, who was born in the Ukraine, began working for one of the second respondent's companies. The first and second respondent later began a personal relationship and eventually married in the Ukraine. On 3 October 2014 the first respondent became the sole registered proprietor of The Grange. On 10 November 2014, the second respondent was arrested on suspicion of defrauding HMRC. On 17 September 2018, he pleaded guilty to that charge, and on 28 September 2018 he was sentenced to a term of imprisonment of three years and eight months.

4. On 24 April 2017 a bankruptcy order was made against the second respondent on his own application, dated 23 April 2017. On 8 March 2018 a restraint order was made against the second respondent in proceedings under section 41 of the Proceeds of Crime Act 2002 ("POCA"). However, because the second respondent was made bankrupt before the POCA proceedings, his assets as at 24 April 2017 are not affected by the restraint order, having already vested in the trustees in bankruptcy.

The Trustee's claim to the property

Points of claim

5. In the Insolvency Act application, points of claim were filed dated 27 May 2022. These provide in part as follows:

> "4. As is set out in more detail below, the Trustees' case is that:
>
> a) [The second respondent] and not [the first respondent] is the beneficial owner of the property That, it having been purchased with money provided by him as the deposit and mortgage repayments, and maintained with money provided by him;
>
> b) [The first respondent] was shown as the registered proprietor of [The Grange] in order to conceal [the second respondent's] ownership thereof;
>
> c) Further or alternatively, the payments by [the second respondent] to [the first respondent] in relation to the purchase of [The Grange],the mortgage payments made thereafter and the outgoings in relation to it fall within sections 339 and/or 423 of the Insolvency Act 1986 and the court is asked to make orders to reverse the position to what it would have been had the payments not been made.
>
> 5. [The second respondent's] fraud against HMRC was carried out between (at the latest) 1 March 2013 and his arrest on 10 November 2014.
>
> 6. The modus operandi of the fraud was as follows:
>
> a) Rare Stamp Associates Ltd ("RSAL") … was a company registered in England and Wales, whose sole director at all material times was [the second respondent].
>
> b) RSAL purchased stamps at auction and then sold them to [UK Philatelics Ltd] at a hugely inflated price, charging VAT on the sales.
>
> c) RSAL deliberately failed to submit VAT returns to HMRC, thus becoming a 'missing trader'.
>
> d) [UK Philatelics Ltd] reclaimed the VAT on its purchases from RSAL and then sold the stamps for their true price and at a considerable loss, generating substantial quarterly VAT repayments.
>
> e) Shortly before the end of the fraudulent scheme, RSAL's place was taken by another company controlled by [the second respondent], PE Phylatelic Exports Limited, a company incorporated in Cyprus.
>
> f) HMRC has calculated the estimated value of the fraud to be £642,945.25. The Trustees will say at trial that there is no reason to doubt the reasonableness of HMRC's estimate."

6. Further paragraphs of the points of claim amplify the Trustees' case summarised in paragraph 4 of the points of claim, and set out above (at [4]). Paragraph 7 of the points of claim deals with the first respondent's bank accounts. Paragraphs 8 through to 16 deal with the first respondent's purchase of The Grange. Paragraph 17 sets out in detail the Trustees' case as to the agreement between the respondents on the acquisition of The Grange. In particular, the opening lines of this paragraph state:

> "It is to be inferred that the common intention of [the respondents] was that [the second respondent] was to be the beneficial owner of [The Grange] and that [the first respondent] was to be registered as the proprietor of [The Grange] so as to conceal the fact of [the second respondent's] ownership."

7. Paragraph 17e and f provides as follows:

> "e. By October 2014, [the second respondent] had been engaged in large-scale VAT fraud for some considerable time. He would have known in general terms of the risk of detection and civil or criminal action, and that such risk would increase the longer the fraud continued. A fraudster such as [the second respondent] is to be expected to have made provision to conceal his assets,
>
> f. In hearings in the Crown Court in the POCA Proceedings on 1 October 2020 and on 8 June 2021, [the second respondent] admitted that he owned 100% of the beneficial interest in the [The Grange]."

8. Paragraphs 18 through to 20 allege that the second respondent put the first respondent in funds to make the mortgage repayment instalments and to pay the outgoings on The Grange.

Directions orders

9. On 30 May 2023, District Judge Markland made an order giving directions to trial. The first respondent was to serve and file an amended defence by 21 July 2023, the applicant was to serve and file reply by 18 August 2023, the parties were to give standard disclosure by 10 November 2023, and to file and serve witness statements by 12 January 2024. On 2 January 2024, District Judge Wales made an order that the second respondent should serve and file his defence by 16 January 2024, and that the second respondent should give disclosure by 30 January 2024 of certain categories of documents. Finally, the applicant was to serve and file any reply by 9 February 2024.

The points of defence

10. In the first respondent's points of defence, paragraph 4 of the points of claim is denied

> "for the reasons set out in the remainder of these Points of Defence below. The Property was purchased, maintained and significantly renovated by the First Respondent who owns it legally and beneficially and resists the application in its entirety."

