Neutral Citation Number: [2018] EWHC 58 (Comm)

Case No: CL-2016-000282

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11th January 2018

Before:

Mr Lionel Persey QC sitting as a Judge of the High Court

- -

Between:

Apollo Ventures Co., Ltd	**Claimant**
- and -	
(1) Surinder Singh Manchanda	
(2) Gurmukh Singh Manchanda	
(3) Gurbaksh Singh Manchanda	
~~**(4) Gurdev Kaur Manchanda**~~	
(5) Gursev Singh Manchanda	
(6) Simrat Kaur Manchanda	
(7) 4G Properties Limited	
(8) HKM Investments Limited	**Defendants**

- -

James Howells QC (instructed by **Watson Farley & Williams LLP**) for the **Claimant**
Jeremy Bamford (instructed by **Rubric Lois King Solicitors Ltd**) for the **First Defendant**
James Ramsden QC and Saima Hanif (instructed by **Squire Patton Boggs (UK) LLP**) for the **2nd to 8th Defendants**

Hearing date: 1 December 2017

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Approved Judgment

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

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MR LIONEL PERSEY QC

Mr Lionel Persey QC:

Introduction

1. On 13 December 2016 seven judgments in default of defence were entered against each of the First to Third and Fifth to Eighth Defendants in the sums of Thai Baht ("**THB**") 237,810,080 (equivalent to about £5,465,000) and £10,000. The Second to Eighth Defendants applied to set aside the judgments against them on 15 December 2016 and the First Defendant issued his application to set aside the judgment against him on 16 December 2016.

2. These applications to set aside were originally listed to be heard on 8 May 2017. The parties subsequently agreed to a consent order on 25 April 2017 to permit without prejudice discussions to take place. Those discussions were unsuccessful and the applications were therefore restored. The applications were promptly made by the Defendants.

Background

3. Much of the relevant background has already been conveniently summarised in the judgment of Mr Foxton QC (sitting as a judge of the High Court) dated 15 June 2016, and what follows is largely taken from his summary. The Claimant ("**Apollo**") is a Thai company incorporated under the laws of Thailand in 2003. The principal shareholders in Apollo are the First Defendant ("**Mr Surinder**") and his second wife, Mrs Rachpal Kaur Narula ("**Mrs Rachpal**"). The claim is concerned with allegations of fraud and misfeasance made by Apollo against Mr Surinder, together with various members of his family by his first wife Harmeet Kaur Dang and their spouses, and two companies that are alleged to have been set up to receive the proceeds of the fraud. The Defendants say that Apollo is now effectively the alter ego of Mrs Rachpal and her son by Mr Surinder, Suhel Manchanda ("**Mr Suhel**"). Mr Suhel has a one percent shareholding in Apollo, as does his sister, Gurdyal Manchanda ("**Ms Gurdyal**").

4. Apollo contends that Mr Surinder, who is domiciled in Thailand, entered into two loans ("**the Loans**") with a well-known Thai businessman, Mr Suchin Worawongsewasu ("**Mr Suchin**"), pursuant to which Apollo borrowed THB220 million and became liable to repay further amounts to a total of about £5.8 million, together with certain fees. Apollo alleges that Mr Surinder purported to enter into the Loans without the knowledge or involvement of the other officers or shareholders; that he forged documents in order to do so; that the greater part of the proceeds of the Loans were paid to or for the benefit of Mr Surinder, his family members and other entities controlled by them; and that some of the money was used to enable Mr Suchin to obtain the title deeds to certain properties.

5. The other Defendants are:-

   (1) The Second Defendant ("**Mr Gurmukh**"), who is the son of Mr Surinder by his first wife, and the Third Defendant ("**Mrs Gurbaksh**"), who is Mr Gurmukh's wife. Mr Gurmukh and Mrs Gurbaksh are domiciled in England.
   (2) The Fifth Defendant ("**Mr Gursev**"), another son of Mr Surinder by his first wife, and the Sixth Defendant ("**Mrs Simrat**"), who is Mr Gursev's wife. Mr Gursev and Mrs Simrat are domiciled in India. Mr Gursev was a director of Apollo.

(3) The Seventh Defendant, ("**4G Properties**"), and the Eighth Defendant, ("**HKM**"), are companies registered in England in Wales. It is common ground that HKM is, and has at all relevant times, been a dormant company.

The claims against the Defendants

6. The claims against the Defendants in these proceedings are advanced under two heads:-

(1) A claim of unlawful means conspiracy against the First to Third and Fifth and Sixth Defendants, these unlawful means being the breach of fiduciary and/or directorial duties, or an equivalent liability under section 423 of the Thai Civil and Criminal Code, Title V.
(2) Claims based on unconscionable receipt by the Defendants and/or an obligation to account for amounts received by the Defendants under Thai law and/or on the basis that the Defendants are constructive trustees of the amounts received by them.

