



Invescap Holdings Limited and Lee Douglass
Royal Court
30th July, 2014

JUDGMENT 36/2014

Plaintiff's Application for summary judgment/strike out.

Approved Text
30.07.2014

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between **INVESCAP HOLDINGS LIMITED** **Plaintiff**
-and-
LEE DOUGLASS **Defendant**

Plaintiff's Application for summary judgment/strike out

Date of hearing: 21st July 2014

Judgment handed down: 30th July 2014

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Plaintiff: Advocate M D P Jones
The Defendant did not appear and was not represented

Cases, Texts & Legislation referred to:

The Royal Court Civil Rules, 2007

Tchenguiz v Investec Trust (Guernsey) Limited (unreported, 26 June 2013)

The Civil Procedure Rules 1998 (*The White Book*)

Summers v Fairclough Homes Ltd [2012] 1 WLR 2004

Jameel v Dow Jones and Co [2005] QB 946

EFG Private Bank (Channel Islands Limited v BC Capital Group SA (in liquidation) and others)
(unreported, 14 July 2014)

Easvair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch)

Re Hydrodan (Corby) Limited [1994] BCC 161

Towler v Wills [2010] EWHC 1209 (Comm)

Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited [2009-10] GLR 38
The Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979
The Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011
The Conditions of Employment (Guernsey) Law, 1985

Introduction

1. On 21 July 2014, I heard an Application dated 30 May 2014, by which the Plaintiff seeks judgment to be entered in its favour in respect of the majority, but not all, of the claims it makes against the Defendant. In relation to some aspects, the Application was brought to have paragraphs of the Defendant's Defences and Counterclaim struck out, with the consequential outcome that judgment should be entered in respect of the corresponding claims in the Plaintiff's Amended Cause. In relation to most of the paragraphs in respect of which striking out has been sought, the alternative claim is that summary judgment should be entered. There were a few paragraphs of the Amended Cause where summary judgment alone has been sought.
2. The hearing itself took place without the Defendant being present or represented. He had informed the Greffe in a letter sent by e-mail on 17 July 2014 that his former Advocates, Collas Crill, were no longer acting for him and so would not be representing him at the hearing on the following Monday. He was endeavouring to secure alternative representation. He sought an adjournment to enable him to find such representation. The request for an adjournment, effectively being made on the papers, was opposed later that afternoon on behalf of the Plaintiff.
3. The Defendant sent a further e-mail message on the morning of 18 July 2014 in which he indicated he hoped to have engaged another Advocate that day. Accordingly, I did not vacate the hearing in order to await any further developments.
4. Late on Sunday 20 July 2014, the Defendant sent a final e-mail message to the Greffe explaining that he had been unable to appoint another Advocate and that his personal health was such that he was unable to attend in person. He referred to the filing of an affidavit and encouraged the Court "*to see that there are many issues that I have an ability to defend and therefore rule accordingly*".
5. Although the final message did not repeat his previous request for an adjournment, I invited Advocate Martin Jones, who appears on behalf of the Plaintiff, to address me on the issue of whether I should adjourn the hearing. Having heard him, and having considered everything that had been put forward by the Defendant, I decided that I should proceed to hear the Application. No real explanation had been given as to why the Defendant was no longer represented by Collas Crill. I was conscious of an earlier application to vacate the hearing, which I had refused, although in doing so I had extended the time in which the Defendant was permitted to show cause against the summary judgment application and respond to the application to strike out. The medical evidence given by the Defendant earlier in the year had not been updated recently, although that was a minor point because the condition from which he suffers appears to be one where he will struggle to make travel arrangements at short notice. However, having reviewed everything I had been told, I concluded that the position in which the Defendant finds himself appears more likely than not to have been brought about by his own actions, or failures to act, rather than something external over which he has no control. In order to do justice to the Application, I concluded that I should not delay the hearing. However, because the Defendant was not in a position to do so, I put to Advocate Jones the points that would probably have arisen had oral submissions been made by, or on behalf of, the Defendant.

Procedural background

6. Proceedings against the Defendant were commenced on 21 December 2012. The Plaintiff obtained a freezing order against the Defendant. Under its terms, an action needed to be instituted and was commenced in early January 2013. Leave to register in the Livre des Hypothèques was granted on 11 January 2013. An Amended Cause was tabled on 15 February 2013. At that time, judgment by consent was entered against the Defendant for £160,000. This related to the matter pleaded at sub-paragraph 9.7 of the Amended Cause. The remainder of the Amended Cause was placed *inscrite*. The freezing order was discharged on 6 March 2013 when it was replaced by acceptable undertakings. The Defendant's Defences and Counterclaim was tabled on 12 April 2013. On 24 May 2013, the Plaintiff filed its Replique and Defence to Counterclaim. This document contained *Exceptions de forme* and extensive requests for further information. These have not yet been responded to.
7. In August 2013, the Plaintiff made an application, *inter alia*, for specific disclosure. In September 2013, the Plaintiff applied to commit the Defendant to prison for contempt of court for not complying with a requirement to deliver up an iPad pursuant to the freezing order within the deadline specified therein. The disclosure application was resolved by way of a Consent Order on 23 October 2013. When the deadline for disclosure passed, the Plaintiff sought an unless order. This was also dealt with by way of a Consent Order. When the later deadline agreed passed, the Plaintiff applied for judgment on 3 January 2014 for failure to comply with the terms of the unless order. That application was met a fortnight later by an application for relief from sanctions. The parties resolved those issues by way of a further Consent Order on 10 March 2014. The Defendant agreed to pay the Plaintiff's costs of a number of applications on an indemnity basis payable forthwith as the price for being placed back in a position of being permitted to defend the claims against him and to pursue his counterclaim.
8. Against that background of procedural twists and turns, the Plaintiff then issued the Application to narrow the disputes between the parties by seeking various strike outs and summary judgment. If granted, there would be comparatively little still in dispute between the parties.
9. The Application is supported by the First Affidavit of Stephen Herbert, who is a director of the Plaintiff, sworn on 29 May 2014. It complies with the requirements of rule 21 of the Royal Court Civil Rules, 2007. There is also an Affidavit of James Toynton, sworn on 30 May 2014, on which the Plaintiff relies in relation to one aspect of its Application.
10. In response, an affidavit of the Defendant described as his "Third Affidavit", albeit currently unsworn, was filed. It looks as though it was prepared with the assistance of Collas Crill. From the Second Affidavit of Mr Herbert, sworn on 15 July 2014, it appears that this unsworn and unsigned version of the Defendant's Third Affidavit was served on the Plaintiff's Advocates on 8 July 2014. This is a further example of the unsatisfactory way in which the response to the Application has been prepared in that the evidence, if it can be described in that fashion, from the Defendant is not even in a sworn form. It leaves me in the difficult position of having to exercise great caution in respect of it. I am satisfied from what I know of the Defendant's past behaviour that he would, had he addressed his mind to it, have appeared before someone with capacity to take his oath in the vicinity of where he now lives. Accordingly, it was perfectly feasible for him to have lodged a sworn Affidavit with the Court prior to the hearing, as required by rule 23 of the 2007 Rules. Because I have not had the assurance that the Defendant has sworn to the truth of what he has set out in his so-called Third Affidavit, Advocate Jones invited me to disregard it completely. In order to do justice to the Defendant in circumstances where he has not been represented or appeared, I consider that such an extreme course of action would unduly disadvantage him. Rule 23 refers to a respondent to a summary judgment application being able to "*show cause against the*

application by affidavit or otherwise to the satisfaction of the Court". Any delay in the hearing of the Application was opposed by the Plaintiff and, in those circumstances, I consider that I can have regard to what the Defendant has set out by way of explanation, but I will not afford the content the same weight as I would have done had it been a sworn Affidavit. His Affidavit fills in some background which is not apparently accepted on behalf of the Plaintiff, although I note that there has been a change of directors since the time when the events in question occurred. However, the principal approach I have taken is to consider the pleaded cases, the evidence adduced on behalf of the Plaintiff (including Mr Herbert's Second Affidavit, which I would otherwise have disregarded had I chosen to give no weight to the Defendant's unsworn document) and the overall impression of how the case might proceed if I were not minded to grant the Plaintiff's Application in its entirety. I have adopted that course of action as a means of giving as fair a hearing as I can to the Defendant when he has not attended and has not provided evidence in the appropriate form.