Paragraph 8d asserts that the first and second respondent married in the Ukraine in September 2011. Paragraphs 10 and 11 of the points of claim are not admitted, the first respondent stating that they are outside her direct knowledge (except for the date of the second respondent's arrest). Paragraphs 8 through to 11 and 13 of the points of claim are admitted, as is part of paragraph 12. Paragraphs 14 and 16 are denied, and paragraph 15 is not admitted as being outside the knowledge for the first respondent. In particular, paragraph 17 of the points of claim is denied.

11. In the second respondent's points of defence, dated 16 January 2024, paragraph 4 of the points of claim is denied. Paragraph 6a is admitted, but paragraph 6b – e is denied, and paragraph 6f is not admitted. Much of paragraphs 7 to 13 is not pleaded to, but paragraphs 14 to 16 and 17 are denied, except for the fact of his conviction for VAT fraud. He does not plead to paragraphs 18 and 19, but denies paragraph 20. It is thus clear that the applicant's case, that The Grange belongs beneficially to the second respondent, is denied by both respondents. It is also clear that, with the exception of the second respondent's acceptance of the *fact* of his conviction for VAT fraud, he denies the various allegations of dishonest conduct set out in paragraph 6 of the points of claim.

Further applications

12. On 10 January 2024, the second respondent made an application by notice for (i) an order extending time for the service of this defence to 16 February 2024, and (ii) an order that there be a "disclosure conference" between the applicant and the second respondent. This application was dismissed on paper without a hearing by District Judge Wales on 31 January 2024. On 16 February 2024, the second respondent made a further application for an order "amending the order of District Judge Wales" of 31 January 2024, so that the applicant would be required to give further disclosure of certain documents to the second respondent. This application was opposed, and it was heard by me at the same time as the application for a trial by jury. After hearing the parties, I dismissed the application for the reasons which I then gave *extempore*.

The application for trial by jury

The evidence of the parties

13. As I have said, the application notice for an order that the trial be held with a jury was issued on 10 February 2024. It is supported by a witness statement from the second respondent dated 14 March 2024. I will not set out the contents of this witness statement in detail, but I note certain points in particular. In paragraph 19 the second respondent says that Irwin Mitchell "explained that the original frauds are not something that can be considered and are irrelevant". If true, this is curious because, as I have said, the points of claim expressly set them out. In paragraph 30 he says that "my status as a convicted criminal me leaves me wondering if I can be dealt with even-handedly by a single judge". He goes on in paragraph 31 to say that "a judge has little discretion to take a holistic view of a major fraud that now spans 10 years", and (in 32) that "[a] jury of my peers is more likely to lend weight to the horror of what has happened overall".

14. The evidence in opposition from the applicant is contained in her witness statement dated 30 March 2024. Most of this witness statement is concerned with the disclosure application, with which I have already dealt. All it says in substance there in relation to the application for a trial by jury is that:

> "9.1. In insolvency litigation of this sort, trials are heard by a specialist judge not by a jury, and … there is no reason why the court should depart from this approach here; and
>
> 9.2. The matters raised by the Second Respondent are not relevant to the issues for trial anyway. The Second Respondent appears to believe that the trial will deal with his complaints about third parties and the background to his bankruptcy, rather than the relief sought in relation to the property at The Grange."

15. Again, it strikes me as odd that, if the background to the bankruptcy is irrelevant, it should have been thought appropriate to make the detailed allegations as to *how* the VAT fraud was committed. As it seems to me, the case which the applicant makes is that the property was bought for the benefit of second respondent with his money. He now being bankrupt, his trustee in bankruptcy is properly seeking to recover his available assets for the benefit of his creditors. But, at first sight, *why* he became bankrupt seems to be irrelevant. (The question of what exactly were the particulars of the offence to which the second respondent pleaded guilty were not debated before me. I leave on one side, for present purposes, the question whether and how far these allegations may or should properly be debated in these separate civil proceedings.)

Submissions

16. As to the *relevance* of these allegations, in her counsel's written submissions, the applicant says that

> "8. Para 5 and 6 of the Points of Claim go to the following issues:
>
> a) To explain the nature of the POCA proceedings in which PR made admissions as to his beneficial interest in the Property, those admissions being a fact relied upon by the Trustee in Bankruptcy in her primary case that PR and not OS was the true beneficial owner of the Property (POC paras 17(f), 22 and 23);
>
> b) As a matter relied upon in connection with PR's solvency at the relevant time, relevant to the Trustee in Bankruptcy's alternative case under IA 86, s 339 (POC para 28; and
>
> c) As a matter relied upon as giving rise to an inference that PR intended to put assets beyond the reach of HMRC in the context of the Trustee in Bankruptcy's alternative case under IA 86, s. 423 (POC para 29)."

17. I understand the point of referring to paragraph 17f of the particulars of claim, where it is pleaded that, during the criminal proceedings, the second respondent

admitted being the beneficial owner of The Grange. If proved, that is a useful admission. But it is not necessary to allege the second respondent's participation in a VAT fraud to do that. It is necessary to state only that, on such and such an occasion, and in such and such a manner, the second respondent admitted such and such. And the other paragraphs in the particulars of claim to which she refers do not mention the VAT fraud at all. So, I really do not see the point of them, unless perhaps to poison the mind of the court (which is not a good reason). Nevertheless, I have to adjudicate on this application on the basis of the material and submissions which the parties have chosen to put in front of me.