7. The relief sought in the Particulars of Claim is for the Recovery of the Loan Money and its traceable substitutes, together with an account of profits, damages and interest.

Proceedings in Thailand

8. A number of criminal and civil proceedings arising out of or in respect of the Loans have been commenced in Thailand. There appear to be six actions in all.

(1) The Criminal Case of the Phatumwan Municipal Court (Black Case No. Aor.770/2555; Red Case No. Aor.220/2558) brought by Mrs Rachpal against Mr Surinder in respect of forgery. The case was dismissed at first instance, but was reversed on appeal, with Mr Surinder being sentenced to one year's imprisonment, and is now being appealed to the Supreme Court.
(2) The Criminal Case of the Dusit Municipal Court (Black Case No. Aor.2811/2577, Red Case No. Aor.220/2558) brought by Mrs Rachpal against Mr Surinder, Mr Gursev and two officials for causing a false statement to be made in a public document. The proceedings against Mr Gursev were dismissed both at first instance and on appeal. Mr Surinder was found liable at first instance and was sentenced to 6 months in prison. This decision is currently under appeal.
(3) The Criminal Case of the Southern Bangkok Criminal Court (Black Case No. Aor.2731/2558) between Apollo/Mrs Rachpal and Mr Surinder and Mr Gursev relating to various alleged offences under the Act B.E.2499. The proceedings against Mr Gursev were dismissed at first instance and on appeal. They are continuing against Mr Surinder.
(4) The Criminal Case of the Southern Bangkok Criminal Court (Black Case No. Aor.1106/2559) between Mrs Rachpal and Mr Surinder in which allegations of false accusation and false testimony are being made.
(5) The Civil Case of the Civil Court (Black Case No. Por.3180/2558, Red Case No. Por.2895/2559) between Apollo as plaintiff and Mr Surinder and Mr Suchin as defendants in a claim in respect of an invalid mortgage. This claim was dismissed both at first instance and on appeal. As at the date of the hearing before me Apollo was seeking an extension of time within which to appeal this decision to the Supreme Court.

(6) The Civil Case of the Southern Bangkok Civil Court (Black Case No. Por.677/2560) between Mr. Surinder and Ms Gurdyal as plaintiffs and Mrs Rachpal and Mr Suhel as defendants in which claims for debt recovery and other compensation have been raised. The evidence will be heard in May 2018.

I was told that Mr Surinder has not yet served any part of the prison sentences imposed upon him and that the judgments against him are not yet final. There are no outstanding court cases against Mr Gursev. The judgments in his favour are apparently final.

Procedural history up to the hearing before Mr Foxton QC

9. On 3 May 2016 Apollo issued an application for, and permission to serve a Worldwide Freezing Order ("**WFO**") out of the jurisdiction. HHJ Waksman QC (sitting as a judge of the High Court) made an *ex parte* WFO against all the Defendants on 9 May 2016 and gave Apollo permission to serve proceedings on Mr Surinder, Mr Gursev and Mrs Simrat outside the jurisdiction. The Claim Form was issued on 9 May 2016 and was served, together with the Particulars of Claim, on each of the Defendants.

10. On 9 June 2016 the matter came back before the Court on the return date and was heard by Mr Foxton QC. The Defendants, who were then all represented by Rubric Lois King Solicitors Ltd ("**RLK**") challenged the WFO and Mr Surinder, Mr Gursev and Mrs Simrat also applied to set aside the order giving permission to serve the proceedings on them out of the jurisdiction. The remaining Defendants reserved the right to seek a stay of the proceedings under CPR Part 11.

11. In his judgment of 16 June 2016 Mr Foxton QC:

(1) Dismissed the application to set aside the order granting Apollo permission to serve the proceedings outside the jurisdiction.
(2) Dismissed, with the exception of HKM, the Defendants' application to set aside the WFO.
(3) Granted HKM's application to set aside the WFO.

12. Mr Foxton QC concluded, on the basis of the evidence then before the Court, that:-

(1) There were serious issues to be tried against each of the Defendants, apart from HKM.
(2) There was no serious issue to be tried against HKM.
(3) The claims against each of the Defendants (with the exception of HKM) disclosed a seriously arguable case on the merits.

I will need to return to his judgment below, because Mr Foxton QC did make it clear that much of the evidence before him was disputed and could not be resolved outside a trial.

13. Also on 16 June 2016 the Defendants issued, but did not serve, a Part 11 Application Notice on behalf of the Second, Third, Seventh and Eight Defendants. It is common ground that Apollo only became aware of this application when it was served on 2 December 2016.

14. On 17 June 2016, having been informed that the parties were to enter into discussions, Mr Foxton QC ordered the parties to exchange lists of neutral individuals available to conduct

ADR prior to 6 July 2016 and to agree upon a neutral individual prior to 24 June 2016, failing which the Case Management Conference was to be restored. The proceedings were stayed by the Court until 8 July 2016.