The Plaintiff's claim

11. The Plaintiff's case against the Defendant arises out of events that occurred when the Defendant was a director and employee of the Plaintiff. The Defendant commenced his employment on or around 31 March 2011 and he resigned on or around 11 December 2012. The Defendant admits that he was subject to certain contractual duties, both express and implied, and that he owed fiduciary duties as a director. The Plaintiff carried on business as an intermediate holding company for the purchase of commercial and residential property.
12. The Plaintiff's claims have been pleaded under four headings. The first relates to unauthorised payments that the Plaintiff alleges the Defendant caused to be paid out of its bank account at Coutts & Co AG (hereafter referred to as "Coutts"). There are thirteen sub-paragraphs in the Amended Cause detailing the specific payments it is said were caused to be made from that account by the Defendant without authority. These claims aggregate to a little over £650,000. The Plaintiff does not seek to obtain judgment in respect of sub-paragraphs 9.12 and 9.13. Those matters will have to be pursued separately from the Application. Sub-paragraph 9.7 covers the payment in respect of which judgment was entered by consent on 15 February 2013. The remaining 10 sub-paragraphs are all live issues under the Application and I will deal with them in more detail when I come to address the arguments advanced by Advocate Jones.
13. The second heading of the claim in the Amended Cause relates to the alleged unauthorised use of the Plaintiff's Assets as security for the Defendant's personal borrowing. In or around February 2012, the Defendant executed a pledge agreement with Coutts over the cash balance of the Plaintiff's bank account up to the sum of £750,000 (hereafter referred to as "the Pledge"). When the Plaintiff formally requested Coutts to transfer the entire balance of that account to another bank on or around 15 December 2012, Coutts declined to transfer the sum of £835,000 because that amount was being retained by it as security for the loans made to the Defendant in accordance with the Pledge. Accordingly, the Plaintiff seeks payment from the Defendant of the amount to which it does not have access by reason of the actions of Coutts.
14. The third heading of the Plaintiff's claim relates to the alleged unauthorised retention of the Plaintiff's funds by the Defendant. The total pleaded claim is £518,789.94, although for the purposes of the Application, the Plaintiff acknowledged that the evidence of Mr Toynton shows that the correct calculation of this figure results in a claim for £516,308.84. The Plaintiff's case is that there was an oral agreement between the Plaintiff and the Defendant to make monthly payments to the Defendant's personal bank account out of which he would make payments of salaries to employees of the Plaintiff, including himself, and that he would settle any tax and social security liability of the Plaintiff. Any balance after making those payments would be returned to the Plaintiff's bank account. The Plaintiff's analysis of what the Defendant was required to pay during the operative period of that oral agreement leads to

the significant balance claimed by it because no surplus was returned by the Defendant as required.

15. The fourth heading of the Plaintiff's claim relates to alleged unauthorised expense claims totalling £128,090.74. This element of the claim is not pursued under the Application and so will need to be progressed to trial in any event.
16. The Defendant's Defences and Counterclaim highlights at the outset that he "*has very few documents to which he can refer in pleading to the Amended Cause*", with the consequence that he has done his best but reserves his right to seek to amend his pleading following disclosure. In paragraphs 4 and 5, he refers to the role in controlling the activities of the Plaintiff played by its ultimate beneficial owner, Karim Issa Mawji. This is a topic on which he expands slightly in his unsworn evidence filed in opposition to the Application. Paragraphs 4 and 5 are two of the paragraphs that the Plaintiff seeks to have struck out.
17. The Defendant agrees that he was employed by the Plaintiff, although he gives his commencement date as 2 April 2011. He deals with the alleged unauthorised payments from the Plaintiff's bank account in a variety of ways. In relation to some paragraphs, he simply admits that the sums claimed are owed by him to the Plaintiff. In relation to some of the paragraphs, he admits that the payments were, as alleged, for his personal benefit, but claims to have been entitled to set off the amounts claimed against the monies then owed to him by the Plaintiff for expenses he incurred on behalf of the Plaintiff from his own funds. In relation to one payment, he accepts that he is liable to repay the maturity value of the underlying investment made on behalf of the Plaintiff. In relation to some of the payments, the Defendant is claiming that the payments were for legitimate business purposes of the Plaintiff.
18. In relation to the question of the Defendant securing his personal borrowing from Coutts by pledging the balance in the Plaintiff's bank account, the Defendant denies that he has breached any contractual or fiduciary duty, pointing to the fact that another director of the Plaintiff re-signed the Pledge on behalf of the Plaintiff on 9 July 2012. Further, he suggests that the amount secured against the Pledge should be lower than the amount retained by Coutts.
19. On the issue of the alleged unauthorised retention of the Plaintiff's funds under the oral agreement requiring the Defendant to use the monies paid to his personal bank account for specified purposes, the Defendant admits that such an agreement was in force, but denies that his personal annual salary was £65,000 per annum, claiming instead that it was £100,000 per annum. He further pleads that he made payments in accordance with what he set out on monthly statements provided to the Plaintiff's administrator, Confidence Limited. To the best of his knowledge, the Defendant considers that he did not retain more than £17,000 from the sums paid to him pursuant to the agreement and accepts that he is liable to repay the Plaintiff whatever it is found he did retain.
20. The Defendant's Counterclaim seeks three things. First, he has pleaded that he is owed his salary for November 2012 and for the first 11 days of December 2012 before he resigned. He further claims that he is owed £100,000 paid to the Plaintiff out of his personal funds on or about 31 July 2012 and 11 December 2012, which has not been repaid to him. (The Application does not impact upon that paragraph of the Counterclaim.) Finally, the Defendant claims for the balance of monies he paid out of his personal funds which have not been set off to defeat the claims made by the Plaintiff.
21. More than half of the Plaintiff's Replique and Defence to Counterclaim is devoted to the *Exceptions de forme* and the requests for further information. In relation to the elements of the Counterclaim that are the subject of the Application, the Plaintiff has identified that they

lack particulars and, in the case of the claim for unpaid salary, contradicts the Defendant's position in his Defences. The Replique joins issue with the Defendant over a number of issues relating to Mr Mawji's status and authority in relation to the Plaintiff. Insofar as the contents are relevant to the issues raised by the Application, I will refer to its contents when dealing with each claim in turn.

The law

22. On behalf of the Plaintiff, Advocate Jones confirmed that the primary argument where the alternatives of summary judgment and strike out were raised, was that the offending paragraph of the Defences and Counterclaim should be struck out with the consequence that judgment should be entered in favour of the Plaintiff on the corresponding element of the Amended Cause. If that primary argument were rejected, where raised, the alternative was to seek summary judgment. In some instances, of course, only summary judgment was sought.

Test for striking out

23. Rule 52(2) of the Royal Court Civil Rules, 2007 provides:

“The Court may strike out a pleading if it appears to the Court-

- (a) that the pleading discloses no reasonable grounds for bringing or defending an action,*
- (b) that the pleading is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings, or,*
- (c) that there has been a failure to comply with a rule ...”.*

In relation to sub-paragraph (a), the “*bringing*” aspect is also relevant because the Plaintiff seeks to strike out two paragraphs of the Defendant's Counterclaim.

24. Advocate Jones referred me to the approach I took in relation to sub-paragraph (a) in *Tchenguiz v Investec Trust (Guernsey) Limited* (unreported, 26 June 2013), in which I accepted that the wording of rule 52 is drawn from rule 3.4 of the *Civil Procedure Rules* in England and Wales. I therefore had regard to the commentary in para. 3.4.2, which explains that:

*“Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (*Harris v Bolt Burdon* [2000] L.T.L., February 2, 2000, CA). A claim or defence may be struck out as not being a valid claim or defence as a matter of law (*Price Meats Ltd v Barclays Bank Plc* [2000] 2 All E.R. (Comm) 346, Ch D). However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (*Farah v British Airways*, *The Times*, January 26, 2000, CA referring to *Barrett v Enfield BC* [1989] 3 W.L.R. 83, HL; [1999] 3 All E.R. 193).”*

There is no suggestion here that there is any novel point of law involved in these proceedings.

25. The commentary in para. 3.4.2 of *The White Book* continued:

“A statement of case is not suitable for striking out if it raises a serious issue of fact which can only be properly determined by hearing oral evidence (Bridgeman v McAlpine-Brown January 19, 2000, unrep., CA). An application to strike out should not be granted unless the court is certain that the claim is bound to fail (Hughes v Colin Richards & Co [2004] EWCA Civ 266; [2004] P.N.L.R. 35, CA (relevant area of law subject to some uncertainty and developing, and it was highly desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts)).

