Neutral Citation Number: [2018] EWHC 1829 (Ch)

Case No: HC-2016-001617

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building, Fetter Lane

London EC4A 1NL

Date: 30/07/2018

Before:

CHIEF MASTER MARSH

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Between :

(1) TRACY DAVID STANDISH

(AND 8 OTHERS)

Clai

- and -

(1) THE ROYAL BANK OF SCOTLAND PLC

(2) SIG NUMBER 2 LTD (formerly West Register Number 2 Ltd)

Defen

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David Reade QC and David McIlroy (instructed by **Lexlaw Solicitors and Advocates**) for the **Claimants**

Paul Casey (instructed by **Addleshaw Goddard LLP**) for the **Defendants**

Hearing dates: 5 June 2018

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Judgment Approved

Chief Master Marsh:

1.
The defendants have applied to strike out the claim pursuant to CPR 3.4(2)(a) on the basis that the particulars of claim show no reasonable grounds for bringing the claim. It is common ground that to succeed, the court must be certain that the claim, as it is set out in the statement of case, is bound to fail: Richards (t/a Colin Richards & Co) v Hughes [2004] P.N.L.R. 706 per Peter Gibson LJ at [22]).

2.
The parties also accept as an accurate summary of the law the notes at paragraph 3.4.2 of Civil Procedure 2018 (“the White Book”) where it is said:

"… It is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact."

Reference is made in the notes to a number of authorities to support that proposition, including the decision of the Court of Appeal in Richards v Hughes.

3.
The claimants' application to amend the particulars of claim issued in response to the application to strike out the claim was heard with it. The two applications stand or fall together. [1]

4.
For the purposes of the applications, it is agreed that the court should accept the claimants' version of events and, if there are any differences between the parties, the claimants' version is accepted. The defendants' application is pursued on the basis that, even assuming the facts relied upon in favour of the claimants, the claim in its original form, and as amended, is bound to fail for legal reasons.

5.
The claimants were all shareholders in a company named Bowlplex Ltd ("the company"). As its name suggests, the company owned and operated bowling sites and by 2007 it owned 16 sites in England, Wales and Scotland. Eight years later, in December 2015, all the then shareholders in the company sold their shares to a third party. The company was given an enterprise value of £30 million and achieved a net return for shareholders of £22,629,642. This bare statement, however, masks the essence of the claimants' case which is that the defendants required the claimants to hand over a disproportionate amount of the company's shares as a condition of National Westminster Bank Plc ("NatWest") continuing to provide banking facilities to the company. For the purposes of this judgment, it is unnecessary to make a distinction between the first defendant ("RBS") and NatWest because it is common ground that at all material times the former was acting as agent for the latter. The second defendant ("West Register") is an indirect subsidiary of RBS.

6.
The claimants' case, in summary, is that the defendants, together with the chairman of the company, Mr Sean Cooper, who was appointed at the request of the defendants, between about 2009 and 2011 combined with the object of maximising their holding of shares and minimising the holding of the claimants. It is alleged the conspiracy was pursued by unlawful means.

7.
The claim is an unusual one because the lending facilities were provided by NatWest to the company and any complaint about the manner in which it and/or RBS behaved might normally be seen as a complaint to be pursued by the company, rather than its shareholders unless by way of a derivative claim. However, the claim is focussed on the actions of the defendants as they affected the company's shareholders as they were before two structuring events and the loss they claim arises from giving up a significant proportion of their shares to West Register. It is not said, however, that the transfers of shares by the claimants were vitiated by duress or otherwise. The transfers were, in legal and equitable terms, voluntary.

8.
The applications can best be seen in the context of a simplified chronology of events. The company was a family owned business. Mr Tracy Standish ("Mr Standish") was its managing director and the holder of 55% of the share capital. The balance of the shares was mainly held by other family

members. The company had enjoyed a good relationship with NatWest since 2004 and had expanded substantially with the help of bank finance.

9.
The main events were:

- June 2004 – The company executed a debenture over its undertaking and legal charges over its properties in favour of NatWest.