Procedural history following the hearing before Mr Foxton QC

15. The parties subsequently agreed to continue the stay of proceedings until 14 July 2016. On 13 July 2016 the Defendants issued an application for permission to appeal the judgment of Mr Foxton QC.

16. The parties were unable to resolve their disputes and on 23 July 2016 RLK wrote to Apollo's solicitors, Watson Farley & Williams LLP ("**WFW**") in which:-

    (1) they sought confirmation of their understanding that the Defence was due to be filed by 4 August 2016;
    (2) they advised that the Defendants were finalising a Part 11 application which they anticipated would be served during the course of the following week; and
    (3) they asked WFW to obtain instructions to confirm that Apollo would not seek to obtain a default judgment after 4 August 2016 and the decision of the Court on the Part 11 application.

17. WFW replied on 26 July 2016 and agreed that the deadline for filing the Defence was 4 August 2016. They said that they would not resist any application to extend the deadline beyond the 28 days permitted under CPR 3.8(4).

18. On 27 July 2016 RLK wrote again to WFW and asked what Apollo's position would be with regard to seeking a Default Judgment after 4 August 2016 in light of the Defendants' Part 11 application.

19. WFW responded on 28 July 2016 in the following terms:-

> "Further to [WFW's email of 26 July] and to your letter of 27 July 2016, we confirm that we will not apply for default judgement in respect of failure to file the defence within time after 4 August 2016."

20. On 25 August 2016 RLK wrote to WFW advising that they were in the process of finalising the Defendants' various applications. RLK asked whether Apollo would be agreeable to increasing the weekly spending limits imposed upon the Defendants by the WFO. No response was received to this letter and RLK sent a reminder on 5 September 2016. A further reminder was sent on 20 September 2016 and on 30 September 2016 RLK wrote to WFW with reference to a threat to wind up 4G Properties that had apparently been made by Mr Suhel to Mr Surinder. WFW did not reply to either of these letters. Nor did they respond to a letter from RLK dated 3 October 2016 which addressed payments that Mr Surinder needed to make in order to secure the use of a vehicle and to a proposed amendment to the WFO in respect of Mr Gursev.

21. On 22 October 2016 David Richards LJ refused the Defendants permission to appeal from the decision of Mr Foxton QC. The application was renewed and on 3 November 2016 the Civil Appeals Office wrote to WFW to advise them that the application for permission to appeal would be heard on 22 June 2017.

22. On 9 November 2016 RLK wrote to WFW to advise that the Defendants were not going to proceed with their application for permission to appeal the decision of Mr Foxton QC.

23. On 23 November 2016 Apollo issued seven applications for judgment in default of defence. These applications were not notified to the Defendants.

24. On 24 November 2016 Squire Patton Boggs (UK) LLP ("**SPB**") filed a Notice of Change of solicitor for all of the Defendants except Mr Surinder, who continued to be represented by RLK. I will for convenience refer to the Defendants whom SPB represent as the "**Other Defendants**".

25. On 25 November 2016 Leggatt J. considered the applications for judgment in default on paper. He noted that as the Particulars of Claim did not include the details required by CPR 16.4(2)(b), rule 12.6 did not allow interest to be included in a default judgment, and that it followed that judgment should be entered for the amounts of THB 237,810,080 and £10,000, together with interest in an amount to be decided by the Court. He gave directions for the service of further evidence and/or argument on the question of interest.

26. On 28 November 2016 Mr Surinder informed RLK that he had heard that a hearing was taking place in these proceedings. Mr Sheppard of RLK telephoned Mr Prentki of WFW who informed him that he was unaware of any court hearing taking place that day. Mr Prentki did not refer to the fact that applications for judgment in default had been filed on 23 November 2016.

27. On 1 December 2016 SPB asked the Commercial Court to issue a number of applications on behalf of the Other Defendants seeking the discharge of the WFO, security for costs, and an increase in the fortification for the cross-undertaking in damages on behalf of 4G Properties. SPB also enclosed a witness statement in support of the application to stay the proceedings that had been issued by RLK on behalf of all of the Defendants on 16 June 2016. The applications were duly issued and sent by SPB to WFW on 2 December 2016.

28. On 7 December 2016 WFW acknowledged receipt of SPB's letter of 2 December and advised that they

> "... did not intend to consider the Defendants' applications because we anticipate judgment in default of defence in respect of the claims made against all the Defendants pursuant to applications made on 23 November 2016, prior to service of your current applications. Please find enclosed sealed applications which we are informed are currently before the Court ..."

This was the first occasion upon which the Defendants became aware of the applications for judgment in default.

29. This letter prompted an immediate response on 7 December 2016 from SPB on behalf of the Other Defendants which observed that WFW's entry of requests for default was little short of outrageous as it was in flagrant breach of an agreement between WFW and RLK. SPB attached copies of the correspondence of 26 to 28 July 2016 to which I have referred above. RLK also wrote to WFW on behalf of Mr Surinder in order to echo the contents of SPB's letter.