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

26. I accept Advocate Jones’ submission that these passages can be read so as to apply to the position of a defendant as they do to a plaintiff. In summary, the principle test can be said to be whether the party’s case is “*bound to fail*”, which creates a high threshold before a pleading, or a part thereof, will be struck out. Simply because a case might be weak is insufficient to justify striking out.
27. By reference to para. 1.6 of Practice Direction 3A, the commentary also states that “*a defence may fall within r.3.4(2)(a) where it consists of a bare denial or otherwise sets out no coherent statement of facts or the facts it sets out, while coherent, would not even if true amount in law to a defence to the claim.*” Although Guernsey does not have an equivalent Practice Direction, as a statement of general principle, I also accept that a pleading, or part thereof, that is so defective as to be beyond redemption through amendment or provision of further information can be treated as a pleading disclosing no reasonable grounds for defending the case or claim in question.
28. In relation to sub-paragraph (b) of rule 52(2), Advocate Jones similarly drew attention to the commentary in *The White Book* as offering guidance of the approach to be taken. Para. 3.4.3 of the commentary reads:

“Although the term abuse of the court’s process is not defined in the rules or practice direction, it has been explained in another context as that process for a purpose or in a way significantly different from its ordinary and proper use (Attorney General v Barker [2000] 1 F.L.R. 759, DC, per Lord Bingham of Cornhill, Lord Chief Justice). The categories of abuse of process are many and are not closed. The main categories which have been recognised in the case law to date are described in the following paragraphs. The court has power to strike out a prima facie valid claim where there is abuse of process. However there has to be an abuse, and striking out has to be supportive of the overriding objective. It does not follow from this that in all cases of abuse the correct response is to strike out the claim. The striking out of a valid claim should be the last option. If the abuse can be addressed by a less draconian course, it should be (Reckitt Benkiser (UK) Ltd v Home Pairfum Ltd [2004] EWHC 302 (Pat); February 13, 2004, unrep. (Laddie J.) (claimant’s application to have defendant’s claim in trade mark case struck out, so far as it related to threats, dismissed); see also Taylor v Nugent Care Society [2004] EWHC 302 (Pat); [2004] F.S.R. 37 (claimant bringing individual action when group litigation order in place)).”

29. The passage supporting the main basis for the Plaintiff’s case under sub-paragraph (b) is in para. 3.4.3.6 of the *CPR* commentary:

“The court may strike out, as an abuse of the court’s process, particulars of claim which are so badly drafted that they fail to reveal to the defendant, or to the court, the

case the defendant can expect to meet at trial. However, proof of bad drafting is not, by itself, sufficient. The court should not strike out the particulars without first giving the claimant an opportunity to amend (see in In Soo Kim v Youg [2011] EWHC 1781 (Ch). Strike out may be appropriate where the court is satisfied that the claimants have made it clear that they have no intention of trying to amend to put forward a coherently pleaded and intelligible claim (Spencer v Barclays Bank Plc, unreported, October 30, 2009 (ChD), LTL 30/10/09) or where, following amendment, and the provision of further information, the claim remains vague and incoherent (Towler v Wills [2010] EWHC 1209 (Comm)).”

30. In Summers v Fairclough Homes Ltd [2012] 1 WLR 2004 it was recognised by the UK Supreme Court that “*deliberately to make a false claim and to adduce false evidence is an abuse of process*”. That Court clarified that the jurisdiction to strike out is qualified only by the overriding objective.
31. The potential impact of an abuse of process affects the Court as well as the parties, as was emphasised by Lord Phillips of Worth Matravers MR in Jameel v Dow Jones and Co [2005] QB 946 (at para. 54):

“An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.”

This is an aspect of dealing with cases justly according to the overriding objective (see, in particular, rule 1(2)(e) of the 2007 Rules).

32. The Plaintiff’s position in relation to sub-paragraph (c) of rule 52(2) was directed more towards the paragraphs of the Defendant’s Counterclaim failing to comply with the requirements of rule 10(2) of the 2007 Rules relating to what a Cause must contain:

“The cause shall contain

- (a) a statement of the material facts on which the plaintiff relies for his claim, but not the evidence by which those facts are to be proved, and*
- (b) a statement of the relief sought (including, where damages are claimed, particulars of the amount thereof so far as reasonably possible).”*

In particular, the Plaintiff is complaining about the lack of particulars as to the amounts being claimed by the Defendant.

Test for summary judgment

33. Turning to the second aspect of the Application, by virtue of rule 19(2)(b) of the 2007 Rules:

“The grounds of the application for summary judgment shall be that-

- (a) the plaintiff has no real prospect of succeeding on the claim or issue, or*
- (b) the defendant has no real prospect of successfully defending the claim or issue,*

and there is no other compelling reason why the claim or issue should be disposed of at a trial.”

Both paragraphs are engaged here because the summary judgment element of the Application relates to the Defendant’s Counterclaim as well as his Defences to the Amended Cause.

34. I have set out the approach I consider should be followed in a number of recent cases and Advocate Jones referred to the judgment from earlier this month in EFG Private Bank (Channel Islands) Limited v BC Capital Group SA (in liquidation) and others (unreported, 14 July 2014). Accordingly, as I have done before (see para. 33 of that judgment), I repeat the summary of the principles to apply given by Lewison J (as he then was) in Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch) (at para. 15), which I find sets out the considerations in an understandable fashion:

“The correct approach on applications by defendants is, in my judgment, as follows:

- 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. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim*

against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that it is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.”

35. The passage from para. 24.2.5 of the commentary in *The White Book* quoted at para. 36 of that previous judgment also deserves to be repeated in the context of this Application:

“If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for trial. The standard of proof required of the respondent is not high. It suffices merely to rebut the applicant's statement of belief. The language of r. 24.2 (“no real prospect ... no other reason ...”) indicates that, in determining the question, the court must apply a negative test. The respondent's case must carry some degree of conviction: the court is not required to accept without question any assertion they make: Britannia Building Society v Prangley June 12, 2000, unrep., Ch D ...”

36. The burden of satisfying the Court to award summary judgment rests with the Plaintiff in this case. I am conscious, as I have said, of the difficulties faced by the Defendant where he has not filed sworn evidence. This has affected the weight I can afford it where he sets out to explain matters. However, when taken with the Defences and Counterclaim and the exchanges of correspondence exhibited to Mr Herbert's evidence, the case he seeks to advance in defending these proceedings starts to emerge.

Strike out application

37. The Application seeks the striking out pursuant to rule 52 of the 2007 Rules of paragraphs 4, 4.1, 4.2, 5, 14.1, 14.2, 14.4, 14.5, 14.6, 14.8, 14.9 22, 24, 35 and 37 of the Defences and Counterclaim.
38. Paragraphs 4 (including sub-paragraphs 4.1 and 4.2) and 5 plead the arrangements the Defendant says arose from the involvement of Mr Mawji in the Plaintiff. A significant number of requests for further information have been raised in the Plaintiff's Replique and Defence to Counterclaim in respect of those two paragraphs.
39. The sub-paragraphs in paragraph 14 of the Defences and Counterclaim are the Defendant's responses to some of the claims of the Plaintiff about unauthorised payments from the Plaintiff's bank account with Coutts. If this part of the Application were to be granted, the sub-paragraphs remaining are simply those where the Defendant admits that he owes the amounts claimed or relate to the payments that the Plaintiff accepts will have to proceed to trial. In respect of each of the sub-paragraphs, the Plaintiff has requested further information in its Replique and Defence to Counterclaim.
40. Paragraphs 22 and 24 of the Defences and Counterclaim deal with the Defendant's assertion that his annual salary was £100,000, where he supports that by reference to the content of paragraph 2 of an Affidavit sworn by Rudiger Falla on 21 December 2012 in support of the

Plaintiff's application for a freezing order, and his assertion that the payments made by him from the money supplied by the Plaintiff under the oral agreement relating to payments of salaries, etc was supported by statements supplied to Confiance Limited each month. Accordingly, whilst admitting that a small amount would remain as the ultimate balance due to the Plaintiff, he disputes the much larger amount claimed by it. Once again, in relation to both paragraphs, the Plaintiff's Replique and Defence to Counterclaim makes a number of detailed requests for further information.

41. Paragraph 35 in the Counterclaim is where the Defendant pursues the salary he says he was not paid in November and December 2012, albeit without specifying the amount he actually claims. I take the view that I can properly infer that his loss must be treated as being based on the salary of £100,000 per annum he pleaded at paragraph 22 and so equates to approximately £12,000 gross. Paragraph 37 then seeks to claim for whatever the eventual outcome of balancing between sums the Defendant owes the Plaintiff and sums the Plaintiff should credit to the Defendant in respect of expenses funded from his personal account if the mathematics show that a payment is due to the Defendant. Both paragraph 35 and 37 are the subject of *Exceptions de forme* pleaded on behalf of the Plaintiff.
42. As a general comment, I take the view that the Application to strike out these paragraphs is premature. Advocate Jones repeated the mantra in relation to them that they are embarrassing for lack of particularity and so should be struck out. However, in doing so, he overlooks the fact that the Plaintiff's remedy is to seek an order requiring the Defendant to answer the *Exceptions de forme* and the requests for further information. Failure to comply would then leave open other remedies for the Plaintiff to pursue to ensure that the Defendant's case is adequately pleaded.
43. In making that comment, I would not wish to suggest that the Defendant's pleading is anything other than unsatisfactory. He could, and should, have given instructions to his Advocates enabling a fuller explanation of his case to be set out. It does, however, amount to more than mere denial. As the commentary in *The White Book* clarifies, striking out is a last resort because it is so draconian. Accordingly, where matters can be addressed in a less draconian fashion, the Defendant should be given the opportunity to take those steps. Accordingly, in order to overcome a poorly drafted pleading, an opportunity to answer the requests for further information and respond to the *Exceptions de forme* should, in my judgment, be given. Whilst I have some sympathy with the position of frustration in which the Plaintiff finds itself because the Defendant is claiming not to have the materials to respond more fully at this stage, from the very documents that the Defendant has already provided under the agreed specific disclosure, he could have undertaken his own analysis of his documents to ascertain what monies went where after passing through his account. The Defendant is an accountant and so is better placed than some other litigants to have undertaken that task, which I believe he could manage without having to leave his home. The inference is that he has been unwilling to undertake that task rather than being incapable of performing it. However, his unwillingness does not, in my view, constitute an abuse of the Court's process where the Plaintiff, for whatever reason, chose not to push receiving responses by making an appropriate application some time ago.
44. If a satisfactory answer is given to the *Exceptions de forme* raised in respect of paragraph 37 of the Counterclaim, it should mean that rule 10 of the 2007 Rules will be satisfied. The alternative would be to permit the Defendant a short time to consider amending that paragraph so as to comply. Again, although there has been a technical breach of rule 10, thereby engaging rule 52(2)(c), because the relief sought is discretionary, I am not minded to grant it but to give the Defendant time to address the concerns raised on behalf of the Plaintiff or face the consequences.

