Summary judgment and prescription.

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between: **(1) RAWLINSON & HUNTER TRUSTEES S.A.**

(2) VIMELATOR HOLDINGS LIMITED

Plaintiffs

-v-

(1) ITG LIMITED

(2) BAYEUX LIMITED

Defendants

Hearing dates: 4th and 18th July 2016

Judgment handed down: 10th November 2016

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Plaintiffs: Advocate P Richardson

Counsel for the Defendants: Advocate J E Roland

Cases, legislation and materials referred to:

The Loi relative aux Prescriptions, 1889
The Royal Court Civil Rules, 2007
Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch)
Tchenguiz v Investec Trust (Guernsey) Limited (unreported, 26 June 2013)
SPL ICC Limited v Moore Stephens (unreported, 13 January 2014)
Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited [2013-14] GLR 445
Three Rivers D.C. v Bank of England (No. 3) [2003] 2 AC 1
Credit Suisse Intl v Ramot Plan OOD [2010] EWHC 2757 (Comm)
The Contracts (Rights of Third Parties) Act 1999
Cobbe v Yeoman's Row Management Limited [2008] 1 WLR 1752
Chitty on Contracts, 32nd ed.
Whitehead Mann Ltd v Cheverny Consulting Ltd [2006] EWCA Civ 1303
Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd [2006] 1 CLC 582

Arnold v Britton [2015] AC 1619
Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council [1990] 1 WLR 1195
The Aramis [1989] 1 Ll Rep 213
Whittle Movers Ltd v Hollywood Express Ltd [2009] EWCA Civ 1189
Snell's Equity, 33rd ed.
Gillett v Holt [2001] Ch 210
The Trusts (Guernsey) Law, 2007

Introduction

1. By an Application dated 23 December 2015, the Defendants applied to have the Plaintiffs' Cause dated 25 August 2015 struck out as an abuse of the Court's process or, in the alternative, sought summary judgment in their favour on the claim or such parts of it as the Court thinks fit. However, on 20 April 2016, the Advocates for the Defendants wrote to the Advocates for the Plaintiffs indicating that they considered it unnecessary to pursue their arguments based on issue estoppel, abuse of process and collateral attack. Accordingly, the hearing of their Application has focused only on whether summary judgment should be granted and also, in that context, the question of prescription.

2. The Plaintiffs' Cause was tabled on 28 August 2015. The Defendants' Defences were tabled on 20 November 2015.

3. The First Plaintiff, Rawlinson & Hunter Trustees SA, brings these proceedings in its capacity as the trustee of the Tchenguiz Settlement and the trustee of the NS One Trust. The Tchenguiz Settlement is a Guernsey trust established by an instrument dated 11 March 1986. The NS One Trust is a Jersey trust established on 29 June 2009. The Second Plaintiff, Vimelator Holdings Limited, is incorporated in the British Virgin Islands. The First Plaintiff holds the Second Plaintiff's share capital in its capacity as the trustee of the NS One Trust.

4. The Defendants, ITG Limited and Bayeux Limited, were the former trustees of the Tchenguiz Discretionary Trust ("the TDT"), which is a Jersey trust established by an instrument dated 26 March 2007. By a Notice of Removal dated 1 July 2010, the protector of that trust, Robert Tchenguiz, removed the Defendants as trustees pursuant to the power conferred upon him by clause 10.1. Robert Tchenguiz, as protector, then appointed the First Plaintiff as the new trustee of the TDT in place of the Defendants. The First Defendant is also the former trustee of the Tchenguiz Settlement, being replaced by the First Plaintiff in accordance with a Deed of Retirement and Appointment dated 9 April 2010.

5. One of the assets that was held by the Defendants as trustees of the TDT is a shareholding in Iver Resources Limited ("Iver"), a company incorporated in the Isle of Man. The Defendants have retained possession of certain assets they held as trustees of the TDT, including the shares in Iver. They have done so pursuant to their right of indemnity against the trust assets, which has been the focus of other proceedings before this Court and which are still subject to appeal proceedings. However, the present dispute between the parties relates to an alleged oral contract for the sale of the Iver shares. The significance of Iver is that it is the registered proprietor of the Royal College of Organists in Kensington Gore, which is the home of Robert Tchenguiz and his immediate family.

6. The primary remedy sought by the Plaintiffs in their Cause is an order for specific performance of what is termed "*the Amended Agreement*". In the alternative, the Plaintiffs seek a declaration that the Defendants hold the shares in Iver on trust for the Plaintiffs or that

the Plaintiffs have an equitable lien over those shares to secure repayment of £6 million. In the further alternative, the Plaintiffs claim damages for breach of contract. At para. 56 of the Cause, the Amended Agreement is defined as what is alleged to be a binding agreement, as at 15 September 2009, "*for the sale of the Iver Shares to Vimelator in consideration of the additional cash payment of £6.4 million and the discharge of the Iver-TDT Debt and otherwise on the terms previously agreed and approved*". The stages prior to the forming of this Amended Agreement were set out in the preceding paragraphs of the Cause and are matters to which I will return in due course.

7. The Defendants deny that any binding oral contract was formed for the sale of the shares in Iver. They say that the Plaintiffs' claim is based on an absurd proposition that an individual could make an oral agreement with himself on 5 February 2009. This is contradicted by contemporaneous evidence and what this individual himself says in his affidavit evidence. Although it might have been more pertinent to the question of whether there are any issue estoppels, which is no longer pursued, the Defendants still refer to proceedings that have been commenced in England where some of these matters have already been canvassed. They effectively say that this Court should approach the question in a similar way and reach identical conclusions about the reality of what is alleged by the Plaintiffs succeeding at trial. In any event, the Defendants have pleaded that the Plaintiffs' claims are prescribed by operation of Article 1 of the Loi relative aux Prescriptions of 1889.

8. At the hearing, Advocate Roland appeared on behalf of the Defendants and Advocate Paul Richardson on behalf of the Plaintiffs. I am grateful to them for the manner in which they took me through the materials on which they each rely.

Summary judgment

9. One matter on which the Advocates agreed was the approach that I should take to the application made by the Defendants for summary judgment. It is, therefore, convenient to set out briefly the applicable principles at the outset before considering how they apply to the present Application.

10. An application for summary judgment under Part IV of the Royal Court Civil Rules, 2007 must meet the two-stage test in rule 19(2):

> "*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, …*
>
> *and there is no other compelling reason why the claim or issue should be disposed of at a trial.*"

11. I have regularly referred to the summary 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), as a readily accessible summary of the considerations involved when deciding applications for summary judgment:

> "*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."

12. As Advocate Richardson puts it (referring to *Tchenguiz v Investec Trust (Guernsey) Limited* (unreported, 26 June 2013) and *SPL ICC Limited v Moore Stephens* (unreported, 13 January 2014)), the overall purpose of the summary judgment jurisdiction is to prevent claims that are "*bound to fail*" from proceeding. Consequently, those responding to applications have a comparatively low threshold to surmount to avoid judgment being entered against them or, perhaps more accurately reflecting the burden of proof, an applicant for summary judgment has a high barrier to overcome.

13. In relation to the "*bound to fail*" test, which is more to do with striking out than summary judgment, I can also usefully refer to the Court of Appeal's decision in *Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited* [2013-14] GLR 445, and the way in which Beloff JA quoted at para. 13 of his judgment from the speech of Lord Hope of Craighead in *Three Rivers D.C. v Bank of England (No. 3)* [2003] 2 AC 1 (at para. 91):

> "*The difference between a test which asks the question "is the claim bound to fail?" and one which asks "does the claim have a real prospect of success?" is not easy to determine. In Swain v Hillman at p 4 Lord Woolf explained that the reason for the contrast in language between rule 3.4 and rule 24.2 is that under rule 3.4, unlike rule 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. In Monsanto plc v Tilly, The Times, 30 November 1999; Court of Appeal (Civil Division) Transcript No 1924 of 1999; Stuart Smith LJ said that rule 24.2 gives somewhat wider scope for dismissing an action or defence. In Taylor v Midland Bank Trust Co Ltd he said that, particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred.*"

Lord Hope continued (at para. 95):

> "*...it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.*"

Beloff JA also referred (at para. 14) to the summary given by Hamblen J in *Credit Suisse Intl v Ramot Plan OOD* [2010] EWHC 2757 (Comm) at para. 24, but I do not set that out here because the substance is so similar to the passage I have already quoted above from Lewison J.

14. I consider that the guidance offered in the speech of Lord Hobhouse of Woodborough in the *Three Rivers* case (at para. 158) focuses the mind on what the first limb of the test entails:

> "*The important words are "no real prospect of succeeding". It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a 'discretionary' power, ie one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect", he may decide the case accordingly. I stress this aspect because in the course of argument counsel referred to the relevant judgment of Clarke J as if he had made "findings" of fact. He did not do so. Under RSC O.14 as under CPR Part 24, the judge is making an assessment not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the 'bottom line' is what ultimately matters.*"

In the same paragraph, His Lordship added the reminder that "*The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality.*" Advocate Roland has also referred to para. 161:

"*The judge's assessment has to start with the relevant party's pleaded case but the enquiry does not end there. The allegations may be legally adequate but may have no realistic chance of being proved. On the other hand, the limitations in the allegations pleaded and any lack of particularisation may show that the party's case is hopeless …*".

15. The various passages to which I have referred clarify the principles that must be applied to this Application. The overriding objective found in rule 1 of the 2007 Rules must never be lost sight of. The Court must be careful to refrain from conducting a mini-trial on the papers where matters might develop differently after disclosure and through oral evidence. This might be particularly relevant where the Plaintiffs' case is pleaded relying on an alleged oral contract. The Court can and must consider what evidence could reasonably be expected to be available at trial.

The evidence

16. Prior to the hearing commencing on 4 July 2016, the Defendants relied on the First Affidavit of Luis Gonzalez sworn on 23 December 2015. He is a director of the First Defendant and a director of the two corporate directors of the Second Defendant. His First Affidavit refers extensively to proceedings that have been instituted in the High Court of Justice in England and Wales where he suggests the relief sought is almost identical to the proceedings that have now been commenced in this Court. The parties to the claim in the High Court (Claim HC13C01256) are the same. The claim form, which was filed on 3 April 2013 states that the Claimants' claim is in respect of a contract for the transfer of shares entered into by the Defendants in their capacity as trustees of the TDT with the trustee of the Tchenguiz Settlement. The relief set out in the Particulars of Claim is noticeably similar to the relief in the proceedings before this Court, although there is a claim in the further alternative in respect of the balance of the cash payment of £6 million after discharging what is described as the Kaupthing debt being held on trust for the First Claimant, together with relief ancillary to such a declaration which has not been replicated in the present action. The agreement in respect of which specific performance is sought is called "*the September Sale Agreement*", but the way it is described in para. 37 is in terms that indicate it is the same alleged agreement that is in issue each time.

17. On 10 September 2013, the Defendants applied to set aside the order granting permission for Claim HC13C01256 to be served outside the jurisdiction of the High Court in Guernsey. In support of that application, reliance was placed on a witness statement from Robert Clifford dated 20 September 2013. The application was heard by Master Marsh on 12 December 2013. In a judgment handed down on 25 February 2014, Master Marsh granted the Defendants' application and set aside the order for service out of the jurisdiction.

18. The Plaintiffs sought leave to appeal that decision. On 24 June 2014, Arnold J granted leave to appeal on two of the grounds of appeal only, relating to the construction of a Deed of Novation of a loan agreement dated 9 April 2010, and refused leave to appeal on all the other grounds. That appeal was heard by Nugee J on 21 October 2014 and His Lordship found that the correct jurisdiction for disputes under the loan agreement was England and Wales. Accordingly, a claim in relation to a loan agreement of 21 May 2009 is being pursued under a separate claim dated 18 November 2014.