The law

18. At the hearing, neither side mentioned section 66 of the County Courts Act 1984, so I raised it with the parties. This section relevantly reads as follows:

> "(1) In the following proceedings in [the county court] the trial shall be without a jury—
>
> (a) Admiralty proceedings;
>
> (b) proceedings arising—
>
> (i) under Part I, II or III of the Rent (Agriculture) Act 1976, or
>
> (ii) under any provision of the Rent Act 1977 other than a provision contained in Part V, sections 103 to 106 or Part IX, or
>
> (iii) under Part I of the Protection from Eviction Act 1977; [or
>
> (iv) under Part I of the Housing Act 1988]
>
> (c) any appeal to the county court under [the Housing Act 1985].
>
> (2) In all other proceedings in [the county court] the trial shall be without a jury unless the court otherwise orders on an application made in that behalf by any party to the proceedings in such manner and within such time before the trial as may be prescribed.
>
> (3) Where, on any such application, the court is satisfied that there is in issue—
>
> (a) a charge of fraud against the party making the application; or
>
> (b) a claim in respect of […] malicious prosecution or false imprisonment; or
>
> (c) any question or issue of a kind prescribed for the purposes of this paragraph,
>
> the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any

> scientific or local investigation which cannot conveniently be made with a jury."

19. Similar provision is made in the Senior Courts Act 1981, section 69, for actions in the High Court, but only in relation to those for trial in the (then) Queen's Bench Division of that court. For this reason, a claim of the present kind, brought by a trustee in bankruptcy in the Chancery Division of the High Court, could never attract a jury trial: see *Stafford Winfield Cook & Partners v Winfield* [1981] 1 WLR 458, 465. But this claim has been brought in *the County Court*, and so the 1984 Act applies. Section 66(2) of the 1984 Act corresponds to section 69(3) of the 1981 Act, and section 66(3) of the 1984 Act corresponds to section 69(1) of the 1981 Act. There is no equivalent in the 1981 Act to section 66(1) of the 1984 Act.

20. It will be seen that section 66(1) of the 1984 Act rules out jury trial in the cases there mentioned. Section 66(3) of the Act creates a default rule in favour of jury trial in the cases mentioned in that subsection, subject to an exception for trials that satisfy the test of not being able to be "conveniently" made before a jury because of the need for examination of documents or other scientific or local investigation. In all other cases, section 66(2) creates a presumption *against* jury trial, but with the court retaining a discretion as to whether to order one.

Further submissions

21. At the hearing before me, it was clear that the parties had not come prepared to debate the application of section 66. Neither party had mentioned it in evidence or written submissions. Once I had pointed it out to the parties, they were immediately aware of its potential significance. Yet neither party was then in a position to cite any of the relevant authorities on this provision to me, or how they applied to the facts of the case. I considered that it would not be fair to adjudicate on this point without proper argument, including reference to the authorities. I therefore decided that I would adjourn the hearing to allow the parties to lodge serial written submissions, so that I would then be able to decide the matter properly, albeit on paper.

22. Following the hearing, I received a written submission dated 27 March 2024 from counsel for the applicant. I asked for any submission in reply from the second respondent by 2 April 2024, but in fact he sent one dated 28 March 2024. The applicant did not make any submission in reply. I proceed on the basis that I now have all the submissions that the parties wish to make. I have read them carefully.

23. I bear in mind that the second respondent in this case (unlike the other parties) has no legal representation. However, so that it is clear, I point out that, in our system, the substantive law and the procedural rules are not different for unrepresented parties. With a very few exceptions (none of which applies here) we have but a single set of rules for everyone: *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, SC. I must judge this case accordingly.

The authorities

"A charge of fraud"

24. The first question of law is the meaning of the phrase "a charge of fraud" in the atatute. In *Barclays Bank Ltd v Cole* [1967] 2 QB 738, the plaintiff bank sued the defendant for £52,250, as money had and received and trespass. It accused him of taking part in an armed robbery at one of their branches, and taking £52,250. Part of the proceeds were later paid into the defendant's account with the same bank (though at another branch). The defendant was convicted of the robbery and sentenced to 15 years' imprisonment. However, at this date the *criminal* conviction was not admissible evidence in the *civil* proceedings of the defendant's participation in the robbery.

25. The defendant sought a trial by jury under section 6(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933, which relevantly read:

> "(1) . . . if, on the application of any party to an action to be tried in the King's Bench Division of the High Court … the court or a judge is satisfied that—
>
> *(a)* a charge of fraud against that party ... is in issue, the action shall be ordered to be tried with a jury … "

(This provision later became section 69(1) of the 1981 Act, though omitting the words "in issue".) The defendant argued that the bank, in accusing him of robbery in the civil proceedings, was making a "charge of fraud" against him within section 6(1). The judge dismissed the application, and the defendant appealed.

26. Lord Denning MR said (at 743-744):

> "'Fraud' in ordinary speech means the using of false representations to obtain an unjust advantage … Likewise in law 'fraud' is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false: see *Derry* v. *Peek*, *per* Lord Herschell. In any case, 'fraud' involves a false representation. Robbery does not. It[f] involves violence, not fraud."