45. I will, however, single out one paragraph for a different treatment, namely paragraph 35 of the Counterclaim. On the Defendant's own Defence, he admits to having received more towards discharging his obligations to pay staff salaries and the associated employment expenses. In those circumstances, even on the Defendant's case, he has received monies that were due to him from the Plaintiff in respect of his salary for November and December 2012. His estimate of what he retained over and above what he was required to pay out broadly equates to two months' gross salary. Because his claim for salary in December is for only approximately one-third of a month, even allowing for social insurance contributions on behalf of the Plaintiff, the Defendant does not have a claim in respect of the salary he alleges is unpaid. Accordingly, because paragraph 35 represents a claim that is bad in law, and is "bound to fail", it will be struck out pursuant to rule 52(2)(a).
46. Although I will deal with the submissions made on the Defendant's claim to be entitled to set off certain payments he admits he owes the Plaintiff in more detail when I turn to the summary judgment element of the Application, I should properly touch on the issue in the context of the strike out aspect as well.
47. In this regard, Advocate Jones has sought to link paragraphs 4, 5 and 37 of the Defences and Counterclaim. He submitted that the Defendant, as a director of the Plaintiff, must have known that Mr Mawji was not a *de facto* or shadow director and so did not have authority to bind the Plaintiff in the manner suggested by him. The difficulty with that submission is that, in a company where there were effectively two human directors, this issue could turn on which of those two humans, Mr Falla and the Defendant, is believed. This is, therefore, exactly the sort of issue where some factual findings will be needed. The required details in the pleading can be obtained through responses to the request for further information and the *Exceptions de forme*. These may show that the position of the Defendant crystallises further. Advocate Jones referred me to passages in the judgment of Millett J in *Re Hydrodan (Corby) Ltd* [1994] BCC 161 in which His Lordship spelt out the difference between the two statuses of *de facto* and shadow director, from which it is apparent that the Defendant should decide which allegation he is making and then plead more fully the basis on which he says this affects his case. These are matters that can potentially be addressed through further pleading and it would, in my view, be too extreme to strike out the offending paragraphs at this stage. Accordingly, although one could possibly go so far as to say that the effort at pleading the Defendant's case is woefully inadequate and so amounts to an abuse of the Court's process, in the circumstances in which the Defendant finds himself, I take the view that there should be an opportunity now to plead a coherent case so that the Plaintiff can properly understand what is being said against it, rather than the position at the moment where we are all left guessing exactly how it is being put. If the Defendant fails to avail himself of that opportunity and the way his case is pleaded remains, in the words in *Towler v Wills* [2010] EWHC 1209 (Comm), "vague and incoherent", that will be the time to consider bringing a further application to strike out these paragraphs.

Summary judgment application

48. The Plaintiff's Application seeks summary judgment in respect of its claims in paragraphs 9.1, 9.2, 9.3, 9.4, 9.5, 9.6, 9.8, 9.9, 9.10 and 9.11 of the Amended Cause (all of which relate to alleged unauthorised payments), Sections D and E of that pleading and paragraphs 35 and 37 of the Counterclaim. On the basis that I have ordered that paragraph 35 of the Counterclaim be struck out, I need say nothing further about the issues raised in respect of it.

Admitted indebtedness

49. At the outset, I note that the Defendant admits the sums claimed in sub-paragraphs 9.3, 9.10 and 9.11 of the Amended Cause (see sub-paragraphs 14.3, 14.10 and 14.11 of his Defences and Counterclaim). It is, therefore, quite clear that he has no real prospect of defending those

elements of the Plaintiff's claim. Further, it would be a waste of time and money to try those issues, so there is no other compelling reason why they should be disposed of at trial.

50. I am, however, left wondering why, on receipt of the Defences and Counterclaim the Plaintiff's Advocates did not invite the Defendant's then Advocates to consent to judgment be entered for those amounts. This would have been the simplest and most cost-effective way of removing those claims from the ongoing dispute between the parties. It would also have avoided the need to make requests for further information in relation to them and to plead further to them. Paragraphs 6.17, 6.23 to 6.25, 20.3, 20.10 and 20.11 of the Replique and Defence to Counterclaim would not then have been needed. It would also potentially have reduced the content of Mr Herbert's evidence in support of the Application for summary judgment.
51. The amounts in question are as follows. The first (sub-paragraph 9.3) relates to a payment of £40,000 from the Plaintiff's bank account on or around 19 September 2011, which was paid to an account in the name of JT Holdings Limited. The Defendant did not repay that amount. The second (sub-paragraph 9.10) relates to a payment of £35,000 (plus a charge of £6) to the Defendant's personal account with SG Hambros, which has not been reimbursed and the third (sub-paragraph 9.11) relates to a duplicate payment of £28,200 (plus the bank charge of £6), where that amount had been paid out of the account on 18 May and 7 June 2012 when it should have been paid only once. The Defendant had not repaid the amount overpaid in error. The aggregate of these three amounts is, therefore, £103,212 and judgment will be entered against the Defendant in that sum.

Admitted obligation to account for investment

52. By sub-paragraph 9.9 of the Amended Cause, the Plaintiff claims £16,340.79 as the sterling equivalent of US\$25,000, which the Defendant caused to be paid out of the Plaintiff's account on 23 February 2012. Sub-paragraph 14.9 of the Defences and Counterclaim admits that the Defendant is liable to repay to the Plaintiff the maturity value of an investment made on behalf of the Plaintiff which matured on 23 February 2014. The Plaintiff does not accept that this investment was made on its behalf.
53. Given the passage of time, it is unsatisfactory that the position in relation to this investment is not clearer. It is possible that the maturity value of the investment is greater than its cost. On the admission of the Defendant, he would be liable to pay the full amount to the Plaintiff. It is also possible that the value on maturity was be less than US\$25,000 or the sterling equivalent claimed, which is what the Plaintiff's bank statement shows was actually paid by it. In that scenario, the Defendant would dispute that he is obliged to repay the full amount paid out. Either way, the key question remains as to whether this was something the Defendant did for the Plaintiff or whether it was something he did for himself but with the Plaintiff's funds.
54. Mr Herbert's First Affidavit exhibits the e-mail traffic on 22 February 2012 relevant to this question. A Ted Mandes sent a message to the Defendant timed at 12.05 in which he wrote "Hey bud just let me know if your in or out I have closing to deal with". Minutes later, the Defendant replied: "Im in. Ill send personally. Don't know what my trustees are playing at. Will be there by tomorrow". A few minutes after sending that message, the Defendant e-mailed Coutts requesting that US\$25,000 be sent to an account in the name of SystemsOne LLC at SunTrust Bank. There is no indication as to what the payment was being made in respect of.
55. In response, the Defendant's unsworn Affidavit explains that this was something he held on behalf of the Plaintiff in his personal name and offers an example of another investment that was handled in a similar way. Accordingly, he maintains that he held the investment as trustee for the Plaintiff and any gains or losses will accrue to the Plaintiff. He suggests that

there should be further documentation available to the Plaintiff, but not at present to him, supporting this assertion. There is no explanation of why the Defendant referred to “*his trustees*” in his response to Mr Mandes. The inference to be drawn may be that this reference supports the Plaintiff’s case that the investment was personal to the Defendant.