19. On the same day, the Plaintiffs filed and served a re-amended claim seeking *inter alia* specific performance of the contract for the sale of shares in Iver. The Plaintiffs' application for permission to file this re-amended claim was heard by Morgan J on 4 June 2015. In his judgment of 10 June 2015, Morgan J dismissed the Plaintiffs' application for permission. Mr Gonzalez draws attention to some passages in the judgments of Master Marsh and Morgan J that show that the English judiciary have reviewed the material that is now before the Court as

a result of the Defendants' Application and which Advocate Roland submits can be reached in the same way by me through conducting a similar exercise.

20. In response, the Plaintiffs relied on the First Affidavit of Ian Davis sworn on 8 February 2016. At para. 12, he summarises what the present action concerns:

> "*It is the Plaintiffs case that the Defendants agreed to the sale of the Iver shares at a meeting on 5 February 2009 ("the **5 February meeting**"). The agreement was subsequently varied, and on the basis of the varied agreement, the TS made a payment to the TDT in March 2009, part of which comprised a portion of the cash consideration for the sale of the Iver shares to Vimelator together with some financing to meet the immediate liabilities of the new owner of the Iver Shares ("the **Cash Payment**"). The Iver Shares have never been transferred.*"

21. The Plaintiffs join issue with the description given by Mr Gonzalez of the proceedings in the High Court. Mr Davis comments that there was no bar to bringing the claim for specific performance, etc but simply a decision that England and Wales was not the appropriate jurisdiction for that claim, which is why the permission to serve out of the jurisdiction was set aside and why the application for permission to file the re-amended claim was refused. He highlights an exchange between Morgan J and Counsel for the Defendants in the transcript of the hearing that acknowledged that Master Marsh's judgment did not give rise to an issue estoppel that there is no contract were this to be litigated in Guernsey. Mr Davis sets out a more detailed procedural chronology of what has taken place in the High Court, noting, in particular, that the application for permission to serve out the re-amended claim including specific performance of the September Sale Agreement carries a different case number (HC 2013 000411). He also refers to the totality of the evidence lodged in the proceedings in England and exhibits some (but not all) of those witness statements. In doing so, he explained that these witness statements do not represent the totality of the evidence on which the Plaintiffs will rely at trial in the present action. He also refutes the suggestion from Mr Gonzalez that the Guernsey action is largely identical to the English proceedings because of differences between the respective pleadings and draws attention to the fact that the legal test being applied by Master Marsh and Morgan J differs from the test for summary judgment before this Court. The rest of Mr Davis' Affidavit makes detailed comment on the materials lodged at that time on behalf of the Defendants.

22. One of the problems with the First Affidavit of Mr Gonzalez was that it did not comply with rule 21 of the 2007 Rules. This was rectified by him swearing a short Second Affidavit during the course of the hearing on 4 July 2016 that contained the technical evidence required. The application to admit this Affidavit is what led to the hearing being adjourned on the application of the Plaintiffs, because Advocate Richardson wished to consider filing additional material in response. (I acceded to the application for the Defendants to rely on the Second Affidavit of Mr Gonzalez because to have done otherwise would have resulted in the application for summary judgment being dismissed for non-compliance with the rule, which I imagined would only lead to the same application to achieve a similar outcome being re-made.) In the end, I granted both sides leave to file further evidence, if they saw fit. As a consequence, on behalf of the Plaintiffs, Timothy Smalley and Robert Tchenguiz each swore a short Affidavit on 4 and 6 July 2016 respectively, in which each confirmed the truth of the contents of their witness statements in the proceedings before the High Court. In a similar fashion, Robert Clifford swore an Affidavit on 13 July 2016 in which he confirmed the truth of the content of his two witness statements used in the High Court. These steps were taken so that these gentlemen properly became witnesses for the parties on the Defendants' Application for summary judgment. The Plaintiffs also filed a Second Affidavit from Mr Davis sworn on 8 July 2016, by which three witness statements of Roland Foord used in the High Court proceedings were exhibited and a Third Affidavit, sworn on the same day, by which he exhibited a one-page document.

The events in issue

23. Although I will cover the various events in more detail in due course, I can summarise the events as follows. The Plaintiffs' case arises out of a meeting held in London on 5 February 2009, which was attended by Robert Clifford, Victor Tchenguiz, Robert Tchenguiz and Tim Smalley, and what followed. Mr Clifford was present at that meeting on behalf of the trustees of the Tchenguiz Settlement and the TDT. Mr Smalley was present on behalf the investment adviser to the TDT, R20 Limited ("R20"). The meeting was held against a background of Victor Tchenguiz wishing to protect the Royal College of Organists for the benefit of Robert Tchenguiz and his family. It is alleged that an oral agreement was made for the sale of the shares in Iver by the TDT on terms that the purchaser was to be a new family trust, which was to be established for the benefit of Robert Tchenguiz and his family and that this trust would be established by the Defendants as soon as possible in a suitable jurisdiction. The purchase price was to be equated to the asset value of Iver, to be calculated by taking the market value of the Royal College of Organists, assumed at that time to be £20 million, less established or agreed liabilities. In part, the purchase price would be paid by an upfront cash payment of £5 million. In 2009, the trustees of the TDT were indebted to Kaupthing Bank hf in the sum of £5 million pursuant to pre-existing finance arrangements ("the Kaupthing Debt"), which is how this figure was determined. The balance of the purchase price would be a debt owed by the new trust to the TDT. The cash payment was to be funded by a loan made from the Tchenguiz Settlement to the new trust, and the amount received by the TDT would enable the discharge of the Kaupthing Debt. The origins of the terms of this agreement came from advice given by the Defendants' legal advisers, Macfarlanes. The Plaintiffs have pleaded that this binding oral agreement was subject to a condition subsequent that the trustees of the Tchenguiz Settlement and of the TDT would approve it. The Plaintiffs suggest that no one indicated that there would be any problem with this approval being forthcoming and that contemporaneous documentation supports there being an agreement. Consequently, there was a waiver of formal consent and trustee approval was given informally and by conduct.

24. The Plaintiffs further plead that this agreement was varied on 11 March 2009. This arose from a conversation between Mr Clifford and Mr Smalley. The amount of funding to be provided by the Tchenguiz Settlement was increased to £6 million so that the new trust could service an existing mortgage in favour of Fortis Bank, which was secured on the Royal College of Organists. The Plaintiffs say this agreement became binding within two days thereafter when the Defendants, as trustees, approved it through their conduct. The transaction was to be implemented by them as shown by the other steps taken around that time.

25. If, however, there was no binding agreement arising from the meeting on 5 February 2009, the terms, as varied in March 2009, became binding on 26 March 2009 when the trustees of the Tchenguiz Settlement made a cash payment of £6 million to the trustees of the TDT. It is said that this was part performance of the transaction to transfer the shares in Iver. The making of this payment enabled the Defendants to pay off the Kaupthing Debt. This analysis treats the discussions on 5 February 2009 as having resulted in an agreement in principle, which was subsequently varied on 11 March 2009 and became legally binding when the cash payment was made.

26. The Plaintiffs assert their entitlements to enforce a contract to which they were not parties as a result of various events that followed. The new trust envisaged was created on 29 June 2009. The First Plaintiff became the trustee of the NS One Trust. Because the Plaintiffs assert that the agreement made is subject to English law, the right to enforce the agreement has been transferred to the First Plaintiff pursuant to the Contracts (Rights of Third Parties) Act 1999. In the alternative, the agreement was varied and/or novated so as to enable the First Plaintiff, as trustee, to enforce it and for the Second Plaintiff to become a party in place of the trustees of the Tchenguiz Settlement. According to the Plaintiffs, the fact that the Defendants entered into a written agreement dated 21 May 2009 in respect of an unsecured loan of £6 million

from the Tchenguiz Settlement to the TDT is not inconsistent with the terms of the agreement. The Plaintiffs contend that it became apparent from about the end of July 2009 that the Defendant did not intend to perform the agreement in respect of the shares in Iver.

27. The First Plaintiff engaged in discussions with the First Defendant with a view to reaching a compromise that would see the agreement performed. As a result, a further variation of the agreement was made orally in mid-September 2009. The terms were that consideration was given to the net asset value of Iver, representing £20 million, less the Fortis Bank mortgage of £5.5 million and also less the indebtedness of Iver to the TDT of £8.6 million. The £6 million paid was to be treated as purchasing part of that debt, reducing the balance to £2.6 million. The NS One Trust would provide additional cash of £6.4 million to the TDT through the Second Plaintiff. The Second Plaintiff would be the purchaser of the shares in Iver and so the new owner of them. Of that additional cash payment, £500,000 would be used to reduce further the balance of the debt owed by Iver to the TDT and the remainder would represent the net asset value of Iver. Accordingly, the Second Plaintiff was purchasing the shares in Iver on the same terms as previously agreed but also in consideration of the additional cash payment of £6.4 million. Thereafter, documentation reflecting the terms of this agreement was to be prepared.

28. As I have already pointed out, the Defendants start from the premise that there has never been any binding oral contract in respect of the sale of the shares in Iver. Because the so-called Amended Agreement of September 2009 is expressed to be a variation of an earlier agreement, if there was no binding earlier agreement there was nothing to be varied. Accordingly, the focus shifts to the way the Plaintiffs put their case in relation to what happened in February and March 2009. The Plaintiffs' primary case is that there was such a binding agreement on 5 February 2009 or, in the alternative, if it were only an agreement in principle at that stage, it became binding through the making and acceptance of the cash payment. However, if no binding agreement existed in either situation, the Plaintiffs' case must fail.

29. The Defendants recognise that the origins of the situation pertaining to the Royal College of Organists was the concern of Robert Tchenguiz that if the Kaupthing Debt were not to be repaid, his family home might be at risk from the creditors of the TDT. Advice was taken from Macfarlanes in January 2009 in relation to a proposal to transfer ownership of the Royal College of Organists away from the trustees of the TDT. Further discussions ensued and further advice was provided by Macfarlanes and forwarded to Robert Tchenguiz, Victor Tchenguiz and to R20. This preceded the meeting on 5 February 2009. The Defendants say that there were two meetings that day, one of which involved just Mr Clifford and Victor Tchenguiz. Whilst accepting that those present agreed in principle that the solution recommended by Macfarlanes was workable, they understood that the trustees of the trusts would then need to decide whether to implement the proposal. The notion that Mr Clifford reached an oral agreement with himself is said to be "*inherently unlikely*". The Defendants rely on various requirements for a minimum of two directors or authorised signatories to approve decisions in respect of the trusts and that such decisions were never made in the United Kingdom. The role of R20 as investment adviser and the need for it to make a recommendation to the trustees was a further factor that needed to be borne in mind. Accordingly, there was no binding agreement on 5 February 2009.

30. Turning to March 2009, although there were further discussions, the contemporaneous correspondence shows that the precise form of the proposed transaction in respect of the shares in Iver had not been finalised. The loan arrangements to enable the Kaupthing Debt to be re-paid, which was the most pressing aspect at the time, were not only understandable as part of the alleged agreement relating to the shares in Iver but can exist distinctly. The way the agreement in May 2009 came about is distinct from the ongoing work in relation to the shares in Iver in respect of the agreement in principle at that time. The Defendants never approved the proposal to transfer the shares in Iver from the TDT. There was nothing binding

by then capable of being varied and no oral agreement reached between the parties at the time. Further, the Defendants contend that the further discussions in September 2009 support their position that nothing had been finalised about the Iver shares.