30. On 8 December 2016 SPB advised the Court that the applications for judgment in default had been made in breach of an agreed extension of time. SPB asked that their letter, together with enclosures, be put before the Judge who was to consider the applications for default judgments.

31. WFW replied on 9 December 2016 and rejected the Defendants' position, arguing that there had been no agreement by Apollo to give the Defendants unlimited time to serve a defence and that the email of 28 July 2016, together with its prior context, had made clear that the only agreement between the parties was that Apollo would not seek default judgment prior to the Defendants making a valid Part 11 application. There was then further correspondence in similar vein between the parties.

32. On 12 December 2016 the Other Defendants filed a Defence with the Court.

The Judgments in Default

33. On 13 December Leggatt J. considered the matter on paper and directed as follows:-

> "…
> 1. Having read the further correspondence, I direct that that judgment in default should be entered pursuant to the amended requests for judgment filed by Apollo.
>
> 2. It appears *prima facie* that at the time when the amended requests for judgment were filed on 9 December 2016 the conditions set in CPR 12.3(2) were satisfied. A defence has now been filed on behalf of the defendants other than the first defendant. However, note 12.3.1 in Vol 1 of Civil Procedure 2016 indicates that the question whether the conditions in CPR 12.3(1) are satisfied is to be judged at the time when the claimants' application for judgment is made. The same interpretation must apply to CPR 12.3(2) as to CPR 12.3(1). It therefore seems to me that *prima facie* the claimant is entitled to obtain judgment.
>
> 3. I have not heard argument on the point and should not be taken to have decided the question of entitlement other than provisionally. It will accordingly be open to the defendants to apply to have the judgment set aside under CPR 13.2(b) if they wish to argue that any of the conditions in CPR 12.3(2) or 12.3(3) was not satisfied …"

The present applications

34. These applications are made under CPR 13.3, which provides in relevant part as follows:

> "... (1) ... the court may set aside or vary a judgment entered under Part 12 if
> (a) the defendant has a real prospect of successfully defending the claim; or
> (b) it appears to the court that there is some other good reason why –
> (i) the judgment should be set aside or varied; or
> (ii) the defendant should be allowed to defend the claim

35. The Defendants rely upon three separate grounds for setting aside the judgments:-

(1) There was an agreement between the parties that judgment would not be entered.
(2) Apollo was not in any event entitled to seek or obtain judgment for the full amount of its liquidated claim;

(3) Each of the Defendants has real prospects of successfully defending the claim and/or there are other good reasons for setting aside the judgments.

I will consider these in turn.

The three grounds

Ground 1 - Agreement between the parties

36. The Defendants contend that the correspondence between WFW and RLK which ended with WFW's email of 28 July 2016 amounted to an unconditional confirmation and agreement to the effect that Apollo would not apply for judgment in default and that the Defendants and RLK relied upon that confirmation and agreement and did not file a defence. Apollo argues, first, that any agreement between the parties was, when viewed in context, no more than a confirmation that Apollo would not seek a default judgment given that a Part 11 application was to be served in the coming days, and secondly that any agreement not to request default judgment was no longer alive as at 23 November 2016.

37. Having reviewed the evidence I am satisfied that, following receipt of WFW's email of 28 July 2016, the Defendants, through Mr Sheppard of RLK, genuinely believed that Apollo had agreed not to apply for default judgment after 4 August 2016 and that this agreement was open-ended. RLK's subsequent conduct was consistent with such a belief. They wrote to WFW on a number of occasions in August, September, October and November, although they did not receive the courtesy of a response.

38. The email of 28 July 2016 is the last message in a chain of correspondence commencing on 23 July 2016. I agree that it needs to be viewed in the context of the exchanges which precede it. The first email in the chain asks for confirmation that Apollo would not seek to obtain a default judgment after 4 August 2016 and the decision of the Court on the Part 11 application, which RLK anticipated would be made during the course of the following week. WFW's response on 26 July 2016 did not provide such confirmation but instead said that Apollo would not resist an application to extend the deadline beyond the permitted 28 days (without specifying the length of any such deadline). RLK's reply on 27 July 2016 understandably sought clarification of Apollo's position and its agreement to not seeking a default judgment up to and including the determination of the Defendants' Part 11 application.