- 2007 to 2009 – The company's business was adversely affected by the smoking ban and the global financial crisis.

- 3 February 2009 – The company entered into a new facility agreement with NatWest.

- April 2010 – The company breached one of the financial covenants in the facility agreement.

- June 2010 – The company was referred to RBS' Global Restructuring Group ("the GRG") with Mr Mark Anderson as its relationship manager. This was in place of the company's local relationship manager in Southampton.

- August 2010 – Mr Kamaldeep Sondhi of West Register ("Mr Sondhi") started to attend meetings held between the company and RBS.

- At around this time Mr Sondhi stated that West Register wished to obtain an 80% stake in the company.

- November 2010 – the company was charged default interest under the terms of the facility.

- Early 2011 – the company became aware that it faced a claim by a former landlord for substantial amounts of rent during the term of the lease.

- February to June 2011 – the company attempted to agree terms with RBS for a Company Voluntary Arrangement ("CVA"). RBS refused to agree terms which meant that a CVA was not possible.

- 1 July 2011 – Terms were agreed for the "First Restructure" which took place by a Deed of Restatement of the 2009 facility (as amended). No debt was written off, but fresh terms were agreed. These included a number of onerous conditions, such as a requirement for the shareholders to provide funding for the company as subordinated debt. In addition, crucially, the First Restructure involved the transfer of 36.3% of the issued share capital in the company to West Register. As part of the First Restructure, Mr Sondhi was appointed as an observer to board meetings.

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January 2012 – Mr Sean Cooper, who was nominated by the defendants, was appointed as chairman.

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March/April 2012 – The "Second Restructure" took place alongside a CVA which had the principal effect of relieving the company of part of its rent burden. In addition, NatWest wrote off £4.45 million of the company's debt. Further shares were transferred to West Register with the result that it held 60% of the equity with 45% of the voting rights. [2] 20% of the shares were held for the benefit of employees. The net effect of the two restructures was to reduce the shareholding of the Standish family and associated shareholders, subject to the possibility of Mr Standish being allocated the employee benefit shares, from 100% to 20%.

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May 2012 – Mr Tracy Standish who was managing director of the company was dismissed on what are said to be spurious grounds achieving one of the objectives of the conspirators.

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July 2014 – RBS stated that the company was to be sold.

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March 2015 – Terms for the sale were agreed.

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December 2015 – The sale was completed.

10.
The actions of West Register have been the subject of great public interest. The Financial Conduct Authority appointed Promontory Financial Group (UK) Ltd ("Promontary") as a "skilled person" pursuant to section 166 Financial Services and Markets Act 2000 to investigate the actions of the GRG as they related to Small and Medium Enterprises, such as the company. The claimants' position is summarised in the skeleton argument of Mr Reade QC and Mr McIlroy:

"The facts of the present case must be, at the very least arguably, shocking to the conscience of the court. A company which [the defendants] assessed as viable, which needed a modest degree of forbearance, and which had put forward a credible CVA (of the very type agreed to by [the defendants] once they had obtained control of the company) was acquired by [the defendants] for themselves. Whether equity and the common law are impotent in the face of such unabashed profiteering by banks from good businesses in temporary distress is a matter of considerable public importance."

11.
The skeleton argument goes further and puts forward the submission that:

"There has been no case in which it has been held that the acquisition by the bank of a shareholding in a company large enough to enable the bank both to the control the company and to squeeze out the other shareholders does not give rise to any claims known to law. This is a fact-pattern specific to the actions of GRG which needs to be fully explored at trial. The court ought not to come to premature conclusions in advance of disclosure and evidence."

12.
However, the claimants do not point to any case in which the acquisition of a substantial shareholding in a company by a bank has been held to give rise to a claim. The submission does not advance the

claimants' case other than to serve as a reminder that the test the defendants must meet on their application is a demanding one. If, however, the claimants' pleaded case is bound to fail, there is, unlike Part 24.2, no secondary test that might justify, in exceptional circumstances, permitting the claim to go forward to a trial.