56. Against that background, I have concluded that it would not be a just outcome to award summary judgment for £16,340.79 against the Defendant as a result of the Application. If the value of the investment on maturity equals or exceeds that figure, on the Defendant’s own admission, the full amount is payable by him and the Plaintiff can, once it knows what the figure is, consider whether it will invite the Defendant to consent to judgment being entered against him in the amount actually received. I can, therefore, leave open that possibility for a short time by making an appropriate order for the Defendant to provide information about the maturity value within a short period of time and put the Plaintiff to its election as to whether it accepts that amount or pursues the sum pleaded to trial.
57. If the value of the investment on maturity was too small to satisfy the Plaintiff, then this is an issue where I take the view that the Defendant has shown cause why summary judgment should not be entered. If he is able to point to a course of dealing under which the Plaintiff agreed to certain of its investments being held by the Defendant, or by his wife, then he has at this stage advanced something that is more than “*fanciful*” and it is an issue that deserves to be dealt with after evidence from those concerned at the time. Given that both parties accept that the arrangements made by the Plaintiff to pay staff salaries involved making a general monthly payment to the Defendant’s personal bank account out of which those payments would be made indicates to me that there were some unusual arrangements in place. For example, I suspect the concept that a personal payment from the Defendant would settle the social insurance contributions required to be paid in respect of Rebecca Goater, who was another employee of the Plaintiff, is not something that the Social Security Department would normally encounter. Accordingly, this is an area where the Plaintiff has failed to persuade me that the Defendant has no real prospect of successfully defending the claim because he might be right that the investment was held by him for the Plaintiff and so any loss from what was paid to its maturity value falls to the Plaintiff rather than to him personally.

Legitimate expense defence

58. In respect of sub-paragraphs 9.5 and 9.8, the Defendant denies that he is liable to repay the Plaintiff because these amounts were legitimate expenses of the Plaintiff.
59. The payment from the Plaintiff’s bank account with Coutts referred to in sub-paragraph 9.5 was £18,580.18. It was made to the Defendant’s personal account at SG Hambros on 14 November 2011. The documents exhibited to Mr Herbert’s First Affidavit show that the reference for this payment was “*Travers s*”. He also exhibits a schedule of fees paid by the Plaintiff to Travers Smith LLP for legal work undertaken by that firm at around that time. There is no payment in an amount corresponding to the sum the Defendant caused to be paid at or around that time. There were, however payments made that are larger than £18,550, which is what the Defendant received after paying the charges, albeit at different times. Mr Herbert queries why a payment to a firm of solicitors would need to be made through the Defendant rather than directly from the Plaintiff’s own account.
60. The payment referred to at sub-paragraph 9.8 is similar. £25,241 (including a charge £6) was paid to the Defendant’s personal account at SG Hambros on 14 February 2012. The payment advice to the Plaintiff once again refers to “*Travers S*”.
61. In his unsworn Affidavit, the Defendant simply refers to the fees he had incurred with Travers Smith LLP in respect of a transaction relating to a property known as Tanglewood. He explains that he cannot add anything more until disclosure because he cannot be precise about

the fees he incurred. Given that Mr Herbert exhibited the payment history of Travers Smith LLP to his First Affidavit, the Defendant really should have commented on that document.

62. I have paid particular attention to the Travers Smith LLP document and the annotations that have been made to it. The first two payments (of £49,555.09 and £4,125.19 respectively) were paid on 3 August and 21 December 2011 by “*T.T. payment*”. Looking at the statements for the Defendant’s account at SG Hambros, which have also been exhibited to Mr Herbert’s First Affidavit, neither of those payments was made from that account. Apart from five credits of £10,000 from another account of the Defendant, which is held at HSBC and where the corresponding payments are shown as transfers out, by mid-February 2012, the only large credits to the account at SG Hambros were the two payments bearing the reference “*Travers S*” made from the Plaintiff’s account at Coutts. The Defendant’s SG Hambros account was then depleted on 17 February 2012 to leave a balance of exactly £5,000 only. However, the transfer out of £54,388.08 was not to Travers Smith LLP but to an account in the names of the Defendant and his wife. The statement showing that amount credited to the joint account does not contain any debits corresponding to the payments made to Travers Smith LLP.
63. The Travers Smith LLP document also shows that, on 20 October 2011, a payment in the amount of £25,205.98 was made and then cancelled the same day. A payment in the same amount was subsequently made on 24 July 2012 by transfer from the Plaintiff’s client account. In the interim, on 27 March and 10 May 2012 payments of £51,359.13 and £292.59 respectively were made by the same means. The bank statements for the Defendant’s SG Hambros account do not show any payments reflecting any of these amounts.
64. I have reminded myself that the Court should not engage in conducting a mini-trial when considering an application for summary judgment. However, these two elements of the Plaintiff’s claim appear to me to rest on what the bank statements show and, in particular, the fact that the Travers Smith LLP billing history points to payments to that firm being made by specified methods on particular dates. In the absence at this stage of a better explanation from the Defendant as to how the firm’s invoices were settled, it is possible, and permissible, for me to have regard to the documents and to consider whether there is any possibility that a better explanation would be forthcoming at trial. I have concluded that there is no prospect of the Defendant being able to go behind the documents, which point firmly against his contention that he caused the two amounts to be paid out of the Plaintiff’s account to his account in order to settle bills in respect of the Tanglewood transaction.
65. In those circumstances, this is an example of where I should “*grasp the nettle*” and reach the conclusion that the Defendant has no real prospect of defending these claims. I have, therefore, proceeded to consider whether there is any compelling reason as to why these aspects of the Amended Cause should be disposed of at trial rather than summarily now.
66. I am conscious that there are some elements of the Plaintiff’s case that will remain whatever the outcome of the present Application. Because there is going to be a trial (or some other applications) in any event, the Defendant seems to be suggesting that it is best to leave everything to that stage. In my judgment, the Defendant is being unrealistic. The overriding objective comes into play. There is no advantage to the parties in lengthening any trial by including matters where it is apparent there is no defence. The Defendant has had ample opportunity before now to explain how these amounts were used by him if they were being used to meet the expenses incurred by the Plaintiff. It is not sufficient to argue that something may turn up between now and a trial. The Defendant has been obliged to disclose all his bank statements. From an analysis of these, it is clear to me that the settlement of the Travers Smith LLP invoices was not made through any of those accounts. I have, therefore, concluded that there is no reason at all why these claims should not result in judgment as a result of the present Application. Accordingly, judgment will be given on these two subparagraphs for £43,821.18.

Rent and expenses defence

67. The first alleged unauthorised payment on 1 July 2011 was in the amount of £31,554.87 (see sub-paragraph 9.1 of the Amended Cause). As pleaded at sub-paragraph 14.1 of his Defences and Counterclaim, to the best of the Defendant's knowledge, these payments relate to the deposit and rent in respect of 10 Lefebvre Street and the legal fees incurred.
68. The receipt of £31,522.94 into the Defendant's bank account at HSBC is shown on a statement exhibited to Mr Herbert's First Affidavit. There were no payments out from that account at around that time that appear to relate to anything to do with 10 Lefebvre Street. There was, however, a transfer to the Defendant's Flex Saver account at HSBC just 4 days later, the consequence of which was to leave a balance of £5,000 in the account that received the original sum from the Plaintiff's account. In the period following, amounts are transferred between the two accounts regularly, and, it seems, automatically, so as to maintain a balance of £5,000 on that account. The statements show that the Flex Saver account was not being used to make payments, but to fund the other account, which I take to be a current account, held by the Defendant at HSBC.
69. Mr Herbert has further explained that a payment of £25,000 was forwarded to Ozannes client account directly from the Plaintiff's account at Coutts on 15 August 2011. An e-mail from Jo Watts dated 17 August 2011 confirms that this amount represents a deposit payment. The Amended Cause pleads that the deposit of £25,000 continues to be held to the Plaintiff's order. Mr Herbert therefore deposes to his belief that the payment from the Plaintiff's account to the Defendant on 1 July 2011 is unconnected to the lease on 10 Lefebvre Street and that the Defendant has provided no justification for it.
70. In the Defendant's unsworn Affidavit he refers to his belief that this amount was used to make payments on behalf of the business but that, until disclosure from the Plaintiff, he cannot identify what was paid when. He did, however, make payments in relation to 10 Lefebvre Street.
71. It would have assisted the Defendant if he had made better use of his own bank statements to point to how the money received had actually been used. As I have indicated, an analysis of his bank statements appears to show that the money received was not used for anything to do with 10 Lefebvre Street. However, on this occasion, I have reached the conclusion that the Plaintiff has failed to discharge the burden on it of persuading me that I should award summary judgment for this amount. Mr Herbert has pointed out that a payment was made in respect of the deposit for 10 Lefebvre Street. What he has not done, which I consider he should have done to meet the burden on the Plaintiff, is to set out in full the payments made by or on behalf of the Plaintiff in respect of 10 Lefebvre Street in order to show that the entirety of the sum transferred out of the Plaintiff's account with Coutts on 1 July 2011 was not used in the manner suggested by the Defendant. Whilst I am unimpressed by the Defendant's failure to descend into greater detail himself, it is important for me to remember that the Plaintiff has the primary evidential burden. Mr Herbert's response in his Second Affidavit appears to suggest that the Defendant should provide documents or evidence to corroborate his assertions. He will, of course, need to do so at trial but, at this stage, it is for the Plaintiff to satisfy the Court that the Defendant has no real prospect of being able to defend the claim in respect of this payment successfully. Whilst I may entertain some doubts as to whether he will succeed, given that the Plaintiff accepts that a transaction relating to 10 Lefebvre Street took place at this time and has not shown that there is no possibility that what the Defendant says cannot be right, I have decided that the position of the Defendant is that his prospects of defending this element of the claim, whether that be in its entirety or in part only, are more than fanciful. The Defendant's evidential burden at this stage is a

comparatively low one. There is potentially more evidence relating to this transaction that will be available at trial. A fuller investigation is, in my view, necessary. Accordingly, I dismiss the Application insofar as it relates to sub-paragraph 9.1.