27. Diplock LJ said (at 745):

> "For at least 100 years (see Bullen & Leake's, Precedents of Pleadings, 3rd ed. (1868)) 'fraud' in civil actions at common law, whether as a cause of action or as a defence, has meant an intentional misrepresentation (or, in some cases, concealment) of fact made by one party with the intention of inducing another party to act upon it, which does induce the other party to act upon it to his detriment. A charge of robbery is clearly not embraced in 'a charge of fraud' in this sense."

28. Russell LJ said (at 746):

> "On the construction of the section I agree that this is not an action in which 'a charge of fraud against … (the defendant) … is in issue.' I agree with the

> judge that fraud is used here in its ordinary and primary sense of deceit, and not as referring generally to dishonesty. Reference may be made to the definitions of fraud in the Oxford English Dictionary; where it is also of some interest to notice the quotation from Swift: 'They look upon fraud as a greater crime than theft.' The charge of robbery in the present case is not a charge of deceit: therefore the defendant has no absolute right to a jury."

29. So, all three judges agreed that fraud involved a false representation. But robbery did not involve such a representation, and therefore a charge of robbery was not one of fraud. Whether it was necessary to go on beyond false representation, and allege that the fraudster had *gained something*, or the victim had *lost something*, as a result, is less clear from the language used. Lord Denning MR referred to the use of the false representation to obtain an unjust advantage. Diplock LJ referred to the false representation "which does induce the other party to act upon it to his detriment". Russell LJ said only that "fraud is used here in its ordinary and primary sense of deceit, and not as referring generally to dishonesty". As is well known, by lawyers at least, the tort of deceit is complete only where there is a false representation *which causes loss*. An unsuccessful fraud is not an actionable deceit.

30. The point arose again in *Grant v Travellers Cheque Associates Ltd*, *The Times*, 19 April 1995. The plaintiff bought £5,400 worth of traveller's cheques from the defendant. He cashed one at the airport and flew from London to Greece. Subsequently the plaintiff claimed that he had lost the remaining cheques, or that they had been stolen, and claimed on the defendant's guarantee to replace such cheques. The defendant refused, disputing that they had been lost or stolen. The plaintiff sued. The county court judge decided that the defendant was making a charge of fraud, and that therefore the trial should be with a jury. The Court of Appeal disagreed.

31. McGowan LJ, after discussing the leading case of *Derry v Peek* (1889) 14 App Cas 337 in the House of Lords, said (at page 3 of the transcript):

> "Thus, there must be fraud with damage for an action of deceit.
>
> That was, it seems to me, trite law at that date.
>
> Returning to the case of *Barclays Bank v Cole*, I therefore read it as plainly deciding that the word 'fraud' in this context is a term of art, amounting to actionable deceit. If that is right, there was no actionable deceit in the present case. If, of course, the plaintiff did not lose or have stolen the travellers cheques, he made an intentional misrepresentation of fact when he told the defendants that he had. In so doing, no doubt he had the intention of inducing the defendants to act to their detriment. However, the defendants did not act to their detriment, because they did not pay him what he asked. Consequently, actionable deceit is not available in this case."

32. Ward LJ said (at page 5):

> "If that is right, a charge of fraud is not confined to a consideration of the false representation and mental element alone, as it is defined by Lord

> Herschell in the passage I have read [from *Derry v Peek*], but to the concluded activity involving the act performed to the detriment of whomsoever has been taken in by the false and fraudulent misrepresentations.
>
> Construed in that way, it is, of course, then wholly consistent for Diplock LJ and Russell LJ in *Barclays Bank v Cole* to treat fraud as synonymous with the complete cause of action, commonly called deceit, which includes the necessary element of damage. Of course, fraud may be raised in civil proceedings, not only by way of a cause of action giving the plaintiff relief, but by a defendant as a means of defence. Ordinarily that would arise where a defendant is seeking to rescind a contract into which he has been induced to enter by reason of the fraud perpetrated upon him. In that event, too, he will have parted with his property and acted to his detriment."

33. Sir Roger Parker agreed, albeit rather reluctantly. He said (at page 6):

> "The result of the foregoing judgments appear to be that s 66(3) of the County Courts Act 1984 must be read in the following way: 'Where, on any such application, the court is satisfied that there is in issue a charge of the tort of deceit against the party making the application, which it is necessary to decide in order to determine the rights of the parties, the action shall be tried with a jury.' The section does not, of course, say so in terms. But, with some hesitation and considerable reluctance, I have come to the conclusion that, on the authorities which have already been cited, that must be regarded as the meaning of this section."

34. In *Parsons v Provincial Insurance plc*, unreported, 20 February 1998, the plaintiff made a claim on his insurance after his house was damaged by an explosion. The insurer refused to indemnify him on the ground that he had caused the explosion himself. He sued the insurer, and sought a jury. The judge refused, on the ground that the allegation that he had caused the explosion himself was not a charge of fraud. The Court of Appeal dismissed his appeal.