39. Although WFW's email of 28 July 2016 refers both to WFW's email of 26 July 2016 and RLK's letter of 27 July 2016 the confirmation that Apollo would not apply for default judgment is unqualified. Whilst it is arguable that WFW were doing no more than confirming that Apollo would not apply for default judgment in the event that a Part 11 application was made in the near future this is not what the email says. And if the agreement was not open-ended then when did it cease to apply, and when would Apollo become entitled to request a default judgment without more? Apollo had difficulty in answering the questions at the hearing. Nor does WFW's understanding as to the meaning of their confirmation emerge with any clarity from the evidence of Mr Prentki of WFW. Mr Prentki says in paragraph 70 of his sixth witness statement that WFW "*gave the confirmation requested on the basis of the previous exchanges*" but he does not address the unqualified nature of the words used in his email. It would appear, when reading paragraphs 69 and 70 of Mr Prentki's sixth witness statement together, that he may be

suggesting that the effect of his confirmation was that the Defendants would still have to apply for an order extending time beyond 28 days. If so, there is in my judgment no justification for putting such a gloss on the 28 July 2016 email.

40. I read WFW's email of 28 July 2016 as a simple confirmation and representation that Apollo would not apply for default judgment after 4 August 2016. This agreement was not unlimited in scope because it was always open to Apollo in the event, say, that it considered that the Defendants were dragging their heels in making their Part 11 application, to bring it to an end upon the giving of reasonable notice. The Defendants submit, and I agree, that 7 days' notice would have been reasonable notice in all of the circumstances.

41. It follows from this that I consider that the Defendants are correct in saying that there was an agreement or understanding between the parties to the effect that Apollo would not apply for judgment after 4 August 2016.

42. If, however, I am wrong about that, I nevertheless consider that a reasonable solicitor in the position of RLK could reasonably have held the views that Mr Sheppard and RLK did hold about the nature and the meaning of the agreement.

43. There was some debate in the evidence and at the hearing as to whether the correspondence relating to the agreement issue was considered by Leggatt J. before he directed that judgment in default should be entered. The Defendants certainly asked for the correspondence to be placed before the Court. Leggatt J. said in his ruling that he had "*read the further correspondence*", and he was clearly aware of the Defence that had been filed on behalf of the Other Defendants. The learned judge does not, however, make any reference to the agreement issue in his ruling. His reasons, which I have set out in full above, are directed solely to the question of whether the conditions in CPR 12.3(1) were satisfied as at the time when Apollo's applications for judgment were made. It does not seem to me that Leggatt J. did in fact focus upon the agreement issue because I would have expected him to mention it if he had done so. He certainly did not decide the point and nor did he have the benefit of the all of the evidence and argument that I have read and heard.

44. Given my findings as to the nature of the agreement or understanding between the parties I consider that it was not appropriate for Apollo to request that default judgment be entered. If Apollo had instead advised the Defendants that it was making time of the essence because of their failure to progress their Part 11 applications then I have no doubt that defences would have been served within any reasonable notice period imposed by Apollo, or that applications for further time would have been made to the Court.

45. In conclusion, I find that the Defendants have shown good reason for setting aside the judgments under CPR 13.3(1)(b).

Ground 2: Apollo was not entitled to seek judgment for the full amount of its claim

46. The principal awarded under each of the default judgments exceeds the sum of the Loans (THB220 million). The Defendants contend that Apollo wrongly sought judgment in the full amount of their originally pleaded claims when there was no justification for them to do so. The Defendants relied on evidence (1) that was before the Court at the hearing before Mr Foxton QC, which (2) had been given in the Thai proceedings, and (3) which was

contained in further witness statements filed in respect of the present application, to suggest that the following monies had been distributed from the Loans:

(1) THB 18,980,000 to Ms Gurdyal;
(2) THB 10 million to Mrs Rachpal and Mr Suhel;
(3) THB 10 million to repay Mrs Rachpal's sister and thereby to release the gold that she was holding as security;
(4) THB 31 million to discharge a Bank of Bangkok mortgage obtained in December 2008;
(5) THB 50 million for upfront interest payments;
(6) THB 8 million for cars that were used by Mr Surinder, Mrs Rachpal and Mr Suhel;
(7) THB 33 million for the purchase of the Eurostar Hotel in Madhok International Ltd (a year later the lease was transferred to LV Plaza Ltd);
(8) THB 15 million for a lease in MGK;
(9) THB 15 million spent on renovations;
(10) THB 10 million was spent on living expenses;
(11) THB 40 million to Mr Gurmukh, as a loan, more than half of which has been repaid. It is said that Mr Gurmukh was not aware that these funds were derived from the Loans at the time that he received this loan;
(12) THB 4.5 million to Mr Gursev, as a loan, part of which has been repaid. It is said that Mr Gursev was not aware that these funds were derived from the Loans at the time that he received this loan;
(13) THB 19 million on commission and brokers fees.

The above sums total just under THB265 million and include a personal loan granted by Mr Surinder.