The parties' submissions

31. The Defendants advance six reasons why the Plaintiffs' contractual claim has no real prospect of success. The first relates to the loan agreement of May 2009 giving rise to a contractual estoppel between the trustees who were parties to it, which similarly applies to the First Plaintiff as successor trustee of the Tchenguiz Settlement seeking to go behind the terms recorded in that contract. This estoppel prevents the First Plaintiff denying that this was an isolated loan and not part of a wider transaction. The second relates to the alleged contract involving three parties, one of which (ie, the trustee of the new trust to be established to acquire ownership of the shares in Iver) did not exist until later and the Plaintiffs relying on a condition subsequent, which is contradictory. The third relates to the crucial position occupied by Mr Clifford as the individual who is said to have committed the respective trustees to a binding agreement where in his evidence he says he did not and the overwhelming evidential difficulties this presents. The fourth reason is that the contemporaneous documentation supports the evidence given by Mr Clifford as to what he did or did not decide on 5 February 2009 (which is consistent with the way Master Marsh approached this evidence). The fifth is that it does not automatically follow that the First Defendant agreed to advance funding to the new trust envisaged because it was going to be available to settle the Kaupthing Debt because there were other valid reasons to do so. The sixth reason, relating to the alleged variation of the agreement in September 2009 is that the evidence contradicts the outcome for which the Plaintiffs contend, it being apparent that no party was regarding itself as bound until all the required documents had been executed.

32. The Defendants also argue that the Plaintiffs' proprietary estoppel claim has no real prospect of success for seven reasons, referring also to the approach outlined in *Cobbe v Yeoman's Row Management Limited* [2008] 1 WLR 1752. The first is that it involves Mr Clifford making a representation to himself, which is an unreal proposition. There is a question of how this can be taken to induce him to do anything and that leads to the second concern as to how he could be said to have relied on it to the detriment of the Tchenguiz Settlement. The third difficulty relates to the position of the First Plaintiff as trustee of the NS One Trust because it was not in existence on 5 February 2009, when the representation is alleged to have been made, and the Plaintiffs have not shown any detrimental reliance. The fourth concern arises from the contractual estoppel already advanced in respect of the contractual claim, which shows that there has been no detrimental reliance in making the loan payment. The fifth difficulty arises from the lack of certainty or clarity in what it is said the representor is now estopped from denying or refusing against the representee because the proposed transaction was a complex one where there were several outstanding issues, which similarly relates to the sixth concern that a representee takes the risk that a hoped-for transaction will not come about. Finally, because it is not alleged that Mr Clifford made any representation or assurance to any other natural person, no one else within the trustees has been identified as the person who caused detrimental reliance on it.

33. The Plaintiffs refer to the fact that the matters to which the Defendants refer have not yet been tested on cross-examination. The issues raised in the Cause are complex and can only be fairly determined at trial. The high threshold that the Defendants have to meet on an application for summary judgment is not shown just by referring to the conclusions reached in the proceedings in the High Court of Justice in England. In particular, the test applicable to the question of whether the order giving leave to serve out of the jurisdiction should be set aside is a different one and involves an evaluation rather than the making of any findings. Reviewing the evidence of those present on 5 February 2009 shows that it is arguable there was a commitment to a course of action where all the important terms had been agreed. This was not a tripartite agreement but an agreement between the trustees of the Tchenguiz

Settlement and the TDT. There needs to be an opportunity for the Plaintiffs to test Mr Clifford's evidence in the light of what was being said and done at that time in correspondence, which is why this is not a matter suitable for summary determination. Instead, what the Defendants are inviting the Court to undertake is a form of impermissible mini-trial on the papers. Because of the need to assess the credibility of those who were present on 5 February 2009, these same comments extend to the Plaintiffs' proprietary estoppel claim. Furthermore, the event which is said to impact the most was the making of the cash payment in March 2009 and not the execution of the loan agreement in May 2009, so there is no contractual estoppel applying to the Plaintiffs.

34. In reply, the Defendants point out that the Plaintiffs' suggestion that the testing of oral evidence through cross-examination is a necessary process to produce fairness was not the way Morgan J approached matters, because he noted that there was no substantial dispute on the facts, but rather a question of the legal consequences flowing from what took place. Moreover, this is not a case where disclosure will provide new material because the litigation in which the parties have already been concerned has resulted in both sides knowing what their strongest cases are.

Facts

35. It is quite clear that the principal basis on which the Defendants submit that the Plaintiffs' claim has no reasonable prospect of success is as a result of what they say happened in the run-up to and on 5 February 2009. I will, therefore, have to expand upon the material before me relating to those events, recognising that it is possible to form an impression of what was said and done by reference to material dated later and looking back at those events.

36. Mr Clifford's Affidavit confirms the truth of his witness statements in the proceedings before the English High Court. In his first witness statement dated 20 September 2013, he explains that he was a director of the First Defendant until he resigned on 17 March 2009 and of the Second Defendant (and the corporate directors of that company) until he resigned on 19 March 2009, adding (at para. 11):

> "*I did not, and could not agree to any decisions on behalf of the trustees on my own. ITGL did not authorise me to unilaterally act on its behalf in connection with any trust. Decisions of the trustees of the TDT could only be passed if they were approved by (i) a minimum of two people, who were either directors or authorised signatories of ITGL, and (ii) a minimum of two people, who were either directors or authorised signatories of the corporate directors of Bayeux. My understanding was that decisions of the trustees of the TS could only be passed if they were approved by a minimum of two people, who were either directors or authorised signatories of ITGL. Whilst I was a director, I would not purport to make decisions on behalf of the trust without the approval of a fellow director.*"

37. In January 2009, it was proposed to him, either by Robert Tchenguiz or by Mr Smalley, that the shares in Iver, through which the leasehold interest in the Royal College of Organists was held, might be transferred away from the assets of the TDT. This was under consideration because of the Kaupthing Debt, in respect of which collection was being commenced against the trustees. On 13 January 2009, he caused advice to be sought from Macfarlanes, which was provided on 15 January 2009, explaining that there were a number of options that might work to achieve the desired outcome and proposing further discussions. Mr Clifford reverted to Macfarlanes on 29 January 2009. He identified two objectives: Victor Tchenguiz was prepared to fund the TDT with £5 million to enable the Kaupthing Debt to be met, but required good security for the funds being made available; and Robert Tchenguiz wanted to have assistance from the trustees to protect his family home and further that he would consider owning property situated in the United Kingdom if it achieved that outcome.

38. Robert Tchenguiz's Affidavit confirms the truth of his witness statement in the proceedings in the High Court dated 8 January 2015. The evidence of Robert Tchenguiz reflects the background summarised by Mr Clifford and explains in more detail how he had discussions with his father, Victor, with a view to protecting his family home from possible enforcement action against the assets of the TDT. Robert Tchenguiz further explains that he was not really concerned with implementation of decisions, once they had been taken, leaving that to others, such as Mr Smalley, to deal with.

39. Mr Smalley's Affidavit confirms the truth of his witness statement in the proceedings in the High Court dated 12 January 2015. Mr Smalley's recollection of the position at this time (para. 22) largely reflects what Mr Clifford says:

> "*At this time, the TDT did not have readily available liquidity to settle the Kaupthing Debt and it was therefore envisaged by all parties in around late January 2009 that the TS would provide the necessary funding. As the TS was a separate trust with different family beneficiaries, the commercial rationale for these funds being made available to the TDT was to facilitate the RCO being sold at market value into a new trust to protect it from other Kaupthing related creditor actions in the TDT. The transaction would therefore achieve two outcomes: firstly repay the Kaupthing Debt that was about to be enforced against the TDT and secondly preserve and protect RT's family home in a separate ring-fenced trust.*"

40. After discussing the matter further in a telephone call on 30 January 2009, Macfarlanes provided Mr Clifford with a letter of advice dated 2 February 2009. It made a suggestion as to how the desired objectives could be achieved which involved the establishment of a new trust, which would then use its borrowing powers to be able to purchase the shares in Iver. It stated that "*The terms of the loan will need further consideration*". It suggested formalising the occupation arrangements of Robert Tchenguiz. It set out five matters relating to preparing documents that would be required "*If this plan is acceptable*". Mr Clifford forwarded this letter by e-mail to Robert Tchenguiz, Mr Smalley and others on 3 February 2009. He explained what was involved and recommended that Robert Tchenguiz and Victor Tchenguiz, to whom the message was copied, should consider taking their own legal advice. Mr Clifford's message ended with "*If, after consideration, you can let me know if you would like to proceed I can follow up and make all the necessary arrangements as promptly as possible.*" Mr Clifford also sent an e-mail to Robert Tchenguiz on 4 February 2009 in which he wrote "*I am meeting your father tomorrow to explain what is proposed here and it would be helpful to know if it has your agreement before then Robbie, or whether we need to look at it again.*" Robert Tchenguiz explains that he discussed this letter of advice with his father, Victor.

41. There are no meeting notes relating to what happened on 5 February 2009. Robert Tchenguiz and Mr Smalley say it took place at the offices of R20. Mr Clifford refers to meeting first with Robert Tchenguiz and Mr Smalley and then meeting alone with Victor Tchenguiz in order to ensure that the latter's private wishes were understood. Mr Smalley says that he remained in the room when Mr Clifford wanted to speak with Victor Tchenguiz and that Robert Tchenguiz was simply asked to leave the room so that Mr Clifford could satisfy himself that no undue pressure was being put on Victor Tchenguiz by his son. Mr Smalley says (at para. 26) that during the meeting Mr Clifford agreed that the shares in Iver would be sold, that a new trust would be set up for the purpose of purchasing the Iver shares, partially funded by the Tchenguiz Settlement and that the purchase price was to be contingent on an independent valuation of the Royal College of Organists and based on the net asset value of the Iver shares. Mr Smalley also explains that he understood that implementation of this agreement would follow because the trustees would approve the terms in Guernsey and his experience was that when Mr Clifford, who held a very senior position, agreed that a transaction should proceed it did in fact proceed. Robert Tchenguiz sets out his understanding of the outcome of the meeting in a similar fashion (para. 29). R20 agreed that it would

provide a formal written recommendation to the trustees of the TDT and Mr Smalley regarded this as a procedural step.

42. Mr Clifford recalls that his discussions with Robert Tchenguiz and Mr Smalley led to the conclusion that the proposal from Macfarlanes was in principle workable and that "*clearly there was work to be done*". In Mr Clifford's words (para. 25) he thinks "*it is correct to say that as a result of the meeting it was the working assumption that Robert Tchenguiz and Victor Tchenguiz were willing for the proposal to be implemented and that this would be put to the trustees for consideration and that it was likely to prove acceptable. But it must have been clear to all that there was more work to be done before the trustees could approve the transaction*". He added (para. 26) that "*I am quite sure I did not make any agreement which bound the trustees. I did not have authority to do so, and it would have been contrary to the whole established practice of the Trusts to operate by means of a binding oral agreement made informally by a single director of one trustee in the UK and not properly recorded.*"

43. There was, however, an urgency to take things forward because of the obligation shortly thereafter to file an acknowledgement of service in relation to proceedings relating to the Kaupthing Debt. As Mr Clifford further explains in his second witness statement dated 1 April 2015, the advice received from solicitors was that there was no defence to the claim brought by Kaupthing Bank hf. The acknowledgement of service dated 6 February 2009 on behalf of the Defendants admitted the claim. However, Mr Clifford also suggests that the payment to be made in respect of this claim was not inextricably linked, ie, as a condition, to the proposal to move the Royal College of Organists out of the assets of the TDT.