Balance remaining after Euro currency transaction

72. The amount of £208,010.17 is claimed under sub-paragraph 9.2 of the Amended Cause. This represents the balance of the sterling amount received in the Defendant's personal account at HSBC on 26 July 2011 after £450,000 was paid to the Plaintiff on 9 August 2011. The amount received by the Defendant was what Cornhill FX paid after receiving €750,000 from the Plaintiff on 21 July 2011.
73. At para. 14.2 of his Defences and Counterclaim, the Defendant claims that he used £91,073.50 to pay to Advocate Strappini for the completion of the purchase of 2/3 Jubilee Terrace in furtherance of the Plaintiff's business and that the remainder of the balance of £116,936.67 was used for other legitimate commercial purposes.
74. In relation to the part of this payment not related to completing the purchase of 2/3 Jubilee Terrace, I find myself in the same position as in relation to sub-paragraph 9.1. Although the Defendant really should have spelt out in more detail by using his own bank statements how he says this amount was used up in meeting those legitimate expenses, with the onus on the Plaintiff, who I consider must have access to documents that would enable it to piece together in more detail what expenses the Plaintiff incurred at the time and how these were paid, its omission to set out that the Defendant's defence cannot be pursued means that it has, in my judgment, failed to discharge the burden before summary judgment for this amount could be granted. This is a further area where a fuller investigation is needed before judgment could be given.
75. The position in relation to the amount of £91,073.50 paid in respect of the completion of the purchase of 2/3 Jubilee Terrace is, however, slightly different because more detail has already been provided. The purchaser was JT Holdings Limited. The Defendant was a director of this company. A structure chart exhibited to Mr Falla's Affidavit of 21 December 2012 shows that a subsidiary of the Plaintiff had a loan arrangement with JT Holdings Limited. When Advocate Strappini sent his pre-completion statement to JT Holdings Limited on 26 November 2011, he referred to having received the balance due in September 2011 by means of a cheque drawn on the joint account of the Defendant and his wife and added the comment that he understood the Defendant had "*a direct personal interest in what is going on*". In his First Affidavit, Mr Herbert has drawn attention to the fact that the Plaintiff's claim at sub-paragraph 9.3 related to monies paid to JT Holdings Limited, which the Defendant admitted he is liable to repay as having come, or at least so he believed, from his director's loan account. (This is one of the amounts in respect of which I have granted summary judgment in favour of the Plaintiff as referred to above.)
76. In his unsworn Affidavit, the Defendant complains that Mr Herbert omitted to include the response to the e-mail from Advocate Strappini referring to the Defendant's personal interest, which he considers would correct the unfavourable impression the bare statement gives. He has pointed out that he resigned from JT Holdings Limited at about the same time as he resigned from the Plaintiff, which he suggests supports his contention that he had no direct interest in JT Holdings Limited. He also explains how the payment fitted into the arrangements made as regards 2/3 Jubilee Terrace on behalf of the Plaintiff and its subsidiary, ending with the comment that "*the amount claimed by Invescap as due to be returned is too high by £10,750.34*". I am unsure whether that amounts to an admission that approximately £80,000 is owed by the Defendant to the Plaintiff. Suffice it to say that I find the bare figures given by the Defendant confusing as I simply cannot work out what he is trying to say.

77. When considering all the material in relation to the transaction in respect of 2/3 Jubilee Terrace, I find myself in the position of not having a clear picture of exactly who had what interest in that venture. I am not satisfied that Mr Herbert has set out as completely as he might what the relationship between the Plaintiff and JT Holdings Limited is and the Defendant appears to be implying that there was more of a link between the companies than a simple loan arrangement through a subsidiary. At face value, there may not be a real prospect for the Defendant in successfully resisting the element of the Plaintiff's Amended Cause and it may only be fanciful, especially as it is possible, as I have said, that the Defendant actually admits that something is payable by him to the Plaintiff. However, because of the level of confusion in what both parties have advanced on this question, and the fact that it is intertwined with the foreign exchange transaction through Cornhill FX where I have decided the balance cannot be awarded in judgment now, I have concluded that this tranche of £91,073.50 cannot be awarded to the Plaintiff under rule 19 of the 2007 Rules, either because the Defendant does have a more than fanciful prospect of succeeding, at least in part, in defending the claim or because the level of confusion is such that there is a compelling reason not to attempt to resolve it through what might otherwise be a mini-trial on the paperwork that is available at present but only after a fuller picture emerges.
78. Accordingly, although the position in relation to this sub-paragraph of the Amended Cause is finely balanced, I have concluded that I should also dismiss this part of the Application.

Setting off against other expenses

79. The two payments in sub-paragraphs 9.4 and 9.6 are admitted by the Defendant to be owed by him to the Plaintiff but he claims the entitlement to set them off against payments he made on behalf of the Plaintiff from his personal funds. The first amount of £8,500.50 was paid out of the Plaintiff's account with Coutts on 17 October 2011 in respect of Newcastle United tickets. The second amount of £26,006 was paid out on 16 November 2011 as payment for a Range Rover.
80. In relation to both payments, the Defendant refers to the various expenses that he incurred through his agreement with Mr Mawji in the latter's capacity as a *de facto* or shadow director. Having declined to strike out paragraphs 4 and 5 of the Defences and Counterclaim, preferring to afford the Defendant the opportunity to supplement what he has pleaded by responding to the requests for further information, it follows that the possibility of there being such an agreement on behalf of the Plaintiff remains open. To that extent, there is *prima facie* a real prospect of the Defendant successfully defending this issue.
81. The alternative argument raised on behalf of the Plaintiff is that the absence of detail means that the Defendant cannot benefit from the Guernsey law right of set-off, or more accurately "*compensation*", as it was explained by Lieutenant-Bailiff Southwell QC in *Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited* [2009-10] GLR 38. Advocate Jones referred in particular to para. 43(c) of the judgment, in which it was noted that "*a genuinely disputed claim could not be set-off against an undisputed claim*" because it was not "*certain*" and "*liquide*". It is also possible, although as yet unclear, that the Defendant will seek to rely on section 1 of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979.
82. If the Defendant responds fully to the requests for further information, the amounts claimed as being paid by the Plaintiff to the Defendant pursuant to the alleged arrangements will potentially crystallise. Accordingly, having provided the Defendant with the opportunity to perfect his pleadings rather than strike out the paragraphs in question, I am not minded then to dispense with that opportunity by ruling, at this stage, that his claim to be entitled to set off is bad in law and so grant summary judgment against him. That would be tantamount to giving with one hand and taking away with the other and would not, in my view, serve the ends of

justice in this case. Accordingly, because there remains live an issue between the parties on whether the basis on which the Defendant claims not to owe the monies he admits taking out of the Plaintiff's bank account for his personal use, I will dismiss the Application insofar as it relates to sub-paragraphs 9.4 and 9.6 of the Amended Cause.

Sums retained by Coutts pursuant to the Pledge

83. The position in relation to the amount retained by Coutts as security under the pledge given by the Plaintiff, initially through the Defendant signing and subsequently through Mr Falla re-signing on its behalf, raises a number of issues that I fear cannot be satisfactorily resolved by way of this Application for summary judgment.
84. The Plaintiff claims to be entitled to judgment for the full amount of £835,000 (see paragraphs 16 and 28.2 of its Amended Cause) because it is being kept out of its money. It is, however, only being kept out of its money because the Defendant has failed to repay whatever amount he owes to Coutts under the loan facility secured by the Pledge. The Defendant has pleaded at paragraph 21 of his Defences and Counterclaim that the amount secured should only be approximately £748,000. Whether that figure has increased since the date of that pleading has not been clarified by him.
85. In Mr Herbert's Second Affidavit, he comments on the possibility of double recovery and concludes that there is no risk because whatever is paid by the Defendant will be paid to Coutts to release the security. I am not sure that this is the correct approach because, if the Defendant's indebtedness is less than £835,000, judgment would have been entered against him for that amount and, once the security is released, any balance in the Plaintiff's account will be free for it to take in its entirety. Accordingly, if I awarded summary judgment for the sum pleaded, I believe there is a possibility that the Plaintiff will recover more than its ultimate loss.
86. As Advocate Jones pointed out, the Plaintiff is not a party to the loan arrangements the Defendant has with Coutts. It cannot, therefore, take steps to resolve the level of indebtedness so that the Plaintiff's liability under the Pledge of the balance on its account is removed or crystallises into a fixed amount for the reason that that is a matter between other parties. This is, of course, something that the Defendant should have taken responsibility to resolve rather than leaving as open-ended as it is. Advocate Jones suggested that one immediate solution would be to enter judgment in favour of the Plaintiff for a lower amount in respect of which there can be no dispute remaining that such an amount will be payable by the Defendant to the Plaintiff.
87. In his unsworn Affidavit, the Defendant has also pointed out that the re-signing of the Pledge on behalf of the Plaintiff supports his contention that he had not breached his duties when entering the Pledge on behalf of the Plaintiff. He has, however, conceded that he is liable to pay equitable compensation to the Plaintiff in respect of whatever monies are called in under the Pledge.
88. Against that background, I have noted the way in which the Plaintiff's case is pleaded and the contents of the Defences and Counterclaim. Its primary case is for damages for breach of contractual and/or fiduciary duties. The Defendant has denied that he is liable to pay the Plaintiff anything by way of damages. To the extent that there is an issue between the parties on the basis of any recovery, I conclude that the Plaintiff has failed to show that the Defendant has no real prospect of successfully defending that issue as pleaded in the Amended Cause. However, the Defendant's acknowledgement in paragraph 31 of his Defences and Counterclaim that he is liable to pay the Plaintiff "*equitable compensation equal to ... the sum secured against the Pledge*" means that it would be contrary to the overriding objective for the full issue of liability to proceed to trial.