47. Mr Foxton QC considered some of the above payments at paragraphs 57 to 60 of his judgment and concluded that the circumstances of the alleged payments each gave rise to issues that would need to be explored at trial. Whilst the fact of some of the payments to Mrs Rachpal, Mr Suhel, Mrs Rachpal's sister and the discharge of a mortgage are not, as I understand it, disputed, Apollo does take issue with the basis upon which these payments were made. The gravamen of the Defendants' submission is that the Court was misled because Apollo failed to draw attention to these matters, that its claim was not, or might not be, as large as had been pleaded, and that it should not have sought judgment for a liquidated sum. This was not accepted by Apollo. Indeed, Apollo argued that it would have been entitled to seek judgment in a larger sum to reflect the profits that the Defendants would have made from the Loan monies but instead chose to limit its claims for the purposes of obtaining a default judgment.

48. Notwithstanding the eloquence of Mr Ramsden QC's submissions on behalf of the Other Defendants I am not persuaded that it is helpful to address these issues of quantum as a separate ground for setting aside the judgments. They are more appropriately to be considered in the context of Ground 3.

Ground 3: Realistic prospects of successfully defending the claim
Applicable test

49. The test is in essence the same as that which applies on applications for summary judgment, although the burden of proof is upon a defendant to show that he has a realistic prospect of

success. The principles to be applied are uncontroversial and were summarised by Lewison J. (as he then was) in *Easyair Ltd v Opal Telecom* [2009] EWHC 339 at [15]:-

(1) The court must consider whether the defendant has a realistic (as opposed to a fanciful) prospect of success;
(2) A realistic defence is one that carries some degree of conviction. This means a defence that is more than merely arguable;
(3) In reaching its conclusion the court must not conduct a "mini-trial";
(4) This does not mean that the court must take at face value and without analysis everything that a party 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. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as of save the cost and delay of trying an issue the outcome of which is inevitable;
(5) In reaching its conclusion, the court must take into account not only the evidence actually placed before it, but also the evidence that can reasonably be expected to be available at trial;
(6) The court should hesitate about making a final decision without a trial where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available and so affect the outcome of the case;
(7) If the application gives rise to a short point of law or construction and, the court is satisfied that it has before it all the evidence necessary for its proper determination, it should grasp the nettle and decide it.

The evidence

50. A considerable body of evidence was placed before the Court in relation to this aspect of the case, including:-

(1) Witness statements served in respect of the applications from Mr Sheppard of RLK, Mr Winston of SPB, Mr Gurmukh, and Mr Prentki of WFW;
(2) The witness statements that had been filed in respect of the WFO/Part 11 applications heard by Mr Foxton QC, including statements from Mr Surinder, Mr Gurmukh, Mrs Gurbaksh, Mr Gursev, Ms Gurdyal and Mr Suhel;
(3) Evidence of Thai law;
(4) Evidence as to the status of the various Thai proceedings.

Relevance of findings of Mr Foxton QC

51. There was some debate as to the relevance, if any, of the findings made by Mr Foxton QC in his judgment of 15 June 2016. In paragraph 94 of his sixth witness statement, Mr Prentki of WFW suggests that the Defendants are unable to argue that they have reasonable prospects of successfully defending the claims given that two judges (HHJ Waksman QC and Mr Foxton QC) had found that claims disclosed a seriously arguable case and that these findings were not appealed. This point was not pressed by Apollo in argument and rightly so. A finding that a claimant has a seriously arguable case on the one hand does not mean that the defendant cannot have reasonable prospects of success on the other.

The Other Defendants

52. I will deal first with the applications of the Other Defendants. I accept Mr Howells QC's submission that the defences of each of the Other Defendants should in principle be considered individually, although many of the allegations against the Other Defendants are in fact common to each of them.

53. *Unlawful means conspiracy.* The claims of unlawful means conspiracy against the individual Other Defendants involve serious allegations of conspiracy and collusion. They fall under two broad heads. First, a conspiracy to enter into the Loans and, secondly, a conspiracy to dissipate the Loan proceeds.

54. The allegations regarding the alleged conspiracy to enter into the loans are general in nature. Apollo refer to and rely upon alleged telephone calls, social media messaging and meetings between some or all of them and Mr Surinder but provide no particulars of these. The Other Defendants fairly point out that the Particulars of Claim (in particular, paragraph 46) do not assert a positive case against any individual Defendant that he or she was the sender or recipient or otherwise participated in any particular communication. The Other Defendants each deny that they were party to any conspiracy to enter into the loans. Mr Howells QC fairly accepted in his oral submissions that "*there will be factual issues in the conspiracy claims*".

55. The alleged conspiracy to dissipate the loan proceeds is also pleaded in very general terms. It appears from paragraph 36 of the Particulars of Claim to be focussed on Mr Surinder, Mr Gurmukh and/or Mr Gursev, although paragraph 37 would appear to implicate all of the Defendants. The Other Defendants each deny that they were party to any conspiracy to dissipate the Loans. They also point to the (disputed) fact that Mrs Rachpal, Mr Suhel and Ms Gurdyal also received monies from the Loans.