44. On 6 February 2009 at 11:13, Mr Smalley sent an e-mail to Mr Clifford in which he stated that "*As per yesterdays meeting and discussion with Victor we have reviewed Macfarlane's advice and your Email and are happy to recommend you transfer the ownership of Iver Resources into a new discretionary trust established for the benefit of Robert and his family … You were going to arrange for the necessary paperwork to be prepared as a priority and we will for our part obtain third party verification of the value of the RCO as requested.*" At 11:27, Mr Clifford sent an internal e-mail to his colleagues, including Mr Gonzalez and Claire Tersigni, explaining:

> "*I met with Victor and Tim on behalf of Robbie and then with Vincent yesterday and the outcome is that Victor is prepared to ask the Trustees of the TS to enter into the recommended transaction as quickly as possible. He is prepared to accept that the Trustees make a gift of the money to Robbie ultimately if that is necessary – although his preference was that TS is repaid at some point if it is possible. Initially Victor said that he would like to see the £5m repaid out of the BRB proceeds but then changed his mind as above when I discussed cash flow and requirements for funding going forwards. Tim was present throughout the discussion with Victor and we then agreed on the recommended structuring – if it is something the Trustees will approve.*
>
> *Could I please ask that you have the Trustees consider the proposal and, if they agree, move ahead with creating the new Trust as promptly as possible? …*
>
> *Would you be able to pick this up and move it on very quickly please? The first action would seem to be consideration by the Trustee(s) and, if agreed, instructions to Macfarlanes to draft the documents and proceed as indicated in their note.*"

At 11:34, Mr Clifford replied to Mr Smalley. He referred to the amount of the loan, writing "*In our meeting we agreed in principle, subject to consideration by the Trustees, £5m for the loan. You mentioned R20 could cover the balance. Has this changed?*". He also recommended that the Geneva office be used to establish the new trust. At 11:37, Mr Smalley accepted the recommendation of Geneva and added "*R20 will cover the c.£200k surplus above £5m needed to repay Kaupthing*".

45. On 9 February 2009, Claire Tersigni sent Mr Clifford a draft letter for Victor Tchenguiz to send to the trustees, which Mr Clifford amended later that day, and she also indicated that she was "*now working on the trustees resolutions of TS and TDT to approve the transaction in principal [sic]*". Victor Tchenguiz signed and returned the letter, which was dated February 2009, confirming his wishes that the arrangements proposed by Macfarlanes as described at the meeting on 5 February 2009 should be entered into.

46. Mr Smalley refers to e-mail exchanges he had with Mr Clifford on 19 and 20 February 2009. By way of example, on the evening of 19 February 2009, Mr Clifford wrote "*We have made progress and have a structure in principle and draft documents but there is a significant issue with regard to how to meet/structure the mortgage repayments.*" Mr Smalley regarded this exchange as confirmation that the agreement reached on 5 February 2009 was being implemented by the trustees and that they were content with the position. There was then no further contact between Mr Clifford and Mr Smalley until Mr Clifford sent an e-mail on 10 March 2009 explaining that progressing repayment of the Kaupthing Debt was needed, "*which means completing the loan and the new Trust arrangements promptly now*". Mr Smalley suggested that a 20-minute discussion the next day might assist in finalising matters.

47. Mr Clifford could not recall whether he had met with Mr Smalley on 11 March 2009 or whether they spoke on the telephone, but he explained to his colleagues the next morning in an e-mail:

> "*I spoke to Tim last night in relation to the RCO Trust destined for Geneva. I am concerned that as we now have the costs details in relation to the £5m TDT loan Weils will start enforcement proceedings if we don't pay in the next couple of days. QE confirm this is likely so the timetable is shorter than we thought.*"

Mr Clifford referred to the work being undertaken by Mr Smalley with the existing lender (Fortis Bank) and explained how he thought the mechanics of the transaction needed to look. He added "*Given we need to pay the £5m promptly now I would think TS could make a loan of £5m to TDT tomorrow to allow that liability to be met, then assign that loan to RTP Trust and add a million of cash when we have the Trust and transfer papers prepared by Macfarlanes and ready to go.*" Mr Clifford suggests this shows that "*the position remained somewhat fluid: there was a proposed transaction whose precise form had not yet been fixed and which had not yet been agreed by the trustees*". Mr Clifford's colleague, Tracey Walker, forwarded this message to Macfarlanes requesting any further thoughts and, if all was in order, for the draft documentation to be prepared for approval. Ms Walker also caused an e-mail to be sent to Robert Tchenguiz, asking him to confirm with his father, Victor, that they were comfortable for the loan from the Tchenguiz Settlement to be increased to £6 million and requesting that Victor Tchenguiz sign and return a letter that was attached for his consideration. A chaser was sent on 16 March 2009.

48. On 16 March 2009, Quinn Emanuel, acting for the Defendants, wrote to Weil Gotshal & Manges requesting a calculation of the amounts said to be due as the Kaupthing Debt, together with payment instructions and explained "*For the avoidance of doubt, our clients are ready, able and willing to pay*". On the same day, Macfarlanes forwarded a draft loan agreement and then sought clarification (at 16:53) about the terms of the transaction involving the shares in Iver so as to be able to document everything. Mr Clifford replied to his colleagues at 17:13 setting out his responses. His e-mail concluded with "*RT is chasing me via Tim today asking that it happens promptly.*" On 17 March 2009, Stephanie Guy informed Mr Clifford, Mr Gonzalez and other colleagues that she had spoken to Victor Tchenguiz that lunchtime and "*he agreed to the £6m transfer for the benefit of RT and his family*". On 27 March 2009, Ms Walker informed Mr Smalley that the funds had been physically passed from the Tchenguiz Settlement to the TDT and that "*£5 million+ of this amount has been utilised to repay Kaupthing*".

49. When Mr Clifford resigned, although he became a consultant to the Investec entities, his role in relation to the matters under consideration became smaller. Effectively he gives no evidence of events beyond March 2009, although he was copied in to some messages.

50. On 13 May 2009, Mr Smalley enquired of Ms Walker whether the transfer of Iver to the new trust had formally completed and, if not, what was still outstanding. Robert Tchenguiz signed a declaration of beneficial ownership on 20 May 2009, which he was told was needed to comply with Swiss anti-money laundering laws. Mr Smalley sent a further request for information on 21 May 2009, to which Ms Walker replied:

> "*I will be sending documents to both Robbie and yourself imminently for execution in relation to the creation of the new trust with Switzerland.*
>
> *All remaining paperwork has now been finalised and passed across to Switzerland.*
>
> *I understand that both you and Robbie have spoken to Robert Clifford to express your disappointment in the length of time it has taken to complete this transaction, and I can only apologise for the delay.*"

Mr Smalley responded saying that he was "*flabbergasted at how long this has taken … despite the high priority that was supposed to have been placed on this*" and expressing Robert Tchenguiz's wish that everything be completed by the following day.

51. The loan agreement between the First Defendant as trustee of the Tchenguiz Settlement and both Defendants as trustees of the TDT was executed on 21 May 2009. It recites that £6 million was advanced on 26 March 2009 and that the parties wished to document their loan arrangements and confirm the terms on which that loan was made. Mr Smalley says that this was done without reference to him, Robert Tchenguiz, Victor Tchenguiz or R20 and is contrary to the terms that had been agreed, as they had been amended in March 2009, and to the intention of those present on 5 February 2009. Robert Tchenguiz adds that the document only came to light as a result of proceedings before this Court in which the Defendants were involved, which started in 2010.

52. Jane Kerins, who took over Mr Clifford's role at the First Defendant, sent an e-mail to Mr Smalley on 29 May 2009:

> "*My profuse apologies for not getting back to you this week. You are overdue an update on Iver. We continue to finesse the detail with our Swiss colleagues and there have been some questions raised as to whether TDT is receiving fair value. I spent some time o[n] the phone with Robert Clifford this morning who explained the transaction to me in a much clearer fashion than I had previously heard it. I am concerned that the documentation as presently drafted does not fully reflect the transaction and this point has also been raised by the Swiss office. I will ensure these matters are addressed and revert soonest.*"

On 2 June 2009, Mr Smalley sent an e-mail to Mr Clifford expressing the frustrations at his end that everything they had been asked to do had been done, yet there were still concerns over the transfer of the Royal College of Organists, which really needed to be finalised so that "*the wider picture*" could then be picked up. He also forwarded to Mr Clifford what Ms Walker had sent on 21 May 2009. Mr Clifford replied shortly thereafter, explaining that he had spoken with Ms Kerins the previous week and he believed "*she was comfortable with the transaction mechanics after that.*" He had spoken to her again that day and "*she would like to deal with you directly on this without my involvement*". On 9 June 2009, copying in Robert Tchenguiz, Mr Clifford sent an e-mail to Mr Smalley explaining that he had been discussing matters with Ms Kerins and Mr Gonzalez, noting that they agreed that the receiving trust could more sensibly be a trust established by the First Plaintiff rather than Investec. Mr

Clifford indicated that he felt he was not adding any value to the process and would cease advising Investec from the end of the month.

53. On both 17 and 18 June 2009, Mr Smalley sought an update on progress from Ms Kerins. She replied to the second message indicating that a report from Ernst & Young was awaited and indicated that a valuation was also awaited, adding "*Not that this is necessary for us to progress*". On 26 June 2009, following a telephone conference with Mr Smalley, Ms Walker set out a revised proposal in an e-mail to him which arose because of the need to take into account a loan between Iver and the trustees of the TDT of £8.1 million. She further explained that "*We know that Robert is keen to progress this matter, however as we hope you will appreciate, we are trying to find a solution which would be workable from all aspects and, ultimately, to provide the protection for the property Robert requires.*"

54. The NS One Trust was settled on 29 June 2009.

55. On 30 June 2009, Mr Smalley replied to Ms Walker, reminding her that "*the £6m that came in from Victor as payment/part payment for the RCO – this was always to be accounted for as a loan to the new Trust and subsequent payment across to the TDT in respect of the RCO.*" Ms Walker responded the next day explaining that "*this loan exists as between Tchenguiz Settlement and TDT and was utilised to extinguish the £5m loan with Kaupthing direct at trust level*". Mr Smalley describes this as coming as a surprise to him because what had been agreed in February and March 2009 did not envisage such a debt being created but that the new trust would owe a debt to the Tchenguiz Settlement in respect of these monies. Equally, Mr Smalley recognised that the debt of Iver owed to the TDT would have to be dealt with.

56. In late June 2009, Mr Smalley produced a structure diagram summarising and developing the discussions he had been having with Investec. On 3 July 2009, Ms Walker sent to him a draft sale and purchase agreement in respect of the shares in Iver. On 14 July 2009, Dominique Gough of the First Plaintiff sent by e-mail to Ms Walker, copying in Mr Smalley, a final draft of the sale and purchase agreement, explaining that the purchaser of Iver was to be the Second Plaintiff, a BVI company wholly owned by the NS One Trust. She indicated that they were happy to sign that agreement on that date. Indeed she informed Mr Smalley a few hours later that Richard Hillier had signed on behalf of the Second Plaintiff. E-mail traffic shows that Mr Smalley chased Ms Walker and Ms Kerins for an update on 20 July 2009 and on 23 July 2009. There were then further discussions about the paperwork and the security to be provided, covered in Mr Smalley's e-mails on 28 July 2009.