89. In those circumstances, where the only dispute between the parties relates to the quantum of equitable compensation payable, I have concluded that there should be judgment in favour of the Plaintiff for equitable compensation to be assessed in respect of the amount Coutts can enforce as against the Plaintiff under the security given by way of the Pledge. There are, I imagine, a number of ways in which that amount can be resolved between them and I take the view that it is better, at least in the first instance, to leave the parties to quantify the loss that should then be recorded in any final judgment rather than me entering judgment now for an amount that might or might not properly reflect the Plaintiff's losses. If the amount cannot be agreed through discussions between the parties, it will have to be resolved at trial.

Return of surplus payments in respect of staff costs

90. The final aspect of the Application relates to Section E of the Amended Cause, under which the Plaintiff seeks repayment of the balance of the funds supplied to the Defendant for the purposes of making payments of salaries and related employment expenses pursuant to the oral agreement made in or around April 2011. The amount pleaded was £518,789.94, although the revised calculations undertaken by Mr Toynton set out in his Affidavit put the figure a little lower at £516,308.84. It is the lower figure in respect of which the Plaintiff seeks summary judgment.
91. In his unsworn Affidavit, the Defendant has complained that Mr Toynton's Affidavit constitutes expert evidence that the Plaintiff has not been given permission to adduce, adding that "*it would be extremely dangerous for the Court to make summary findings which would totally ruin my life based on such flaky evidence*". Because Mr Toynton is well-known to the Court, I would be satisfied, if it were relevant, that he is qualified to give expert evidence in the field of accounting. However, having considered his Affidavit, I am satisfied that he is not giving opinion evidence in it, but rather is giving evidence of a factual nature. For example, if the Plaintiff had an officer dealing with finances, that person would have been able to give the same evidence as is contained in Mr Toynton's Affidavit. Accordingly, this is not a situation in which permission to adduce Mr Toynton's Affidavit pursuant to the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011 was required.
92. The Plaintiff's case rests on an oral agreement between it and the Defendant. There is only one aspect of the oral agreement that is disputed by the Defendant. He has pleaded that his annual salary was £100,000 rather than the salary of £65,000 to which the Plaintiff has referred. He admits the remainder of the terms. In those circumstances, even though the Plaintiff has not given any evidence about the making of the oral agreement, because it did not involve Mr Herbert or Mr Toynton, the Defendant's admission, as well as his concession that he will be liable to pay such monies as he has retained out of the sums paid to him pursuant to the agreement, suffice to establish that there is some liability on the part of the Defendant in this regard. The dispute, therefore, is less about the principle and more about the quantum.
93. Advocate Jones invited me to reach a conclusion based on the Defendant's claim that his salary was £100,000 per annum on the basis that this would still result in a substantial judgment being entered in favour of the Plaintiff. The remaining issue of whether the Defendant's salary had been agreed at a lower amount could be left to be resolved at the trial with any additional payment required from the Defendant being calculated at that stage. The reason why I choose not to follow that suggestion is that Mr Toynton's calculations show that there would be a gross difference in the amount the Defendant would have been obliged to pay out from the amounts he received of £24,368 but that he has also explained that "*If it is determined that the salary is other than £65,000, the Social Security and ETI figures would change*". Whilst I also note that the Plaintiff indicates it has been (and, if relevant, would continue to be) its responsibility to meet any further payments arising from a higher salary, it seems to me that there is a sufficient element of uncertainty surrounding exactly what the

Defendant should have paid out under the oral agreement that I would run the risk of attempting to resolve questions on which evidence should properly be heard. For example, some figures showing the Plaintiff's social security contributions and the payments actually made would have been capable of clarifying whether the Defendant did act as he was obliged to do.

94. Returning briefly to the evidence in support of the Application, Mr Herbert's First Affidavit does not paint a clear picture as to the precise basis on which the Plaintiff agreed to pay a gross sum to the personal account of the Defendant out of which he would make salary payments and contributions in respect of taxes and social security. There was an e-mail exchange between the Defendant and Tom Hamon on 19 April 2011, which has been exhibited to Mr Toynton's Affidavit. It may not represent the full material available though because the first message (timed at 12:48) begins "*Answers in order as follows*", from which I infer that Mr Hamon was responding to questions raised by the Defendant, or by someone else on behalf of the Plaintiff. Mr Hamon explained "*With regards to salaries, we/I can make the first payment this/next week with you executing these going forwards. The Company will need to book keep all salaries, PAYE, Income Tax, accordingly in the books, so as to be able to produce reliable and accurate EOY accounts.*" Later in the message he added "*I will transfer, say £35k, to the Invescap account in anticipation of salary payments and to give a small balance.*" The Defendant responded: "*Had a read through 35k will be required at least with er's ni to be added*", to which Mr Hamon replied "*Ok, will transfer £40k so as to have sufficient. I will put as a "Salary Debtor" to you. You can confirm net salaries paid, PAYE, etc. so as privacy is maintained.*" The Defendant's final comment in that exchange was "*Perfect! Well done.*"
95. Given that Mr Hamon must have had an idea of what monies would need to be paid out of the £35,000 monthly he was proposing to transfer, from which he considered there would be "*a small balance*", which was agreed to be £40,000 once the Defendant raised the employer's social security contributions that would also need to be met, the implication is that the salary payments for the staff were envisaged to leave a far smaller balance than the figure of around £½ million claimed by the Plaintiff as representing the balance owing some 20 months later. This is an area where the Defendant should have assisted by conducting a more complete analysis of the monies received and spent by him over this period pursuant to the agreement he admits, but the Plaintiff's evidence has not adequately explained why Mr Hamon was apparently so hopelessly out in his calculations.
96. There is also an element of confusion on the material adduced on behalf of the Plaintiff as to what salary the Defendant was actually entitled to receive. Mr Herbert's First Affidavit exhibited salary slips that show a basic salary equating to £130,000 per annum. In its Replique and Defence to Counterclaim, the Plaintiff indicates that it "*will rely on the terms of the contract of employment at trial*" (paragraph 29). In the absence of a signed contract of employment, such reliance will potentially be on an oral agreement (where the terms are apparently in dispute between the parties) and whatever documents may support the parties' contentions. At this stage, I would have expected the Plaintiff to be able to produce the written statement of terms and conditions it was obliged by section 1 of the Conditions of Employment (Guernsey) Law, 1985 to have provided the Defendant with within four weeks of him commencing employment with the Plaintiff. It has not done so. Therefore, on the Plaintiff's own evidence, I am not satisfied that the Defendant's salary was £65,000, as pleaded in the Amended Cause, which means that I cannot enter summary judgment in its favour for the amount pleaded (or as reduced slightly in the light of Mr Toynton's calculations).
97. I have considered carefully whether I should regard the Defendant's highest position as being his pleaded case that his salary was £100,000, although even then it is unclear whether he is asserting that that was his salary throughout his employment or whether it rose from £65,000

to £100,000 at some point during his employment. The figure of £100,000 pleaded at paragraph 22 of the Defences and Counterclaim refers to there being confirmation of that figure in paragraph 52 of Mr Falla's Affidavit, in which he deposed that "*I note that LD did not earn more than £8,333.33 gross per month prior to his resignation*". Having seen the documents exhibited to Mr Herbert's First Affidavit, it appears that Mr Falla's evidence failed to have regard to the pay slips available to the Plaintiff. The Defendant's unsworn Affidavit does not descend into any detail to support or modify his pleaded position and he arguably muddies the water still further by suggesting that the pay slips showing a high salary were only in draft and never sent out in that form.