56. Mr Foxton QC observed in paragraph 28 of his judgment that it is impossible to determine whether or not Mr Gurmukh's or Mr Gursev's account of their knowledge of the loans is true without a trial of this action and, in paragraph 29, that it is simply not possible at this stage to know where the truth lies. He considered that the claims against Mrs Gurbaksh and Mrs Simrat rested on weaker grounds but merited exploration at trial. I have formed the same conclusion on the evidence that I have considered. If it is not possible at this stage to know where the truth lies then it necessarily follows that the Other Defendants have shown that they have realistic prospects of success and/or a defence that is more than merely arguable in respect of the unlawful conspiracy claims.

57. *The receipt-based claims.* Apollo asserts in paragraph 42 of the Particulars of Claim that the Defendants are liable to it as constructive trustees because Mr Surinder transferred the Loan Money (or its proceeds) to himself and to them and that they had actual or constructive notice that the Loan Money was transferred to them as a result of Mr Surinder's and/or Mr Gursev's breach of duties under Thai law. No particulars of this assertion are given. The pleaded case reflects the test under English law as established by the Court of Appeal in *BCCI (Overseas) Ltd & Anor v Akindele* [2001] Ch. 437. In his oral submissions, however, Mr Howells QC submitted that the mere fact that Defendants knew that the monies that they received had come from loans from Apollo would be sufficient to make them liable as constructive trustees. This goes well beyond the *Akindele* test and does not reflect the law. The Other Defendants will only be liable as constructive trustees if they knew that the assets received by them were traceable to a breach of trust or fiduciary duty or, having later acquired knowledge to that effect, unconscionably retained such assets or their traceable

proceeds: see *Re Diplock* [1948] Ch. 465 at 477; *Lewin on Trusts* (19th Ed.) at §42-03. It is also relevant to distinguish knowledge of facts on the one hand from knowledge of claims or allegations on the other. Knowledge that there is a disputed claim in respect of trust property is not the same as knowledge that the property is in fact trust property: see *Carl Zeiss Stiftung v Herbert Smith & Co (No.2)* [1969] 2 Ch. 276; *Baden & Others v Société Générale S.A.* [1993] 1 WLR 509 at [249].

58. The individual Other Defendants each deny that they were aware that any assets received by them were traceable to a breach of trust or fiduciary duty by Mr Surinder and, as I have already observed above, say that they were not at the time aware that the funds provided to them were derived from loan agreements that Mr Surinder had executed on behalf of Apollo. Mr Gurmukh, Mr Gursev and Mrs Simrat say that the monies which they received from Mr Surinder were given to them as a loan. Mr Gurmukh received a loan of about £800,000, of which about £500,000 has been repaid, Mr Gursev received loans of US$75,000 and 630,000 Rupees and Mrs Simrat received loans of US$750,000 and 300,000 Rupees. Mr Gursev says that he has repaid 910,000 Rupees and that he and Mrs Simrat fully intend to repay the balance.

59. Mr Howells QC submitted that the evidence in relation to each of the individual Other Defendants showed that, even if they were not aware of the source of the funds provided by Mr Surinder at the time of receipt, they subsequently became aware that the monies were derived from the Loans and yet continued to benefit from these monies and their proceeds.

(1) In the case of Mr Gurmukh, Mr Howells QC relies on his statement that he assumed that the money would have come from his father's borrowing against business or assets including Apollo and submits that this admission is sufficient to establish constructive knowledge. He further relies on the fact that Mr Suhel subsequently advised Mr Gurmukh that the money had been raised against Apollo's asset as evidence of actual knowledge.

(2) Mr Howells QC submitted that Mrs Gurbaksh's involvement was "entirely related" to that of her husband, Mr Gurmukh, and that she therefore had no prospect of successfully defending a claim that she should also be subject to the imposition of a remedial constructive trust with respect to money that she had received.

(3) Mr Howells QC pointed to the fact that, although both Mr Gursev and Mrs Simrat assert that they were unaware of the source of Mr Surinder's loans at the point of receipt, their evidence shows that they subsequently became aware that they were derived from loans against The Claimant's asserts and that they used some of these monies to invest in 4G Properties.

These facts are not, in my judgment, by themselves sufficient to show that the individual Other Defendants were aware, whether at the time monies were received by them or when they subsequently became aware of the source of the funds or of allegations in relation to those funds, that such monies were in fact traceable to a breach or breaches of Thai law. The nature, extent and relevance of each of the Other Defendant's knowledge is a matter of fact and evidence and will need to be explored at trial.

60. I can deal with the position of the two corporate Defendants more briefly:-

(1) The Defendants' evidence shows that 4G Properties received some of the monies that had been loaned by Mr Surinder to his sons and daughters-in-law. There is, as

Mr Foxton QC has already found, a serious issue to be tried as to whether any knowledge of Mr Surinder, Mr Gurmukh, or Mr Gursev is attributable to 4G Properties. The knowledge of 4G Properties cannot, however, be greater than that of the individual Defendants and, as I have said above, in relation to the Other Defendants, the nature and extent of such knowledge will need to be explored at trial.