57. On 5 August 2009, a lawyer at Quinn Emanuel sent an e-mail to Mr Smalley in which she explained that she had spoken with Mr Clifford, "*who I understand you have also been trying to get hold of. He will say what is necessary and provide the necessary linkage to enable the transaction to be sorted, and I have asked him to send an email to Investec now.*" Mr Clifford's e-mail of that date to Ms Kerins states:

> "*I spoke with Sue this afternoon and understand that you had a meeting with her and RT/VT earlier today when the question of Iver Resources and RCO was discussed. In this context Sue asked me to confirm whether there was any linkage between the £6m that moved from the Tchenguiz Settlement to TDT I can confirm that the £6m was transferred with the underlying intent (on the part of TS and TDT) of facilitating the transfer of Iver Resources and RCO out of TDT. As you are aware the Trustee has been trying for months now to make this transaction happen. The transfer of the £6m happened sooner than it would otherwise have done (when the structure for the property transaction was finally resolved) because of the immediacy of the debt due from TDT to Kaupthing, but it was always intended that the funds would be used to enable the property transfer to happen.*"

58. On 20 and 25 August 2009 there were further e-mail communications between Ms Walker and Mr Smalley, apparently purporting to reflect discussions that had taken place but showing that the terms to be incorporated into the share and purchase agreement were still evolving. This continued on 7 September 2009. On 9 September 2009 Mr Smalley indicated that R20 was "*prepared to recommend that the Trust sell Iver Resources Ltd to Vimelator Holdings Ltd for £6.4m cash paid at completion on the basis that the residual £2.1m loan is formalized on to a 10 year unsecured, interest free basis with repayments of £150k p.a. for the first 5 years rising to £270,000 p.a. for the subsequent 5 years.*" The next morning, Ms Walker replied that, having discussed it with Ms Kerins, they "*would be prepared to proceed on the basis below, on the proviso that Vimelator Holdings would be prepared to subordinate any future lendings it may make to Iver for servicing loans etc in TDT's favour.*" Mr Smalley replied that that was fine and Ms Walker responded "*We will get on to this straight away.*" On 14 September 2009 Mr Smalley requested an update from Ms Walker and Ms Kerins, including in relation to the documentation and was informed the next morning that the documents were with Macfarlanes for review. It seemed that all concerned wanted matters finalised as soon as possible.

59. On 15 September 2009, Mr Smalley met with Ms Kerins in London. Their discussions ranged over matters going beyond the sale of the shares in Iver, but Mr Smalley says that the net asset value of Iver was agreed at £5.9 million, being the value of the Royal College of Organists at £20 million less the Fortis Bank mortgage and the debt owed by Iver to the TDT, that the £6 million payment from the Tchenguiz Settlement was to be treated as purchasing part of the debt owed by Iver to the TDT, that the NS One Trust was to provide an additional cash payment of £6.4 million to the TDT through the Second Plaintiff, which would then purchase the shares in Iver, with the balance of £500,000 reducing the outstanding debt owed by Iver to the TDT to £2.1 million, which would then be set off against the £3.1 million debt owed by the TDT to the Tchenguiz Settlement. In e-mails sent on the same day, Mr Smalley indicates that he discussed these terms with Ms Kerins and the final element was agreed by her in principle subject to checking the figures.

60. On 21 September 2009, Macfarlanes informed Ms Walker that the firm would be sending documents recording the sale of Iver to the Second Plaintiff later that day. The draft documents were forwarded the following day. They were never executed.

The English proceedings

61. Although no one has suggested that I am obliged to follow or even adopt the findings made by Master Marsh and Morgan J in the English proceedings (HC13C01256), Advocate Roland has urged me to consider reaching the same, or at least similar, conclusions on the material placed before this Court, which was effectively also before Morgan J and, at least in part, before Master Marsh. Accordingly, it is appropriate to refer to those decisions.

62. Master Marsh's decision was handed down on 25 February 2014. At para. 4, he noted that "*The main claim is based upon an assertion that an oral agreement was made on 5 February 2009 between the TS Trust and TDT.*" The principal alternative case is that the Claimants are entitled to rely on a proprietary estoppel founded in representations made in conversations between Mr Clifford and Robert Tchenguiz prior to 5 February 2009 and representations made by him at the meeting that were relied on by the trustee of the Tchenguiz Settlement (para. 6).

63. The test being applied was set out in paragraphs 9 and 10:

> "*In order to justify the grant of permission to serve out of a jurisdiction under CPR 6.36, the Court must be satisfied that one of the grounds set out in Practice Direction 6B paragraph 3.1 applies to the claim. The burden lies on the Claimant and the claim must fall within both the letter and the spirit of the rule. Where there are issues*

of fact between the parties concerning the applicability, or otherwise, of the grounds set out in the Practice Direction, the standard of proof is that there is a 'good arguable case', which means more than a serious issue to be tried or real prospect of success, but less than the balance of probabilities. It is usually appropriate to apply what is called the Canada Trust gloss namely that the Claimant must show that it has "much the better, or at any rate the better, of the argument". See Cherney v Deripaska [2008] EWHC 1530 (Comm) per Christopher Clarke J [41].

If the Court is satisfied that one of the gateways under the Practice Direction applies, the Court must also be satisfied that so far as the merits of the claim are concerned, there is a serious issue to be tried or a real prospect of success (such that the claim would survive an application for summary judgment or a strike out). Where the same issue goes both to the question of whether a jurisdictional gateway is met and the merits, the merits question is effectively subsumed in the question whether the gateway has been satisfied, since the test for the purposes of the gateway is a higher one."

64. Master Marsh drew attention to the fact that Mr Clifford was "*the only person who has first hand knowledge of the relevant events who has made a witness statement*" for the purpose of the application and that where his evidence was consistent with the contemporaneous documentation, greater weight would be given to his evidence than that of a lawyer on instructions (para. 15). He explained (at para. 21) that:

> "*... the only way in which such an agreement could have arisen was by Mr Clifford deciding unequivocally as a director/representative of Investec and Bayeux that such an agreement was to be entered into. At least notionally, there would have to have been an offer made by Mr Clifford on behalf of Investec as sole trustee of the TS Trust to Investec and Bayeux as joint trustees of TDT and a corresponding acceptance of the terms. It is not suggested by the Claimants that this somewhat unreal process occurred aurally and, thus, it could only have been an internal process to which no-one other than Mr Clifford was privy. Thus, his evidence that he did not deal with himself in this way is hard to discount, unless it is inconsistent with the surrounding documents.*"

65. Having regard to the letter of advice from Macfarlanes on 2 February, "*Although it is not determinative, it was clearly not Macfarlanes' understanding that there might be an oral agreement between the Trustees supporting the entire transaction*" (para. 22). He considered that the purpose of the meeting fixed for 5 February 2009 "*was not to conclude an agreement but merely to explain a proposal to Victor Tchenguiz*" (para. 24). He regarded "*the tone and content*" of Mr Smalley's e-mail on 6 February 2009 as not having "*the tenor of an email confirming an agreement had been made*", adding that "*the idea of a moderately complex transaction merely being implemented by documents being put in place has a sense of unreality about it*" (para. 25). Similarly, he concluded that what Mr Clifford wrote on 6 February 2009, referring to an agreement in principle and the uncertainty surrounding the loan, pointed to there being no agreement concluded in Mr Clifford's mind. He further concluded that "*There is nothing in the email traffic surrounding the meeting on 5 February 2009 to suggest that Mr Clifford attended the meeting as a representative of the TS Trust and TDT with authority to include [sic] an agreement on behalf of the Trustees*" (para. 41). He acknowledged that the payment of £6 million "*provides some support for there having been a prior understanding about such a payment being made*" but that that "*does not provide a firm foundation for the Claimants' pleaded case*" (para. 42). In doing so, he recognised that the informality surrounding this did not sit comfortably with the assertion of Mr Clifford that everything done by the trustees was minuted, although when subsequently documented it had the appearance of a commercial arrangement. In summary, Master Marsh decided that "*the Defendants have much the better of the argument as to whether or not a binding oral agreement was made on 5 February 2009*" and "*Even looked at from the narrower*

perspective as to whether there is a serious issue to be tried or there are real prospects of success the difficulties facing the Claimants are all too apparent" (para. 43). At para. 52, he further ruled that "*the proprietary estoppel claim does not meet the threshold test of the claim showing reasonable grounds or the Claimants having a real prospect of success*". Although it was not relevant to his decision, at para. 54 he concluded that England was not the appropriate forum "*and that the issues the Claimants wish to litigate should be pursued in Guernsey*".

66. The judgment of Morgan J was delivered on 10 June 2015. His Lordship had before him the witness statements of Mr Smalley and Robert Tchenguiz, neither of which had existed when Master Marsh reached his decision. At para. 50, Morgan J dealt with the witness statement of Robert Tchenguiz:

> "*Robert Tchenguiz does not appear to me to contradict the evidence originally given by Mr Clifford that Victor and Robert Tchenguiz wanted the proposals to be implemented and that the proposals would be put to the two sets of trustees and it was likely that the trustees would accept the proposals were proper proposals that they should implement. Robert Tchenguiz's witness statement does not contain evidence dealing with the alleged variations of the alleged contract of 11 March 2009 and 15 September 2009.*"

In relation to Mr Smalley, Morgan J (at para. 51) further explains:

> "*As Mr Smalley was the adviser to the trustees of TDT, a consensus between himself and a representative of his client, the trustees of TDT, does not go very far to establish a binding contract between the trustee of TS and the trustees of TDT. In effect, what the Claimants want to say on the strength of this evidence is that, on 11 March 2009, Mr Clifford (having consulted Mr Smalley) made an agreement with himself (albeit in another capacity) and on 15 September 2009, Ms Kerins (having consulted Mr Smalley) made an agreement with herself (albeit in another capacity). Mr Smalley also gives evidence about his concerns at the delay on the part of the two sets of trustees in implementing the various proposals but that does not advance the pleaded case as to the existence of a binding contract at any time.*"

67. As a result, the conclusion reached by Morgan J was set out in para. 74:

> "*In his judgment, when considering the material which was put before him, Master Marsh referred to the evidence from Mr Clifford and to the contemporaneous material and he commented that there was no evidence from Victor and Robert Tchenguiz and Mr Smalley. That has now led the Claimants to adduce witness statements from those three witnesses. I have seen those witness statements. I do not regard them as changing the balance of the argument to any serious extent. This is not a case where there is any substantial dispute of fact as to what was said at the meeting on 5 February 2009. The witnesses largely agree on the facts. What matters is the legal consequence of the statements made at that meeting. I consider that all of the points made by the Master continue to have whatever force they originally had, even if one takes into account what is said in the three new witness statements. Further, the witness statements do not change in any substantial way the arguments as to the alleged variations on 11 March 2009 and 15 September 2009. The difficulties in the Claimants' way arise as a result of what the Master regarded as the inherent improbability of the case that a contract was made on 5 February 2009, particularly when he considered how matters were expressed in the contemporaneous documents.*"

His Lordship added (in para. 76) that "*The Claimants have had their day in court*" and that "*There should be finality on the question of jurisdiction.*"

Discussion

The contractual claim

68. The first consideration necessarily has to be whether there is no real prospect of the Plaintiffs succeeding on their claim that there was a binding contract formed on 5 February 2009, albeit one subject to a condition subsequent that formal trustee approval would be given. Although I have the benefit of what the English judiciary have concluded, I have approached this issue afresh in the light of the material placed before me and having in mind the principles applicable to a summary judgment application.

69. Although the Advocates accepted that it is theoretically possible for the trustee of one trust to agree something binding with itself and another as the trustees of another trust (and the Loan Agreement of 21 May 2009 is an example of this), the proposition in this claim is that Mr Clifford committed the parties to a binding agreement to sell the shares in Iver. None of the evidence adduced thus far suggests that Mr Clifford made such an open acknowledgement in their hearing that what was discussed on 5 February 2009 would come to pass. To that extent, when Mr Smalley and Robert Tchenguiz refer to what they understood to be the position, they must be imputing a state of affairs on Mr Clifford where his evidence, which has not been tested through cross-examination, says something quite different.