13.
After the defendants' application was issued, the claimants' made an application for an order for early disclosure. The claimants' application, in its first manifestation, sought an order that the defendants disclose, prior to the hearing of the strike out application, a copy of the report prepared by Promontory. In the event, the application proved to be unnecessary because the report was published by the Treasury Select Committee. The application was then amended and the claimants sought an order that the defendants provide what were described as the "customer journey documents" prepared by Promontory for each of the sample companies it looked into for the purposes of its report (which sample included the company). The basis of the application, put shortly, was that the claimants needed to see these documents in order to deal with the strike out application. The application was refused at a hearing on 20 April 2018.

14.
At paragraph 44 B of the particulars of claim, the claimants have referred to the conclusions in the review undertaken by Promontory although it was not the purpose of the review to draw legal conclusions. There are, however, a number of significant criticisms of the way in which the GRG operated including that the GRG saw the delivery of its own narrow commercial objectives as paramount objectives that focused on the income the GRG could generate from the charges levied on distressed customers and that the GRG failed to take adequate account of the interests of the customers it handled. The conclusions included two other findings that are of potential relevance:

(1)
That the relationship between the GRG and West Register was inappropriate and gave rise to a series of conflicts of interest that were not adequately addressed (5.1.74).

(2)
That there had been cases of a material loss of ownership rights in a business where an unnecessary upside instrument had been required of the business (6.2.47).

15.
The issue the court has to deal with on the defendants' application is not, however, whether the defendants and the GRG behaved in commercial terms which were unsatisfactory, but whether, as a matter of law, the claim shows reasonable grounds. Unethical business behaviour may, or may not, found a legal claim depending upon what it entails.

16.
The conspiracy alleged by the claimants is put briefly at paragraph 52 of the particulars of claim:

"At a date or dates presently unknown to the Claimants, RBS, West Register and (subsequently) Mr Cooper ("the Conspirators") combined with the object of maximising their own equity in the Company and minimising the equity share of the Claimants."

17.
The unlawful means that are alleged fall into three categories:

(1)

RBS acted in breach of a duty of good faith.

(2)
RBS acted in breach of certain equitable duties.

(3)
West Register (alternatively Mr Sondhi) acted in breach of its fiduciary duties as a shadow director.

18.
The defendants say that in each respect the unlawful means are bad in law and thereby the claim is bound to fail. It is necessary to examine how it is said that the duty of good faith and the equitable duties arose, and the scope of West Register's fiduciary duties, assuming that the claimants are able to establish that West Register acted as a shadow director. For the purposes of the application it does not matter whether the shadow director was West Register or Mr Sondhi.

19.
The company entered into a number of formal agreements with NatWest and RBS over the period of time bank facilities were provided to it. The claimants say there was an overarching "Customer Agreement" and the formal facility agreements are to be regarded as sub-agreements for particular purposes. Paragraph 12 of the particulars of claim does not explain how the Customer Agreement came into being or when that occurred. It merely asserts that the relationship between RBS and the company was governed by it.

20.
The Customer Agreement is one of the central elements to the claimants' case because they say there are terms to be implied into it. It is a serious matter that the claimants have failed to comply with Practice Direction 16 paragraph 7.5 which requires that: "Where a claim is based upon an agreement by conduct, the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done." The particulars of claim do not address these matters and no attempt has been made to cure this defect, despite considerable amendment to other aspects of the claim.

21.
The claimants say in paragraph 15 of the particulars of claim that it was a necessary implied term of the Customer Agreement that: "… each party would, in the performance of that agreement and/or any sub- agreements entered into by the parties during the course of the relationship, cooperate with each other and act in good faith." It is said that it was an incident of this implied term that:

"(1) RBS would perform the Customer Agreement and/or any sub- agreements entered into during the course of the relationship, in good faith and not in a commercially unacceptable or unconscionable way.