(2) Apollo has given no satisfactory explanation as to why it was thought appropriate to obtain judgment against HKM, a company in respect of which Mr Foxton QC held that there was no serious issue to be tried.

61. *Thai law.* Much of the focus of the parties' submissions proceeded on the assumption that English law is applicable. It is, however, clear that Thai law is of considerable relevance to a resolution of the parties' disputes. There is no independent evidence of Thai law before the Court. The Claimant relied upon the evidence of a Thai lawyer in WFW's Bangkok office, Mr Tossaporn Sumpiputtanadacha ("Mr Tossaporn"), and the Defendants relied upon evidence given by their own Thai lawyers from Anglo-Thai Legal Company Ltd. Their statements do not address all of the Thai law issues that have been pleaded. Nor do they comprehensively describe the current status of each of the Thai proceedings.

62. *Quantum.* Judgment was obtained against each of the Other Defendants in respect of a sum which is larger than the full amount of the Loans. Apollo acknowledged in argument that each of the Other Defendants could only be liable in respect of the monies that they had received (and any profits derived therefrom). Each of the Other Defendants has reasonable prospects of showing that Apollo would not be entitled to recover the full amount of the judgment sum against them and that some of the Loan monies were used to make payments to Mrs Rachpal, Mrs Rachpal's sister, Mr Suhel, Ms Gurdyal and to discharge a mortgage liability of Apollo.

63. *Conclusion.* In conclusion, I am satisfied on all of the evidence that the Other Defendants each have realistic prospects of successfully defending the claims against them and that the judgments against them should be set aside under CPR 13.3(1)(a).

Mr Surinder

64. Mr Surinder is in a different position to the other Defendants. He admits that he procured the Loans. He has been convicted in Thailand of forgery and of causing false statements to be made in a public document, although both of these convictions are currently under appeal.

65. Mr Surinder's defence, which appears in his witness statement and in a draft Defence, is that:-

(1) Mrs Rachpal and Mr Suhel were informed of the proposed Loans with Mr Suchin and were also informed of the proposed shareholders' meetings which approved those loans.

(2) The shareholders' meetings were validly held.

(3) The directors and shareholders were aware of, and consented to, the Loans and the subsequent use and dispersal of the Loan monies.

(4) Mrs Rachpal, Mr Suhel and Mrs Rachpal's sister each received monies from the loans and an existing Bank of Bangkok mortgage in the sum of THB31 million was paid off.

66. As matters presently stand in Thailand Mr Surinder could well have something of an uphill struggle on the first three limbs of his defence. The position may, however, change after his appeals have been heard in Thailand. The allegations against Mr Surinder are extremely serious, encompassing as they do forgery, fraud, bribery, conspiracy, breach of his obligations as a director of Apollo, together with a number of other civil wrongs under Thai law. The issues are highly fact sensitive, there are many disputes of fact on the witness statements and on the pleadings, and much will or may depend upon matters of Thai law. It is not in my view appropriate to reach any final decisions in this case without a trial because there are reasonable grounds for believing that a fuller investigation into the facts of the case (including Thai law) would add to or alter the evidence available and so affect the outcome of the case. I have concluded that Mr Surinder does have a defence that is more than merely arguable and that he does therefore have reasonable prospects of successfully defending the claim. He also has reasonable prospects of challenging the quantum of the claim by showing that some of the Loan monies were used to make payments to Mrs Rachpal, Mrs Rachpal's sister, Mr Suhel, Ms Gurdyal and to discharge a mortgage liability of Apollo.

67. If I am wrong about that, then I nevertheless consider that it is appropriate for me to exercise my discretion under CPR13.3(1)(b) to set aside the judgment against Mr Surinder for other good reasons. These other good reasons are:-

(1) There is at least a prospect of Mr Surinder successfully defending the claim as to liability – his defence cannot be described as hopeless.
(2) The allegations against Mr Surinder are very serious and it is desirable that they should be given as full a hearing as the circumstances permit: see *Berezovsky v Russian Television and Radio Broadcasting Co* [2009] EWHC 1733, per Eady J. at [16]; *Latmar Holdings Corp v Media Focus Limited and Others* [2012] EWHC 262, per Eder J. at [76-82]. I consider that Mr Surinder ought to have the opportunity to defend those allegations and to cross-examine the people who have made them.
(3) The amounts at stake are relatively large insofar as Mr Surinder is concerned.
(4) Mr Surinder's conduct is at the centre of the allegations against all of the Defendants and it is, on the particular facts of this case, appropriate for the case against all of the Defendants to be heard together.

Conclusions

68. For the reasons that I have given above I set aside the judgments in default against each of the Defendants under both CPR 13.3(1)(a) and CPR 13.3(1)(b). The parties should seek to agree a draft Order that reflects my findings. I will address any consequential matters either on paper or at a date convenient to the Court and to counsel.