70. I would frequently take the view that a claim based on an oral contract is the type of claim where oral evidence would be regarded as helpful to resolve any disputes about whether the agreement was formed and, if so, its content. The parties themselves would be advancing different versions of what was said in order to identify whether there was a meeting of minds with the other requirements for forming a contract being satisfied. In the present case, however, it is not being suggested that one person voiced an offer of terms to another and that other person indicated their preparedness to be bound on those terms. Instead, it seems to be the Plaintiffs' case that Mr Clifford acted in such a way as to show that the trustees of the Tchenguiz Settlement and the TDT would, subject only to formal approval being forthcoming, give effect to the transaction that had been agreed. In Advocate Roland's submission, this is highly improbable, especially in the light of Mr Clifford's evidence. It seems she has chosen to draw on the description given by Master Marsh and Morgan J as to the inherent improbability of these events leading to a binding contract. Of course, the test for summary judgment is not one of probability but involves considering the absence of reality. An improbable case may still need to be allowed to proceed to a trial even if the judge considers it is more likely than not to fail.

71. In my view, in determining the reality of what occurred, it is permissible to have regard to the events before the meetings on 5 February 2009 and to what happened shortly thereafter. It is common ground that Robert Tchenguiz was concerned about the potential threat to his family's ongoing occupation of their home at the Royal College of Organists. It is also common ground that the Kaupthing Debt needed to be settled. There may have been tactics that could have been deployed to defer the day when enforcement action might be capable of being taken against the assets *inter alia* of the TDT, but there were the dual concerns in early 2009 of having sufficient cash to settle the Kaupthing Debt and also to protect the Royal College of Organists from any possible enforcement action by any creditor looking to the assets of the TDT for that purpose. On behalf of the trustees, Mr Clifford was looking for possible solutions. He sought advice from Macfarlanes. When that advice arrived, he shared it with the investment adviser to the TDT, R20, which had the added benefit of engaging Robert Tchenguiz, and also with Victor Tchenguiz. What was envisaged was ensuring that everyone involved was comfortable with the solution that had been found.

72. I think that the reality of what was taking place also needs to take into account the way the trusts had been operated by the Defendants and the extent to which those present at the meetings on 5 February 2009 understood how the trusts had been and were being operated. In

itself, this is not determinative, but is another factor to take into account. In that regard, it has not been suggested that Mr Clifford held himself out as having any different level of authority on behalf of either or both of the trustees from before. It follows that the suggestion from Mr Smalley and Robert Tchenguiz that Mr Clifford could commit the respective trustees to a binding contract, subject only to formal trustee approval being given, which they thought would be a formality, runs contrary to how they understood the trustees to operate. They have not explained why the process was said to be different on this occasion. I am not persuaded that cross-examination of Mr Clifford is required on this and the other issues that arise about whether there was a binding agreement on 5 February 2009.

73. There is an overlap here with the way the Plaintiffs refer to there being a condition subsequent. In *Chitty on Contracts*, 32nd ed., para. 13-030 with conditions subsequent are dealt with as follows:

> "*The obligation of one or both parties may be made subject to a condition that it is to be immediately binding, but if certain facts are ascertained to exist or upon the occurrence or non-occurrence of some further event, then either the contract is to cease to bind or one or both parties are to have the right to avoid the contract or bring it to an end. In such a case the contract is said to be subject to a condition subsequent. An example is provided by the case of Head v Tattersall where A bought a horse from B which B warranted to have been hunted with the Bicester hounds. If it did not answer its description, A was to have the right to return it by a certain day. The horse did not answer its description and A accordingly returned it before the day. In the meantime, however, the horse had been injured without A's fault. It was held that the injury did not cause A to lose the right to return the horse and he could recover the purchase price paid.*"

Advocate Roland points out that para. 24 of the Cause pleads the immediately binding oral agreement as at the conclusion of the meeting, "*which was subject only to the condition subsequent of the Trustees of the TS and the TDT approving the agreement in Guernsey*" and suggests that this involves legal tautology because the parties to the agreement had either already concluded a binding agreement between themselves or they had not. There is no possibility of them agreeing something subject to them then deciding not to agree to be bound. The example given in *Chitty* is of quite a different type where the contract had been performed but could be unwound.

74. Advocate Richardson accepts (at para. 52 of his Skeleton Argument) that Mr Clifford's assertion that he did not make any agreement in England on 5 February 2009 which bound the trustees may be technically correct in the sense that the trustees could have decided not to proceed. However, he contends that on the evidence no such decision was likely to be taken or was taken. The problem, though, is that the Plaintiffs' case is put on the basis of trustees approving the agreement, which I regard as referring to the occurrence of something, rather than the non-occurrence of something. In those circumstances, the way the case is put supports there being an agreement in principle that was not binding at the time, but rather indicative of there being comfort that a viable solution to the concerns that needed to be resolved having been found but where further work needed to be done before it could be said to crystallise into an agreement that was capable of being enforced. If, contrary to that view, it was the non-occurrence of formal trustee approval, I accept Advocate Roland's submission because this means that the parties had agreed to be bound unless they did not so agree, which is circular.

75. I have considered whether there is something further that can reasonably be expected to be available at trial that has not been placed before me on this Application that could lead to a conclusion that there was a binding agreement as at 5 February 2009. I am conscious that the other proceedings in which the parties have been involved have generated a lot of documents. Accordingly, I proceed on the basis that a disclosure exercise in this case is not reasonably

expected to produce any new document that sheds a different complexion on the events in February 2009. This in turn means that the evidence that can be given of what took place on 5 February 2009 is confined to the gentlemen present. The only person from whom no evidence has been adduced directly in support of or opposition to the Application is Victor Tchenguiz. The witness statement that was before Morgan J from him dated 18 September 2012 has been exhibited to the First Affidavit of Mr Davis. It is brief. Victor Tchenguiz must now be in his 90s and the prospect of him being subjected to cross-examination that reveals anything above what he has written is, I think, unrealistic. Similarly, the versions of events given by Mr Clifford, Mr Smalley and Robert Tchenguiz in their evidence are unlikely to change. In particular, I very much doubt that Mr Clifford can reasonably be expected to agree that he had committed the respective trustees to a binding contract on 5 February 2009.

76. Advocate Roland has referred to *Whitehead Mann Ltd v Cheverny Consulting Ltd* [2006] EWCA Civ 1303 as being supportive of a conclusion that there was no binding contract. At para. 42, the Court of Appeal of England and Wales explained that:

> "*... it is possible to make a contract orally. But the more complicated the subject matter the more likely the parties are to want to enshrine their contract in some written document to be prepared by their solicitors. This enables them to review all the terms before being committed to any of them. The commonest way of achieving this ability is to stipulate that the negotiations are 'subject to contract'. In such a case there is no binding contract until the formal written contract has been duly executed, see The Chinnock v Marchioness of Ely 4 De GJ&S 638. But it is not essential that there should have been an express stipulation that the negotiations are to be 'subject to contract'. As Jessel MR pointed out in relation to negotiations conducted through correspondence in Winn v Bull (1877-78) LR 7 Ch.29, 32:*
>
> > *"When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail."*"

There were some unknowns at the time of the meetings on 5 February 2009. Having taken advice from Macfarlanes, had it been envisaged that Mr Clifford would commit the trustees in a binding fashion, it seems likely that he would have wished someone from Macfarlanes to be in attendance to cover anything that might crop up and it is likely that others present may have wished to have their own lawyers in attendance to a similar end. What took place was not expressed to be subject to contract nor was it a negotiation carried out through correspondence, but there is an overall sense in what is said to have been covered that it was a step towards there being an agreement in due course rather than it being anything else at that stage.

77. Looked at in this fashion, I am satisfied that the Plaintiffs have no real prospect of succeeding in establishing the existence of a binding oral contract involving the Defendants as they allege to have occurred. Mr Clifford's evidence provides the foundation for that conclusion. It is unrealistic to consider him taking upon himself to bind the trustees in the manner the Plaintiffs now suggest. Further, the contemporaneous documentation, in my view, does not support the contention that a binding agreement was in place. For example, the price at which the shares in Iver were to be purchased needed to be worked out and it is apparent that there was insufficient information available on 5 February 2009 for there to be adequate certainty on that aspect to enable the alleged agreement to be capable of being enforced. In particular, in his e-mail to Mr Smalley on 6 February 2009, Mr Clifford referred to there being an agreement in principle, subject to consideration by the trustees, which I consider accurately reflects the state at that time. This means that the primary case of the Plaintiffs has no real prospect of success and they must rely instead on the alternative case based on what happened

in March 2009 if the action is to proceed (subject to consideration of the second limb of the test for summary judgment).

78. Having concluded that there is no real prospect of the Plaintiffs succeeding in proving the so-called Conditional Agreement, there was no contract capable of being varied. The alternative way in which the Plaintiffs' case is put is at para. 41 of the Cause, relying on the terms that had been agreed in principle and then varied on 11 March 2009 becoming a legally binding agreement when the payment of £6 million cash was made by the trustee of the Tchenguiz Settlement to the trustees of the TDT. This part of the Plaintiffs' pleaded case is different from the way it was put in the English proceedings so there is nothing in the judgments of Master Marsh or Morgan J that can be regarded as being of direct assistance anyway.

79. It is in relation to this aspect of the case that the contractual estoppel advanced by Advocate Roland seems to be most relevant. It is suggested that the Loan Agreement of 21 May 2009 is a key document because it precludes the First Plaintiff from arguing now that a contract for the sale of the shares in Iver should be inferred from the fact of the payment of the £6 million because this agreement shows it was just a loan made by the trustee of the Tchenguiz Settlement (in which capacity the First Plaintiff brings these proceedings). Advocate Roland relies on the way this was put in *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221 by Aikens LJ:

> "*143. Before I examine Lowe v Lombank and subsequent cases on this issue, I will try and analyse the matter from principle. If A and B enter into a contract then, unless there is some principle of law or statute to the contrary, they are entitled to agree what they like. Unless Lowe v Lombank is authority to the contrary, there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the contract is concluded or has been so in the past, even if that is not the case, so that the contract is made upon the basis that the present or past facts are as stated and agreed by the parties. It is, after all, common in marine insurance contracts for an assured to 'warrant' that a certain state of affairs has existed in the past or is still existing at the time the insurance contract is concluded or will continue, e.g. that the nationality of a ship was and is British; or that a ship was and is 'in Class' with her Classification Society. The shipowner may know that those things are not the case; the insurer may have his suspicions that they are not the case. The parties agree that for the purposes of the insurance contract, the facts as 'warranted' by the assured are as he has stated them to be. A 'conclusive evidence' clause in a sale contract, viz. that a report on e.g. the amount or condition of a commodity sold under a contract between A and B shall be 'conclusive evidence' of the matters stated in the report is to the same effect. The parties are agreeing that the statements in the report shall be the case for the purposes of the contract of sale and the parties cannot go behind that agreement.*
>
> *144. So, in principle and always depending on the precise construction of the contractual wording, I would say that A and B can agree that A has made no pre-contract representations to B about the quality or nature of a financial instrument that A is selling to B. Should it make any difference that both A and B know at and before making the contract, that A did, in fact, make representations, so that the statement that A had not is contrary to what each side knows is the case? Apart from the remarks of Diplock J in Lowe v Lombank, Mr Brindle did not show us any case that might support the proposition that parties cannot agree that X is the case even if both know that is not so. I am unaware of any legal principle to that effect. The only exception might be if the particular agreement between A and B on the certain state of affairs concerned contradicts some other specific or more general rule of English public policy. [Footnote 161 here states: "For instance, if A and B agree for the purposes of an insurance and re-insurance that A has never been in jail, yet both know he has, it may be that enforcing that agreement might contravene English law*

notions of public policy."] Like Moore-Bick LJ in Peekay I see commercial utility in such clauses being enforceable, so that parties know precisely the basis on which they are entering into their contractual relationship."