98. The position overall is, therefore, far from satisfactory. The Plaintiff's alternative position, seeking judgment based on the Defendant's pleaded case that he was employed at an annual salary of £100,000, has a certain attractiveness because, even on the Defendant's case, he is not denying the entirety of the Plaintiff's claim and Mr Toynton's review of the Defendant's bank statements strongly suggests that the Defendant will be unable to show that he used the bulk of the monies received pursuant to the oral agreement as he contends. However, the precise amount of money the Defendant will be required to repay has not been adequately explained in the Plaintiff's evidence. This is not the type of claim in respect of which I feel I can properly "*grasp the nettle*" and I am concerned that I would be jumping to conclusions, and potentially be accused of having conducted a form of impermissible mini-trial on the incomplete picture painted even by the Plaintiff's own evidence, if I were to grant judgment in any amount. I further take the view that what the Plaintiff has suggested could be done in this regard by the Defendant is tantamount to reversing the burden of proof beyond what the commentary in *The White Book* envisages.
99. This is, therefore, another example of a claim where I am satisfied that, on the Defendant's own admissions, an amount of money has been retained by him so that the issue of liability to repay does not need to be dealt with at trial. However, there does need to be an inquiry into the amount that needs to be paid back by him and the order I will make pursuant to rule 22 of the 2007 Rules is that leave to defend Section E of the Amended Cause be confined to the issue of the amount of money retained by the Defendant and which he is liable to repay.
100. Although there are more unknowns on the actual figures, it does appear that the Defendant accepts that he did not perform the term of the oral agreement that required him to repay any balance into the Plaintiff's bank account with Coutts. In those circumstances, I consider that it is appropriate to direct that judgment be entered against the Defendant in respect of that breach, with damages to be assessed. In this way, the Defendant may offer a very different version of events as to what the arrangements were for paying the other members of staff of the Plaintiff and may be able to explain the transactions on his bank accounts differently from the evidence of Mr Toynton. Whether he will be able to do so to the extent of persuading the Court that his liability is as low as his pleaded estimate of £17,000 is questionable given the entries on his various bank statements as exhibited to Mr Herbert's First Affidavit. It would be sensible, therefore, for him to devote some time in the near future towards setting in more detail than he has in his unsworn Affidavit where he claims the monies he received have gone. The sooner those issues between the parties are narrowed the less extensive the inquiry needs to be at trial.

Set off in Counterclaim

101. The final aspect of the Application relates to paragraph 37 of the Defendant's Counterclaim. This is an aspect of the case where more detail is required by the Defendant responding to the *Exceptions de forme*. In doing so, the Defendant will set out as fully as possible what he says he has paid out of his personal funds on behalf of the Plaintiff. Accordingly, it will only

become apparent whether there is actually a counterclaim being pursued once the amounts in question are explained.

102. Because it is theoretically possible that the Defendant wishes to pursue a claim against the Plaintiff for a certain amount alleged to represent an amount by which what he claims to have paid out exceeds the amounts that the Plaintiff is entitled, or will be found to be entitled, to recover from the Defendant, I will dismiss this element of the Application because I imagine that it would be more costly for the parties to have to engage in discussions about amending the Defences and Counterclaim to reintroduce a more fully pleaded claim than to leave it there for the time being whilst requiring to Defendant to respond to the *Exceptions de forme*. In the absence of those details, I cannot be satisfied that the Plaintiff has shown that the Defendant (in his capacity as the plaintiff to the Counterclaim) has no real prospect of succeeding on his claim. Of course, if the response to the *Exceptions de forme* confirms what the Plaintiff suggests will be the case, and it is quite apparent that there can be no claim based on set-off, I would expect the Defendant to seek to agree with the Plaintiff to delete paragraph 37 from the Defences and Counterclaim. If he fails to do so, the Plaintiff will be put to the unnecessary expense of bringing a renewed application for summary judgment on that paragraph with all the costs consequences associated with it.

Conclusions

103. For the reasons given, the Plaintiff's Application has succeeded in part only.

104. In relation to paragraph 2, seeking the striking out of a number of paragraphs in the Defences and Counterclaim, the only paragraph I will order be struck out is paragraph 35 of the Counterclaim. The remainder of paragraph 2 of the Application is dismissed.

105. The Defendant must, however, take steps to supplement what is poorly pleaded by responding to the *Exceptions de forme* and the requests for further information at paragraphs 5 and 6 respectively of the Replique and Defence to Counterclaim insofar as they relate to paragraphs of the Defences and Counterclaim that remain in issue between the parties (ie, sub-paragraphs 5.3, 5.4, 6.1 to 6.16, 6.18, 6.20, 6.21 and 6.23 to 6.33). I consider that a period of five weeks offers the Defendant plenty of time to do so. Accordingly, I will direct that responses to those sub-paragraphs must be lodged and served by 4 pm on Thursday, 4 September 2014.

106. In relation to paragraph 1 of the Application, I am first granting it in respect of sub-paragraphs 9.3, 9.5, 9.8, 9.10 and 9.11 of the Amended Cause in the aggregate sum of £147,033.18. In relation to the other sub-paragraphs of paragraph 9 of the Amended Cause, the Application will be dismissed and they will need to be pursued further. I am also granting judgment that the Defendant pay the Plaintiff equitable compensation in respect of the sum secured against the Pledge, with the amount of that compensation to be assessed in the light of crystallising the Defendant's indebtedness to Coutts and the amount to be paid pursuant to the Pledge (Section D of the Amended Cause). Similarly, I am granting judgment against the Defendant in respect of his retention of the Plaintiff's funds contrary to the agreement to repay whatever was not used in paying salaries and employee-related expenses, but giving him the opportunity to defend that part of the Plaintiff's claim on quantum only (Section E of the Amended Cause). I am also dismissing the Application insofar as it sought summary judgment on paragraph 37 of the Counterclaim.

107. Because Sections D and E of the Amended Cause are comparatively large elements of the Plaintiff's claim where I have granted judgment on liability but not in any specified amount, these should be dealt with by the Defendant as a priority ahead of other case management steps in these proceedings. Further, because I am aware of the additional problems arising from the Defendant being a litigant in person and not resident within the jurisdiction, I wish to impress upon him the importance of cooperating with the Plaintiff's Advocates and the Court

to progress matters in a timely fashion. I will, therefore, attach a number of conditions to the Defendant's leave to defend these aspects of the Plaintiff's Amended Cause.

108. In my judgment, the only satisfactory way to proceed is for the Defendant to be obliged to lodge some sworn evidence. Because I have treated the Defendant as having overlooked the need to swear to the truth of the content of his so-called Third Affidavit, that oversight should now be corrected. The unsworn Affidavit must, therefore, be sworn at the earliest opportunity and the original provided to the Greffe, with a copy served on the Plaintiff's Advocates. Further, I will direct that the Defendant must swear a separate affidavit (a) setting out the position under his loan arrangements with Coutts in order to crystallise the amount that will be enforced under the Pledge and (b) explaining in detail where he says the monies provided to him pursuant to the oral agreement he has admitted have been spent. In relation to that last point, if the Defendant within the next 21 days requests copies of the statements he says were supplied to Confiance Limited setting out the payments made so as to enable him to prepare this affidavit, the Plaintiff is to supply copies of those statements to the Defendant within 14 days of receiving such a request. The Defendant is, of course, at liberty to cover any other issues he wishes in this further affidavit. Allowing for the fact that it is now the summer, the two sworn Affidavits must be lodged and served within a period of approximately seven weeks, namely by 4 pm on Thursday, 18 September 2014. The case will then be reviewed the following week in the Interlocutory Court on 26 September 2014, with Advocate Jones taking responsibility for listing it on his firm's agenda.

109. If the Defendant fails to respond to the *Exceptions de forme* and requests for further information, or if he fails to lodge and serve the affidavit evidence as directed, within the times specified, any application from the Plaintiff can also be made at the Court sitting on 26 September 2014. However, because the Defendant has not had an opportunity to be heard on the directions I have just made and, in particular, in relation to the times by which certain things must be done, I will add a general liberty to apply on three days' notice.

Costs

110. Paragraph 3 of the Application seeks the Plaintiff's costs on the indemnity basis. In his Skeleton Argument dated 4 June 2014, Advocate Jones set out in detail the submissions he makes in support of that Application. Before an award of costs on a full or partial indemnity basis can be made, the requirements of rule 83 of the 2007 Rules have to be satisfied.

111. Because the Application was not entirely successful, it will be open to the Defendant to argue that the Plaintiff should not be given an order for all of its costs and, in particular, not all of its costs on a full indemnity basis. In those circumstances, I will reserve the question of costs to the hearing on 26 September 2014. If, in the light of the content of this judgment, the Defendant wishes to oppose paragraph 3 of the Application, he must lodge and serve brief written submissions by no later than 4 pm on 18 September 2014. In doing so, he ought to aim to respond, in particular, to the submissions set out in paragraph 94 of the Plaintiff's Skeleton Argument.