(2) RBS would exercise its powers or discretion under the Customer Agreement and/or any sub-agreements entered into during the course of the relationship, in good faith and not arbitrarily or capriciously or for an improper purpose. This obligation extended to include RBS's power or discretion to:

(a)
remove the management of the company's relationship from the existing relationship management team at RBS and place under the management of RBS's purported turnaround division, the global restructuring group ("GRG");

(b)
waive any covenant breach by the company;

(c)
demand repayment of its loan facilities;

(d)
vary the interest rates applied to the company;

(e)
set the terms of any proposed refinance package for the company, and the time to be allowed for negotiations in relation to the same."

22.
The claimants' pleaded case is that the duty of good faith is to be implied into the Customer Agreement; it is not said that the duty is to be implied directly into the facility agreements, or any other sub-agreement. Their case is that the duty arose indirectly; that by virtue of the term implied into the Customer Agreement, the facility agreements were to be performed in accordance with such a duty. The claimants' skeleton argument submits that it is arguable the duty of good faith affected the relationship regardless of whether the Customer Agreement came into being because it is "… wholly artificial to regard the relationship of a long-standing customer with its bank as nothing but a series of individual contracts." That is not, however, how the case is pleaded.

23.
The implied terms are said to arise from "… the relevant factual background, including the shared assumptions set out above and RBS' commitment to Treating Customers Fairly…" ["TCF"]. The shared assumptions are described in paragraph 14 of the particulars of claim. They are very general in nature. The paragraph bears setting out in full:

"14. … From the outset of the relationship and all material times subsequently, the Company and RBS shared certain understandings about the relationship, including that:

(1)
The relationship was envisaged to be a long-term and developing relationship.

(2)
The parties would need to work together cooperatively throughout the length of the relationship.

(3)
RBS and the company would at all times act in good faith towards the other, and neither would behave in a commercially unacceptable or unconscionable way towards the other.

(4)
Debt finance, and the terms on which it was provided with vital to the company's business."

24.
Notably, these are said to be understandings that were present from the outset of the relationship and applied throughout it. However, no clue is given about how these understandings are said to have arisen or what the basis for them may have been.

25.

“Treating Customers Fairly” is a reference to an internal policy adopted by RBS in April 2009 bearing that name. The particulars of claim do not explain how an internal policy of which the claimants (and the company) were unaware could be the basis for implying a term into the Customer Agreement.

26.
The second source of unlawful conduct are the equitable duties that have been inserted by way of amendment to the particulars of claim:

“18A. As the agent of the mortgagee and/or chargeholder, RBS owed to the Company and to the Claimants, as persons interested in the business, duties in equity:

(1)
To act in good faith towards the Company and to the Claimants;

(2)
Not to exercise its powers as mortgagee, or to threaten to exercise its powers as mortgagee, for an improper motive;

(3)
To act fairly towards the Company and to the Claimants;

(4)
Not to act unconscionably towards the Company or the Claimants;

(5)
Not to act in a manner which unfairly prejudices or wilfully and recklessly sacrifices the interests of the Company or those of the Claimants.”

27.
As a result of the First Restructure, RBS was entitled to appoint an observer to attend the company’s board meetings and Mr Sondhi was so appointed. It is alleged that his role went well beyond that of an observer because he gave instructions to the directors that the directors felt obliged to follow. Paragraph 30 of the particulars of claim provides particulars of Mr Sondhi’s actions as a shadow director.

28.
The alleged breaches of the duty of good faith and/or of the equitable duties and the alleged breaches of fiduciary duty are set out at length respectively in paragraphs 45 and 51 of the draft amended particulars of claim.

29.
The defendants’ case is that, taken at its highest and assuming there was a conspiracy as it is pleaded, the claimants are unable to establish as a matter of law their case about the unlawful conduct of the defendants. They say that:

(1)
There is no basis upon which the claimants will be able to establish the existence of the Customer Agreement.

(2)
If the Customer Agreement existed, or the sub-agreements were subject to the implied terms (albeit this is not the claimants’ case), they do not assist the claimants.

(3)
There is no basis in law for the equitable duties.

(4)
West Register/Mr Sondhi only owed fiduciary duties to the company in respect of the instructions or directions they gave to the board. No breach of duty is asserted in relation to such instructions or directions.