80. With respect to her, the two paragraphs Advocate Roland has cited do not contain any proposition of law that could be applied to the present case. The paragraphs following contain the analysis of Aikens LJ of other cases dealing with contractual estoppel, including *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] 1 CLC 582, which His Lordship regarded as being good law (para. 169), having previously quoted para. 57 of the judgment of Moore-Bick LJ:

> "*It is common to include in certain kinds of contracts an express acknowledgment by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in Colchester Borough Council v Smith. However, that particular question does not arise in this case. A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established: see EA Grimstead & Son Ltd v McGarrigan (CA) (unreported, 27 October 1999) …*"

However, even allowing for this explanation of the principle, I do not think it applies in the present case.

81. Recital C of the written Loan Agreement executed on 21 May 2009 (on which date the trustees also met and executed their respective resolutions) records that the trustee of the Tchenguiz Settlement (as Lender) advanced to the trustees of the TDT (as Borrowers) £6 million on 26 March 2009. Recital D then states: "*The Lender and the Borrowers have agreed to document their loan arrangements and wish to confirm the terms on which the Loan has been made.*" The absence of any reference to this transaction forming part of a wider transaction involving the sale and purchase of the shares in Iver is not, in my opinion, conclusive that this loan was entirely separate from that. It would involve considering the loan arrangement out of its context to reach that conclusion. I do not think that a document nearly two months after the payment was made can have that effect and prevent the Plaintiffs arguing that the loan was an integral part of the transaction of which the Iver shares formed a part.

82. As I have already pointed out, the genesis of the alleged agreement in respect of the shares in Iver was to find a solution to the problems that also involved settling the Kaupthing Debt. The Plaintiffs appear to recognise that whatever agreement they rely upon, it was necessary for there to be a series of formal documents prepared to reflect the component parts of the transaction. Although a loan arrangement between the trustee of the Tchenguiz Settlement and the trustees of the TDT might have been put in place without reference to Mr Smalley and others and he would have been alarmed had he known, it can potentially be viewed as part of the jigsaw under this alternative basis on which the Plaintiffs say a binding agreement arose. Because there is nothing on the face of the written Loan Agreement that states that it is part of a wider transaction or that it is an entirely isolated agreement, I do not accept the submission from Advocate Roland that it constitutes a contractual estoppel that now prohibits the Plaintiffs from arguing that it could be viewed as part of the overall transaction relating to the sale and purchase of the shares in Iver. In time, this might be established, but I take the view

that it is premature at this stage of the proceedings to reach such a conclusion on untested evidence.

83. I have also borne in mind the guidance offered by the Supreme Court in *Arnold v Britton* [2015] AC 1619 about the interpretation of contractual provisions, especially the first factor identified by Lord Neuberger (at para. 17):

> "*... the reliance placed in some cases on commercial common sense and surrounding circumstances (e g in Chartbrook [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of a provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.*"

I accept that the Loan Agreement records an earlier agreement to advance £6 million. As I have said, I accept that there is nothing explicit linking this to the sale of the shares in Iver. It might be that the Loan Agreement is accepted to be distinct from what is called the Iver shares transaction but, on the material placed before me, I do not think that this is the only possible outcome. The amount borrowed had risen from the bare figure to cover the Kaupthing Debt. It follows that the parties to the Loan Agreement had in mind something more than just that element of what had been under discussion. This might be explained in the evidence, but it has not been explained in the evidence before me on this Application. The issue is not, in my view, just about construing the document's terms but goes more widely than that on the basis of the cases the parties have pleaded.

84. Advocate Roland further refers to the principles in English law about the need for caution where it is alleged that an agreement has been formed by, or varied through, conduct or through implication. In relation to the former, she has highlighted what Bingham LJ stated in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195 (at page 1202F):

> "*I readily accept that contracts are not to be lightly imputed. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for. It must also, in most cases, be able to answer the question posed by Mustill L.J. in Hispanica de Petroleos S.A. v. Vencedora Oceanica Navegacion S.A. (Np. 2) (Note) [1987] 2 Lloyd's Rep. 321, 331: "What was the mechanism for offer and acceptance?"*"

In relation to the latter, she has drawn attention to what Bingham LJ had said in *The Aramis* [1989] 1 Ll Rep 213 (at page 224):

> "*... it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.*"

This passage was cited by Waller LJ in *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189, where it was also confirmed that "*no contract will be implied unless it is necessary to do so (Baird Textile Holdings v Marks and Spencer [2001] EWCA Civ 274*".

85. There is, in my view, a difference, however, between reaching such a conclusion at the end of a trial and being invited to do so on the material placed before me on this Application. This arises, at least in part, because of the burden that the Defendants have to persuade me that there is no real prospect of success of the Plaintiffs' claim. The evidence of Mr Gonzalez (at para. 16 of his Affidavit) refers to the determination in the High Court that there was no binding agreement in February 2009, so nothing to be varied. I agree, but Mr Gonzalez has not, in my view, addressed the alternative way in which the Plaintiffs have put their case, which is that the earlier agreement in principle became binding when the cash payment of £6 million was made. Further, Mr Clifford's evidence does not deal with this matter because the case in the English proceedings was not put this way. Mr Clifford's witness statement, which he has confirmed for the purposes of this Application, deals only (in para. 33) with whether or not he made a binding agreement on behalf of the Tchenguiz Settlement or the TDT. Consequently, no one on behalf of the Defendants has attempted to give any evidence about the making of the payment from the First Defendant to the two Defendants on 26 March 2009.

86. In those circumstances, I am not satisfied that the Defendants have discharged the burden on them to dispel the possibility that the payment made was an integral part of an agreed transaction. In that regard, I note the content of the e-mail traffic at the time. In particular, on 16 March 2016, Macfarlanes were working on a basis that linked the lending from the Tchenguiz Settlement to the sale and purchase of the shares in Iver. Mr Clifford has not dealt with this in his evidence before this Court, when he could potentially have done so. This is an area, therefore, where I find I cannot be satisfied that there is no real prospect of success, even though I may have some hesitation as to whether the way this strand of the Plaintiffs' case has been advanced has any great prospect of succeeding, whether as the result of the caution that has to exercised when a contract on this basis is asserted or for some other reason. It is almost as if the Defendants had concentrated so much on the strike out aspect of the Application when it was originally prepared, which has not then been pursued, that the subtle difference of the way the Plaintiffs have now pleaded their case from the way it was pleaded in the High Court has been missed in relation to the application for summary judgment.

87. The consequence is that the Plaintiffs' contractual claim has not been shown by the Defendants to have no real prospect of succeeding because there is this pathway open to the Plaintiffs to argue that a binding agreement came into existence in March 2009. If that is so, it is also possible that the agreement was then amended in September 2009, although I suspect that the Plaintiffs will face considerable difficulty in establishing that the persons who they say negotiated and then agreed the changes set out in para. 55 of the Cause could do this. On the basis that the evidence adduced by the Defendants does not deal with the September 2009 variation alleged by the Plaintiffs because their Application has largely been predicated on there being no binding oral agreement as at 5 February 2009, I am similarly not able to conclude that there is no real prospect of the Plaintiffs' claim succeeding and the Application cannot be granted in respect of the entirety of the Cause. I reach this conclusion on the assumption that there was in existence by that time a binding agreement that it was theoretically possible to vary. Accordingly, although I share the concerns that have been rehearsed by Advocate Roland as to whether what took place in September 2009 had any binding effect, on the basis that there was otherwise a different binding agreement capable of being enforced as between the parties (or some of them), what took place could be viewed in a different light. In other words, I believe that there is more than a fanciful prospect of the variation argument succeeding because of the desire of the parties to conclude the transaction on slightly different terms.

88. It is, therefore, on this narrow basis, relating primarily to the Defendants' evidence in support of this Application omitting to address the way in which the present action is pleaded

differently to the English proceedings, that the Application cannot be granted in respect of the entire contractual claim. The case must, in my judgment, be permitted to proceed because the Defendants have not satisfied the first limb of the test in rule 19 of the 2007 Rules.

Proprietary estoppel

89. The Plaintiffs' claim based on proprietary estoppel falls to be considered distinctly. Paragraph 67 of the Cause refers to the conversations between Mr Clifford and Robert Tchenguiz leading up to and at the meeting on 5 February 2009 amounting to a representation and/or promise to do something. Paragraph 68 refers to the trustee of the Tchenguiz Settlement relying on that representation or promise to its detriment by making the cash payment in the belief that the shares in Iver would be transferred from the TDT to a new trust. Paragraph 69 adds that the trustee of the Tchenguiz Settlement and of the NS One Trust (ie, the First Plaintiff) acted to their detriment by establishing the NS One Trust and the Second Plaintiff.

90. The Defendants submit that this allegation faces the same inherent improbability argument as the contractual claim founded on the events of 5 February 2009. The notion that one individual can make a representation or promise to himself inducing something to happen suffers from conceptual difficulties. It is an unreal proposition. This is because corporations act through humans and there needs to be more than one person involved. In response, the Plaintiffs argue that these are matters that can only properly be determined after disclosure and oral evidence. In particular, there needs to be a fuller enquiry than there can be on a summary judgment application of the reasons why the Cash Payment was made, because that is the act, or at least one of the acts, to the First Plaintiff's detriment in reliance on what had been represented by Mr Clifford.

91. I gratefully adopt the principles set out in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 as offering guidance in the present case. As Lord Scott of Foscote explained in his speech (at para. 14):

> "*An "estoppel" bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel. The estoppel becomes a "proprietary" estoppel – a sub-species of a "promissory" estoppel – if the right claimed is a proprietary right, usually a right to or over land but, in principle, equally available in relation to chattels or choses in action.*"

At para. 28, His Lordship stated that:

> "*Proprietary estoppel requires, in my opinion, clarity as to what it is that the object of the estoppel is to be estopped from denying, or asserting, and clarity as to the interest in the property in question that that denial, or assertion, would otherwise defeat. If these requirements are not recognised, proprietary estoppel will lose contact with its roots and risk becoming unprincipled and therefore unpredictable, if it has not already become so.*"

Lord Walker of Gestingthorpe (at para. 81) added "*that conscious reliance on honour alone will not give rise to an estoppel*" and cautioned "*that the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel. That applies to commercial negotiations whether or not they are expressly stated to be subject to contract.*"

92. The summary offered in *Snell's Equity*, 33rd ed., at para. 12-038, is for the Court to look at the matter in the round but to do so through considering the three main elements: "*a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance*" (taken from *Gillett v*

Holt [2001] Ch 210). I have borne the principles outlined in *Snell's Equity* in mind as guidance on how to proceed as a matter of Guernsey law.

93. My approach to the question of whether or not there is a real prospect of succeeding on this element of the Plaintiffs' Cause is coloured by what I am about to turn to on the question of prescription. However, if I concentrate solely on the facts that have been given in the evidence before me, I agree with the principal contention on behalf of the Defendants that there is an inherent improbability in one individual making any representation or promise to himself, especially when the person concerned (Mr Clifford) suggests that this did not happen. Adapting what Master Marsh said (in para. 21 of his judgment, to which I have already referred), the only way this could have arisen is by Mr Clifford internally raising the idea (on behalf of the trustees of the TDT) and persuading himself in another capacity that this was something the other trustee (of the Tchenguiz Settlement) was entitled to rely on. The Plaintiffs' pleading refers to there being a representation or promise; this is not a case of acquiescence or standing-by. Although the test for summary judgment focuses on reality and not probability, my starting point is that there is a sense of unreality involved in this premise. If there was nothing that could be regarded as a promise or representation on which reliance can be placed, the ability to claim that a person is then estopped from denying or asserting something is lost.