35. Henry LJ, with whom Aldous LJ agreed, said (at page 3 of the transcript) that *Barclays Bank v Cole* was "authority binding on us that the charge of fraud referred to in the section must be framed and founded on the complete tort of deceit." Accordingly, an allegation that the plaintiff had caused the explosion was not a charge of fraud within the statute. So, the plaintiff/appellant argued two more grounds. The second was that the insurer claimed that he had given an untrue answer to a contractual condition question, that is, that no trade or business was to be carried on in the house, and the insurer could avoid the policy. The third was that he had induced the insurer to extend cover by a false representation (that an extra bedroom had been added).

36. As to the second, there was no need for the insurer to allege fraud. Untruth in the answer was sufficient for the insurer to avoid liability. Similarly in relation to the third. There was no need to allege that either representation was made *fraudulently*. As Henry LJ said (at page 6):

> "the simple answer is that the defendant does not have to and will not try to establish fraud. If no bedroom, the claim was false and it matters not whether the brokers misunderstood their client's instructions or not; the defendants do not have to establish fraud by the plaintiff in order to avoid the contract.
>
> Accordingly, in my judgment fraud is not in issue in either of these two heads of claim. Nor is the defence asserted in those two heads founded on a charge of fraud. Accordingly, in my judgment, the plaintiff is not entitled to a jury under s 69(1)."

37. The third member of the court, Sir Christpher Staughton (like Sir Roger Parker in *Grant*, rather reluctantly), agreed that, in the light of the authorities, there was no charge of fraud in this case, and that the claim to trial by jury as of right failed.

38. These authorities are all binding on me, sitting here at first instance in the County Court. I conclude therefore that a "charge of fraud" within section 66(3) of the 1984 Act is not merely one of the making of a false statement, but instead one of the complete tort of deceit, including the allegation of loss suffered by the victim as a result. But section 66(3)(a) applies only where the "charge of fraud" is made *against the person applying for the jury trial* (*ie* the second respondent in this case).

39. I should also mention the decision of Sir Robert Megarry V-C in *Stafford Winfield Cook & Partners v Winfield* [1981] 1 WLR 458, where a claim was brought in the Chancery Division of the High Court. The defendant sought a transfer of the claim to the Queen's Bench Division so that he could apply for trial by jury under section 6(1) of the 1933 Act which, unlike the later sections 69(1) of the 1981 Act and 66(3) of the 1984 Act, contained the words "in issue" after "charge of fraud". Sir Robert Megarry V-C said (at 466-467):

> "Now the claim in respect of the alleged constructive trust obviously does not depend on the company establishing fraud against the defendant, and the same applies to the claim for money had and received to the company's use. There is, indeed, a claim for damages; but since the Misrepresentation Act 1967, section 2, such a claim may succeed without proving that the misrepresentation was fraudulent; and the charge of conspiracy to pay the money in breach of duty to the company is not a charge of fraud. It seems to me that the company could succeed in all that is claimed without establishing that the defendant is guilty of *Deny* v. *Peek* fraud. Obviously the company's claims against the defendant involve grave imputations against her; but that is not enough to bring the case within the statute."

40. There is nothing in any of the modern authorities to suggest that the omission of the words "in issue" changes matters, and that *Barclays Bank Ltd v Cole* and the authorities following it no longer apply to a case where an allegation of the tort of deceit is made but the allegation is not "in issue". Indeed, in *Parsons*, a decision under section 69 of the 1981 Act (*ie* without the words "in issue"), Henry LJ applied *Barclays Bank*, and specifically said (in the extract referred to

above at [34]) that "fraud is not *in issue* in either of these two heads of claim" (emphasis supplied).

The "cannot conveniently be made" exception

41. If such a charge is established, then the second respondent is *entitled* to a jury, unless

> "the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury".

That is not a pure exercise of judicial discretion, but an example of (reviewable) decision-making, as is shown by the authorities bearing on this second order question. So, I turn to consider those authorities.

42. In *Taylor v Anderton* [1995] 1 WLR 447, the plaintiff sued the defendant Chief Constable for malicious prosecution. That is a category of case generally giving rise under the applicable legislation to a default position of trial by jury. However, the plaintiff put a great many facts in issue, meaning that in practice a great many documents would need to be considered by the court at trial. The matter went to the Court of Appeal.

43. On the appeal, Sir Thomas Bingham MR, with whom Rose and Morritt LJJ agreed, said (at 456):

> "If the plaintiff had limited his case to a simple assertion of malicious prosecution based on the unsuccessful fraud prosecution and particulars of malice directly related to that prosecution, then I would regard the case as one which might well have been capable of being conveniently tried by a jury. Much of the documentation, much of the factual pleading, not all but much of it, might very well then have been irrelevant.
>
> The plaintiff, however, no doubt for reasons which seem good to him and his advisers, has not adopted that course. He has based his case of malice on the whole course of police conduct from early 1985 involving the establishment and operation of the D.I.U. and has made allegations of a very far-reaching plot to destroy the plaintiff as a means of destroying Mr. Stalker. The plaintiff having put his case in that way, it seems to me inevitable that the defendant would seek to deploy a very detailed and heavily documented case in order to seek to rebut it. No application has been made to strike out any part of the defence and, in my view, the plaintiff cannot be heard to complain if his claim provokes a defence of this kind."