The Customer Agreement and the implied terms

30.
The Customer Agreement is a mysterious creature. As I have previously remarked, no particulars are provided about how it is said it came into being and it has no express terms. Its function, in reality, is to provide a vehicle into which terms can be implied. The court is invited to conclude that an agreement came into being which was not the subject of any discussion between the parties and was not based upon any communications between them, oral or written.

31.
Contracts may arise by implication. In The Elli 2 [1985] 1 Lloyd's Rep 107 (at 115), May LJ formulated the test in the following way:

"… I agree that the boundaries of the doctrine are not clear. I would not expect them to be so. As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case - and the different sets of facts which arise for consideration in these cases are legion. I also agree that no such contract should be implied on the facts of any given case unless it is necessary to do so: necessary, that is to say, in order to give business reality to a transaction and to create enforceable obligations between the parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."

32.
In The Aramis [1989] 1 Lloyd's Rep 213 Bingham LJ (at 224) observed:

"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 to the effect contended for. 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."

33.
This observation was approved by the Court of Appeal in Baird Textile Holdings Ltd v Marks & Spencer plc [2001] C.L.C 999. Mance LJ at paragraph [59] to [61]:

"59. For a contract to come into existence, there must be both (a) an agreement on essentials with sufficient certainty to be enforceable and (b) an intention to create legal relations.

60. Both requirements are normally judged objectively. Absence of the former may involve or be explained by the latter. But this is not always so. A sufficiently certain agreement may be reached, but there may be either expressly (i.e. by express agreement) or impliedly (e.g. in some familiar situations) no intention to create legal relations.

61. An intention to create legal relations is normally presumed in the case of an express or apparent agreement satisfying the first requirement … It is then for the party asserting such a contract to show

the necessity for implying it. As Morison J said in his para 12(1), if the parties would or might have acted as they did without any such contract, there is no necessity to imply any contract. It is merely putting the same point another way to say that no intention to make any such contract will then be inferred."

34. The law relating to implied terms was restated by the Supreme Court in Marks & Spencer v BNP Paribas Securities Services Trust Co [2015] 3 WLR 1843. Mr Casey who appeared for the defendants extracted the following propositions from that decision and I adopt his helpful formulation:

(1) The default position is that nothing is to be implied into a contract; the more detailed the contract, the stronger that presumption will be.

(2) The court needs to construe the express words first and then consider implied terms. Until it has been decided what the parties have expressly agreed, it is difficult to see what, if anything, they each have impliedly agreed.

(3) It is impossible to imply into a contract any term or condition inconsistent with the express provisions and, even if there is no necessary inconsistency, an express term in a contract excludes the possibility of implying any term dealing with the same subject matter.

(4) A term can only be implied if it reflects the only meaning consistent with the other provisions of the instrument. If the omission to include an express provision may have been deliberate, no term will be implied.

(5) The implied term must be reasonable and equitable. On the other hand, it is not enough that a term is reasonable or appears fair or equitable for it to be implied. These are necessary but not sufficient grounds. The sufficient ground is that the implied term must be necessary to give business efficacy to the contract and is so obvious that it goes without saying. Moreover, a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

(6) Because the implication of terms is potentially so intrusive, the law imposes strict constraints on the exercise of the power.

35. The Customer Agreement must have come into being at some point before the company was referred to the GRG in June 2010. It follows that the facility agreed in February 2009 must be, on the claimants' case, subsidiary to it. It is instructive to consider its principal terms. Unsurprisingly, it is a dense document running to 17 pages. It provides for a loan of £16.5 million to refinance the company's borrowing, with the loan repayable by specified instalments with the final instalment of £12 million payable on 24 April 2012. The loan is secured against the company's properties, by inter-company guarantee and, inter alia, by the assignment of a life policy on the life of Tracy Standish. It has all the terms that might be expected to be contained in a facility agreement of this type. It is an unremarkable agreement, save perhaps that it does not contain an 'entire agreement' clause. The closest it comes to such a provision is clause 16.7 which provides that the agreement supersedes all prior agreements with the bank about the loan.