94. There is also the discrete issue of whether the Second Plaintiff, which did not exist at the time of the representation and /or promise pleaded, can rely on the alleged estoppel. It cannot do so directly, but could only purport to raise an estoppel already available to someone else. I struggle to understand how the doctrine, however flexible it might be, extends to cover such a situation in the circumstances of this case. In short, I doubt that the relief claimed in the Cause pursuant to the alleged equitable estoppel is available to both Plaintiffs and suspect that the constructive trust alleged in para. 71 of the Cause in favour of the First Plaintiff is the highest at which this claim can be put and that this means that the Second Plaintiff has no independent claim in this regard. How the First and Second Plaintiffs organise matters between themselves is a question outside these proceedings.

95. In summary, therefore, I am inclined to the view that there is no real prospect of the Plaintiffs' claim based on proprietary estoppel succeeding because it looks to be more dependent on what happened up to and at the meeting on 5 February 2009, which I have concluded does not support a possible finding that there was a binding oral contract. In similar fashion, I am not persuaded that there was any representation or promise that can form the basis of a claim for proprietary estoppel in respect of the shares in Iver. My only hesitation relates to the way in which this element of the claim is put, relying on the making of the Cash Payment. This arguably shifts the attention away from what happened up to February 2009 to what took place in March 2009. Accordingly, although this would involve amending the Cause, there is a consistent line of argument that would result in the representation or promise continuing up to the moment where the Cash Payment is made that would cross over into the way I have analysed the alleged legally binding agreement by March 2009. On the basis that I have found that there is more than a fanciful prospect of the Plaintiffs' alternative argument succeeding, disregarding for these purposes the likelihood of that outcome being achieved, I think there is a potential linking of a claim for proprietary estoppel to be made by the First Plaintiff on the basis of those ongoing discussions. In other words, because the alternative basis for the contractual claim is to be permitted to continue, there is a degree of logic in the alternative claim based on proprietary estoppel also being permitted to continue. However, having regard to the way in which the Cause is currently pleaded and considering the parties' evidence in support of, and in opposition to, the Application, I am persuaded that the test in rule 19(2)(a) of the 2007 Rules has been met, in principle permitting summary judgment to be entered in favour of the Defendants.

Prescription

96. Paragraph 3 of Les Defences alleges that "*any cause of action relating to the alleged agreement entered into by the Defendants in excess of six years prior to the commencement of the Plaintiffs' claim (by Summons dated 25 August 2015) is prescribed by operation of Article 1 of the Loi relative aux Prescriptions 1889 and should be struck out*". This was not raised by the Defendants in their original Skeleton Argument in support of the Application, but was raised in their reply. As a result, the Plaintiffs responded in a Supplemental Skeleton Argument.

97. The Defendants refer to passages in the Cause that suggest the Plaintiffs are relying on alleged breaches of the binding agreement made no later than March 2009 in July 2009. Paragraph 53 states:

> "*However from about the end of July 2009, it became clear that the Defendants did not intend to comply with their obligations under the Agreement despite the fact that the TDT had had the benefit of the Cash Payment from the TS.*"

The Defendants also refer to the way in which the pleading in the English High Court proceedings referred to this occurring in late June or early July 2009. As a result, the Defendants allege that the Plaintiffs are complaining about breaches that took place more than six years before the present action was commenced.

98. The difficulty with that submission is that the primary relief sought by the Cause is for an order for specific performance of the Amended Agreement, which only crystallised in that form as at 15 September 2009 (see para. 56 of the Cause). It necessarily follows that any alleged non-performance of that contract must post-date the agreement being in that form, which means that it took place within six years of the commencement of these proceedings. I do not consider that I need to elaborate further on the Defendants' prescription point in relation to the contractual claim. On the present Application, in my judgment, prescription does not provide the Defendants with an argument entitling them to have summary judgment for the claim entered in their favour.

99. The position in relation to the proprietary estoppel point, however, is potentially different. The highest the Plaintiffs have put their case is that the estoppel arose on the making of the Cash Payment because that was a step taken in reliance on the representation and/or promise made in February 2009. The Cash Payment was made in March 2009 and the terms of it were recorded in May 2009. Whether it is the earlier of those dates, as I think it ought to be, or the later of those dates from which to calculate the running of time, both are more than six years before these proceedings commenced. If the action were found to fall within the description "*Toutes demandes mobilières at actions personnelles*", it would mean that article 1 of the 1889 Law creates a period of prescription of six years. However, the effect of section 76 of the Trusts (Guernsey) Law, 2007 confirms that there is no period of limitation or prescription involved in the Plaintiffs seeking to recover from the Defendants the shares in Iver as trust property. Even if there were an issue about prescription and the proprietary estoppel point, I would conclude that this is the type of novel question where it is preferable to determine it on actual findings of fact rather than on the incomplete picture presented by the evidence adduced on this Application.

Other compelling reason for trial

100. The second limb of the test for summary judgment in rule 19 of the 2007 Rules seldom gets the same level of analysis as the first limb. I have asked myself whether, in the light of the findings I have made about whether the Plaintiffs have no real prospect of succeeding on certain issues, I should nevertheless permit the Cause as a whole to proceed. In part, this flows from recognising that the action is not being brought to an end by this Application.

101. One aspect of these proceedings that raises an interesting question of law is the extent to which, if at all, Guernsey law will recognise the remedy of specific performance. The two opinions on this issue that were given in the English proceedings have been included in the material placed before me. There is a sense of irony in the fact that the opinion of Advocate Richardson dated 8 May 2015, given on behalf of the Claimants in the English proceedings, states that "*it is generally known and accepted by practitioners in Guernsey and their firms that specific performance is likely to be unavailable in Guernsey*" and that the opinion of Advocate Dawes dated 1 April 2015, given on behalf of the Defendants, states that he believes "*that specific performance is available as a remedy in a Guernsey contract case … and subject to similar limitations on the remedy as under English law*". If nothing else, this material shows that there is a divergence of opinion at the Bar as to whether the remedy exists and, if so, its ambit.

102. On that basis, there is a respectable argument that the entirety of the Plaintiffs' contractual claim should be permitted to proceed. However, I have concluded that it would be wrong to permit the aspects of the Plaintiffs' claims that rely on an alleged oral agreement concluded in February 2009 to proceed as if it were that agreement that is capable of being varied subsequently and relied upon as the Amended Agreement. I take the view that the starting point has to be the relief sought and the agreement in respect of which specific performance is being sought which is the claim. As I have already indicated, the only route to that agreement available to the Plaintiffs is to rely on an earlier agreement in March 2009 being varied. It would re-introduce into the action an unnecessary element if there were not to be some requirement imposed on the Plaintiffs to refine their case so as to rely only on the claim I consider can be pursued. In any event, the issues relating to whether or not specific performance exists as a remedy remain the same, as does the factual history to reach that point; all that would be disappearing would be the assertion in para. 24 of the Cause of there being an immediately binding oral contract (the "Conditional Agreement"), in respect of which no remedy is sought anyway (and, if it were, it might be seriously at risk of being prescribed).

103. The position in relation to the proprietary estoppel claim, though, is where I consider that erring on the side of caution is appropriate. These paragraphs of the Cause, as currently pleaded, make a claim that is, in my view, one in respect of which there is no real prospect of succeeding. However, because the material facts already referred to in the Cause when read as a whole could potentially be relied upon to raise the estoppel in a way that mirrors the contractual claim, so that the alternative remedy is put as being available if it were eventually found that there was no binding agreement in respect of which specific performance could be awarded, or that the remedy itself is unavailable, it does not strike me as sensible to enter summary judgment against the Plaintiffs on this part of the Cause. To do so could lead to the Plaintiffs seeking leave to amend the Cause if this is an alternative that they still wish to pursue. In those circumstances, rather than leave the parties to spend yet more time and money on that type of interlocutory skirmish, I have reached the conclusion that it is more appropriate for me to treat this as a compelling reason to allow the part of the claim that I have found could lead to summary judgment being available to continue, but subject to the attachment of conditions, as permitted by rule 22 of the 2007 Rules. This aspect of the action is one where all the different angles to be argued seem to me best to be argued in the light of actual findings of fact rather than being determined summarily at this stage.

Conclusion

104. For the reasons I have given, the Application only succeeds in part, with the consequence that the Plaintiffs' action is able to proceed. I have had to pick my way carefully through the approach that was taken in the English proceedings, where there may have been some superficial attraction to treating the two claims as substantively indistinguishable and adopting all the reasoning contained in the judgments of Master Marsh and Morgan J. However, on closer analysis, I have been persuaded by Advocate Richardson that there is a meaningful

difference between the way the case had been put and how it is now pleaded. I also appreciate that the tests that were being applied in the High Court are not identical to the test that I have to apply on an application for summary judgment. These differences explain why the outcome is not identical.

105. In reaching my conclusions, I have paid particular regard to the differences of opinion that exist as to whether specific performance exists as a remedy in Guernsey law. I wish to make it abundantly clear that this remains an open question and that is one of the reasons why I consider that, if nothing else, the Application has shown that the case for the Plaintiffs needs to be as focused as it possibly can be so as to concentrate everyone's minds on what is being alleged and the consequences that flow therefrom. Because I have made a finding that the assertion in para. 24 of the Cause of an immediately binding oral agreement between the trustees of the TDT and the trustee of the Tchenguiz Settlement has no real prospect of success, I take the view that it follows that the Cause should be amended. I can make a similar comment in relation to the paragraphs of the Cause in which the proprietary estoppel point is raised because, if the way the case is put is not amended, I am satisfied that the Court will, if required to reach a decision on this alternative relief as it is pleaded, reject it on the basis that Mr Clifford could not make a representation to himself.

106. By reference to rule 22 of the 2007 Rules, because none of the relief sought by the Plaintiffs is being brought to end, I think it follows that the Application is being dismissed, but it is being dismissed on terms rather than unconditionally. (An alternative approach would be to treat the various issues raised in the Cause as separate, in which case there would be judgment against the Plaintiffs on the claim based on an immediately binding oral agreement, as pleaded at para. 24 but, as I have indicated, this is a step towards the final agreement on which the relief claimed is sought rather than an end in itself.) I consider it just, therefore, to make it a condition of the action proceeding in the manner I have set out that the Plaintiffs shall amend their Cause in such a way as to rely on the alleged variation in September 2009 of the agreement concluded as set out in para. 41 and, assuming that the Plaintiffs do not wish to abandon the alternative relief of a declaration that the shares in Iver are held on trust pursuant to the estoppel pleaded in paragraphs 67 to 71, the Plaintiffs also need to re-cast that aspect of their claim as well. I invite the Advocates to attempt to agree a form of wording to be included in the Act of Court to reflect that order. If the amendments to the Cause can be agreed, including as to the costs implications, which in principle I think should be the usual arrangement of the Plaintiffs paying the Defendants' costs occasioned by such amendments, and the time by which any amendments to the Defences shall be filed and served, this can be achieved without reference to the Court. Once the pleadings have been finalised in this way, a case management conference can be sought.

107. I will reserve the costs of the Application. It is likely that the costs will be ordered to follow the event but I do recognise that the Plaintiffs have not been 100% successful, so there is scope for the parties to agree how the outcome should be reflected, if at all, in a discount from the recoverable costs that would otherwise be ordered. If there is no agreement and either party wants the matter resolved sooner rather than later, the case can be listed before a suitable Interlocutory Court.