44. And then he went on (at 457):

> "The first question was: will this trial require any prolonged examination of documents or accounts? Like the judge, I am of opinion that it certainly will. The second question was and is: can this prolonged examination of documents or accounts conveniently be made with a jury? Like the judge, I am of opinion that it cannot. The case as it stands will be very lengthy, very

> expensive, very burdensome and very difficult to control if tried by a judge alone. If tried by a judge and jury it will be even lengthier, even more expensive, even more burdensome and even more difficult to control. I can think of no adjective less appropriate than 'convenient' to describe the trial of this action by a jury."

45. In the later case of *Aitken v Preston* [1997] EMLR 415, CA, the plaintiff politician sued the defendant editor and newspaper proprietors for libel. The judge decided that trial should be by judge alone, without a jury. The plaintiff appealed. Lord Bingham CJ, with whom Hirst and Millett LJJ agreed, stated the following principles:

> "(i) The basic criterion, viz that the trial requires a prolonged examination of documents, must be strictly satisfied, and it is not enough merely to show that the trial will be long and complicated (*Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013, [1973] 1 WLR 448). However, the word 'examination' has a wide connotation, is not limited to the documents which contain the actual evidence in the case and includes, for example, documents which are likely to be introduced in cross-examination (*Goldsmith v Pressdram Ltd* [1987] 3 All ER 485, [1988] 1 WLR 64).
>
> (ii) 'Conveniently' means without substantial difficulty in comparison with carrying out the same process with a judge alone. This may involve consideration of several factors, for example:
>
> > (a) the additional length of a jury trial as compared with a trial by judge alone;
> >
> > (b) the additional cost of a jury trial taking into account not only the length of the trial but also the cost of, for example, additional copies of documents;
> >
> > (c) any practical difficulties which a trial by jury would entail, such as the handling of particularly bulky or inconvenient files, the need to examine documents alongside each other, and the degree of minute scrutiny of individual documents which will be required;
> >
> > (d) any special difficulties or complexities in the documents themselves (*Beta Construction Ltd v Channel Four Television Co Ltd* [1990] 2 All ER 1012, [1990] 1 WLR 1042 especially per Stuart Smith LJ at page 1047 of the latter report and per Neill LJ at page 1055 H, referred to and applied in the recent case of *Taylor v Anderton (Police Complaints Authority Intervening)* [1995] 2 All ER 420, [1995] 1 WLR 447).
>
> (iii) The ultimate exercise of discretion will in each case depend substantially on the circumstances of each individual case, and it would be idle to attempt to enumerate all the factors which might arise."

46. But Lord Bingham also went on to identify four factors to take into account:

> "(1) The emphasis now is against trial by juries, and this should be taken into account by the court when exercising its discretion (*Goldsmith v Pressdram* (*supra*) at page 68 of the latter report per Lawton LJ with whom Slade LJ expressly agreed). This conclusion is based on s.69(3), which was a new section appearing for the first time in the 1981 Act to replace s.6(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933, the provision in force at the date when *Rothermere v Times Newspapers* was decided.
>
> (2) An important consideration in favour of a jury arises where, as here, the case involves prominent figures in public life and questions of great national interest (*Rothermere v Times* (*supra*)).
>
> (3) The fact that the case involves issues of credibility, and that a party's honour and integrity are under attack is a factor which should properly be taken into account but is not an overriding factor in favour of trial by jury (*Goldsmith v Pressdram* (*supra*) at page 71 H per Lawton LJ).
>
> (4) The advantage of a reasoned judgment is a factor properly to be taken into account (*Beta Construction v Channel Four Television* (*supra*))."

47. Lastly on this point, there is *Oliver v Calderdale Metropolitan Borough Council*, *The Times*, 7 July 1999. This was another case of malicious prosecution, where the judge disapplied the presumption of jury trial. On appeal, Buxton LJ, with whom May and Laws LJJ agreed, said:

> " … this case does not fall under the criteria requiring a jury trial as provided by s.66. The two questions are whether the trial requires any prolonged examination of documents, or alternatively any scientific investigation which cannot conveniently be made with a jury. It is clear from the reports of Dr Kehoe and of the consultant psychiatrist that there is a significant dispute between those leading professionals as to the present psychiatric state of the claimant and the reasons for it. Of course, that question could be debated before a jury, and I accept that, in cases where jury trial is in fact mandatory, that is to say, in the criminal jurisdiction, some questions similar to that are sometimes raised before the jury. The question, however, is whether that can be done conveniently with a jury. In my estimation, it is not convenient for a medical question of that sort, and particularly of the sort that is to be debated in this case, to be investigated with a jury. Secondly, the defendant's case requires a close examination of the whole of the medical records of the claimant, it being the defendant's case that his present condition is explicable in the context of his lengthy medical history, and not merely in the context of the incident that did or did not happen in 1995. Although, as Mr Gledhill has urged on us, the records in question are less formidable than the sort of records that have been threatened in other cases where juries have not been ordered, nonetheless, for my part, I consider that there is a substantial danger, indeed likely to be a requirement, that there will be prolonged examination of those records. Mr Gledhill said that was not so because the defendant's doctor was unlikely to be challenged in detail upon them. I beg to express some scepticism of that. Certainly, I do not see how the defendant's case could be properly

> tested, much less properly tested before a jury, without those documents being looked at in some detail.
>
> In my judgement, therefore, this is a case in which I am of the opinion, which is what the statute requires, that, first of all, the case certainly requires a scientific investigation, which cannot conveniently be made with a jury. I am also of the view that it requires prolonged examination of documents, which again could not conveniently be made with a jury."

Discretion

48. Finally, I turn to the question of discretion, pure and simple. This arises under section 66(2) of the 1984 Act. Under that provision, the court has the power to order a trial by jury. The applicant's counsel referred in this connection to the decision of the Court of Appeal in *H v Ministry of Defence* [1991] 2 QB 103, where Lord Donaldson MR referred at (112) to

> "how exceptional the circumstances would have to be before it was appropriate to order such a trial … "

However, by "such a trial" in that phrase, Lord Donaldson was referring to a trial of a claim for damages for personal injuries, and not to jury trials generally. This, of course, is not a claim for damages for personal injuries. So, I respectfully consider that that observation does not assist me in the present case, which is not one for compensation for personal injury.

49. On the other hand, I refer again to the decision of the Court of Appeal in *Parsons v Provincial Insurance plc*, unreported, 20 February 1998, which I mentioned above. Henry LJ, with whom Aldous LJ agreed, said (at page 6 of the transcript):

> "I turn to the question of discretion. Should the judge have ordered the jury in the exercise of his discretion? The judge viewed this as a relatively ordinary case where an insurer is saying that the claim under the policy was 'fraudulently made'. He could, less provocatively but with equal accuracy, have said 'dishonestly made'. Such claims were at the time of *Barclays Bank* [1967] 2 QB 738, [1966] 3 All ER 948 and are today, routinely tried by a judge alone. Mr Rees, for the plaintiff, criticised the judge for relying on what routinely happened on the facts in this individual case. The significance of 'routinely' is that it is a fundamental principle of justice that like justice should be obtained in like cases. He was therefore right to take into account the fact that these actions are routinely tried by judge alone and would, in my judgment, have been wrong not to take it into account."

50. He went on (at page 7):

> " … the judge took the reality of the seriousness of the allegation into account. He also took into account, as he was entitled to do, that the trial would be shorter and cheaper and more manageable if tried by a judge alone. He is an experienced judge. It was his discretion. I can see nothing in his judgment to fault his approach to the exercise of that discretion. The plaintiff, despite Mr Rees' eloquence, does not come close to showing that

> the judge's refusal to order a jury fell outside the broad discretionary ambit entrusted to him. That is the test. But I would go further and say that he was plainly right."

51. The third judge, Sir Christopher Staughton, said (at page 8):

> "As to discretion, I see no sufficient reason to interfere with the decision of May J, although I am not convinced that where trial by jury is otherwise appropriate it should be refused solely on the ground that it may take longer or cost more money. One does not need to turn to family law for the proposition that this court is slow to interfere with the decision of a judge on a matter that must have been in his discretion."

52. More recently, in *McGrath v Independent Print Ltd* [2013] EWHC 2202 (QB), Nichola Davies J said:

> "25. The disposition of the courts today is against trial by jury. Trial by judge alone provides real case management advantages."

Application of the law to the facts

"A charge of fraud"

53. If paragraphs 5-6 and 17e, dealing with the VAT fraud, had been omitted from the points of claim, then, with one possible exception to which I shall return, there would be nothing in this claim by the trustee that could be said to amount to a charge of fraud within section 66(3)(a) of the 1984 Act. The second respondent's application would (again, subject to that possible exception) rest entirely on the discretion given to the court under section 66(2). Of course, the trustee could have decided to abandon the VAT fraud paragraphs, and then the jury point would (subject to the possible exception) be unarguable by the second respondent. However, as I have said, they seem to me to add nothing to the substance of the claim in relation to The Grange, except purely prejudicial allegations. But the trustee has not abandoned them, those paragraphs remain there, and accordingly they must be considered.

54. The authorities to which I have referred establish that a charge of fraud requires the allegation of the complete tort of deceit. Paragraph 6 of the points of claim alleges that the second respondent, as sole director of RSAL, caused RSAL to fail to submit VAT returns to HMRC as it should have done, although RSAL had charged VAT on its sales to UKPL (another company alleged to be controlled by the second respondent). Thus, it is impliedly alleged that RSAL failed to pay HMRC the VAT it had collected from UKPL. It is then alleged that UKPL reclaimed the VAT element it had paid to RSAL (by offsetting it against the VAT it would otherwise pay over to HMRC), and then sold the stamps at a loss to third parties, generating VAT repayments from HMRC.

55. So, the substantive allegation is that, by RSAL's failing to submit VAT returns when it should have done, UKPL was able to claim and obtain VAT repayments to which it would otherwise not have been entitled. This is, at least impliedly, an allegation of the tort of deceit. So, it is "a charge of fraud" for the purposes

of section 66. Is it "a charge of fraud" against *the second respondent* (as opposed to either of the two companies alleged to have been involved)? The second respondent is alleged to have acted as director of the companies involved, and to have caused the companies to act as alleged. That is an allegation of actionable deceit *by him*: see *Standard Chartered Bank v Pakistan National Shipping Corporation (No 2)* [2003] 1 AC 959, HL.

56. There is a further point I should mention here. In his written submission in answer of 28 March 2024, the second respondent says that the allegations which *he* makes prove fraud, and not just dishonesty. I think he has misunderstood section 66(3)(a), and in particular the significance of the word "against". As I pointed out above (at [38]), for the provision to apply, the charge of fraud must be made against the person seeking the jury trial, and not against some third party.

57. I referred above to a possible further exception. This relates to the opening lines of paragraph 17 of the points of claim, which allege that The Grange was put into the first respondent's name so that the second respondent could hide his ownership from his creditors. If that is properly an allegation of a false representation, however, it is *not* an allegation of the tort of deceit, because there is no allegation that anyone has relied on the representation and suffered loss as a result. So that is not a charge of fraud for this purpose. I can therefore put that on one side.

The statutory exception

58. The jury rule being thus engaged, I turn therefore to the statutory exception. This is whether, in the opinion of the court, the matter could not be conveniently tried before a jury. The Trustee makes three points. First, she says that this is not "local business" within the Insolvency Practice Direction, para 3.8, and therefore must be dealt with by the specialist Business & Property Courts judge. But that is not what the Practice Direction says, and in any event its text cannot prevail against the words of an Act of Parliament which provides (whether by mandatory wording or the exercise of a power thereby conferred) that there *shall* be a trial by jury.

59. Her second point is that there will be very many pages of documentary evidence to consider. She says the exhibits to the applicant's own witness statements exceed 600 pages in length. And, thirdly, she refers to the need to examine bank statements and analyses of payments. However, the test in section 69(3) does not depend on the *amount* of evidence that has been put forward, but on *what will actually be needed to be considered*. The necessary consideration of even a half-dozen detailed and complex documents may make it not convenient to try the matter before a jury, though they may be the only evidence. The necessary examination of just a half-dozen short letters among thousands of pages of otherwise marginally relevant evidence admitted may lead to the opposite conclusion.

60. The second respondent on the other hand says that the jury would require "little time to understand the counterfeiting and frauds", and would require "no particular accounting skills". Here the words "the counterfeiting and frauds"

refer, not to the allegations which the applicant makes against the second respondent, but to those which *he* makes against *third parties*. So far as I can see, these are not relevant to the question concerning the beneficial ownership of The Grange, nor to the further issue of how the VAT fraud was carried out by the second respondent.

61. In my opinion, even if this case is restricted merely to the evidence dealing with the acquisition of The Grange, and the question whether the second respondent has or has not a beneficial interest in it, it will be one "which cannot conveniently be made with a jury". This is because it will certainly involve the consideration of bank statements and detailed financial documents, in which the numbers are more important than the pieces of paper.

62. I do not ignore the fact that, in criminal cases where a jury is required, such cases must by law be tried with a jury. But that requirement does not apply to civil cases, and in any event it does not mean that they are being tried "conveniently" by the jury (which *is* the test for civil cases). If the court has to consider in addition the allegations of VAT fraud, requiring the examination of further accounts and financial documents, it will be even less "conveniently" made with a jury. Accordingly, the *non-jury* default position applies, and this application must be refused.

Discretion

63. In these circumstances, I consider that I have no further discretion to exercise. But, in case I am wrong about this, I add the following. Like Sir Christopher Staughton in *Parsons*, I too am not convinced that it would not be right to refuse a jury trial simply on the basis that it would take longer or cost more. But it is legitimate nevertheless at least to weigh time and cost in the balance. And I bear in mind (as in *Parsons*) that claims of this kind by trustees in bankruptcy are routinely tried by judge alone, and, as Nicola Davies J said in *McGrath*, "Trial by judge alone provides real case management advantages."

64. The second respondent makes two points in particular in relation to trial by jury. First, he says that "my status as a convicted criminal me leaves me wondering if I can be dealt with even-handedly by a single judge". I do not see this as an argument in favour of having a jury over a judge alone. There is no *a priori* reason to suppose that a professional judge would be less sympathetic to a convicted criminal than a popular jury, and the second respondent adduces no evidence or other material in support of such a view. Indeed, some might say that any possible prejudice was the other way round. Moreover, a professional judge must give reasons for the decision, which can if appropriate be examined at appellate level. A jury gives none, and an appeal is thus rendered more difficult.

65. The second reason given by the second respondent is that "a judge has little discretion to take a holistic view of a major fraud that now spans 10 years". But the fact-finding function is exactly the same, whether the tribunal is a popular jury or a judge sitting alone. Neither form of tribunal has any more or less "discretion" in the finding of facts than the other. There is therefore nothing in this point.

66. The third reason given by the second respondent, following on from this, is that a "jury of my peers is more likely to lend weight to the horror of what has happened overall". If what he means is that he considers that a jury is more likely than a judge to ignore the law, or the legal duties laid upon a fact-finder, then in my judgment that is an irrelevant, indeed illegitimate, consideration. If what he means is that a non-lawyer, or non-judge, is more likely to pay attention to purely human considerations, then I disagree. We professional judges are human too.

67. For all these reasons, I consider that if I had a discretion, I would exercise it against conducting the forthcoming trial with a jury.

Conclusion

68. In the result, this application fails and must be dismissed. If there are any consequential applications, these can be dealt with at the pre-trial review on 8 April 2024.