36. The claimants point to two clauses which they say contain contractual discretions:

(1) Clause 4 deals with interest. Clause 4.1 provides that the interest payable by the borrower is to be the aggregate of three elements including "the margin" which is a defined term meaning 2.75% initially and thereafter the sum calculated in accordance with clause 4.2. Clause 4.2 permits the bank to review the margin in accordance with a formula. Clause 4.4 gives the bank the right to charge

interest at a higher rate in the event of a default. The rate is specified to be 4.75% above BBA LIBOR and Mandatory Costs “or such other rate as may be determined by the bank.

(2) Clause 13 defines twelve events of default. Most are defined events. However, the “material adverse change” event is defined by reference to the opinion of the bank. The claimants also point to the provision that applies in relation to all the events of default that the bank may by written notice declare all sums due to be immediately payable.

37. Little more needs to be said about the Customer Agreement. It is common ground that the company dealt with NatWest through a series of standard banking agreements throughout the period in question. There is no obvious reason why the court should conclude that there was an additional overarching agreement, without express terms, that came into being at some unspecified stage.

38. The claimants’ case falls at two initial fences.

(1) The circumstances of its creation are wholly unparticularised. The claimants say they are at a disadvantage in pleading their case because they no longer control the company and do not have access to its papers. Whilst there is some truth in this assertion, it is not open to the claimants to avoid setting out their claim in general terms. After all, the first claimant, Mr Tracy Standish, dealt with NatWest and he must know of their dealings. There is simply no basis put forward from which the court might be able to conclude that the parties turned their minds at any stage to the question of whether or not their business relationship, beyond the black letters of their written agreements, gave rise to an additional agreement with wider duties and responsibilities placed upon the bank (which themselves were to be implied into the implied contract).

(2) The contract fails the necessity test. The parties were already dealing with each other in accordance with written contracts and there was no need for another contract to govern their relationship. The claimants are unable to point to any conduct that might have been different had the contract been in place.

39. The Customer Agreement is a completely artificial construct that is divorced from the commercial realities of the dealings between the parties. I am in no doubt that this element is bound to fail. It appears to me that it is a transparent device attempting to circumvent the difficulty in implying a duty of good faith in the operative written agreements.

40. I would add that the failure to provide particulars explaining how the Customer Agreement came into being is not just a technical pleading point. It suffices on its own to provide a ground to strike out this element of the claim because it is essential that the defendants are able to understand the case they have to meet.

41. It is therefore strictly unnecessary for me to consider whether the claimants’ case based on contractual duties, based as it is on terms to be implied in the Customer Agreement, could assist them. The claimants, realistically, do not say that terms are to be implied into the facility agreements. It is unnecessary for me to consider the discussion by Leggatt J (as he then was) in Sheikh Tahnoon v Kent [2018] EWHC 333 (Comm) at [167] to [172] or the discussion about implied terms in a similar context to the present by Asplin J (as she then was) in Property Alliance Group Ltd v RBS [2016] EWHC 3342 (Ch) [275] to [281].

42. I will however record briefly the conclusions I have reached on this aspect of the application:

(1) The shared assumptions are put forward at a high level of abstraction and they cannot provide a basis for implying additional terms.

(2) Equally, the policy known as TCF does not form a basis for implying terms. TCF is one of the rules of the "Principles for Business" of the FCA Handbook ("PRIN"). Compliance with TCF is mandatory for RBS' regulated business. The decision to extend compliance to the non-regulated side of the bank's business was voluntary. In swaps cases claimants have unsuccessfully argued that terms could be implied in their derivative contracts that the bank would comply with PRIN. A recent example of this is the decision of HHJ Waksman QC (as he then was) in Flex-E-Vouchers v RBS [2016] EWHC 2604. It would be anomalous if terms could not be implied in a regulated context but were to be implied in an unregulated case where the bank, unknown to its customer, voluntarily extends TCF to them. All the more so if the term is to be implied into a contract which itself arises by implication.

(3) The implied terms the claimants rely on would not achieve their objective. It is necessary to distinguish the exercise of a discretion as opposed to the exercise of a contractual right that involves making an assessment or choosing from a range of options: per Jackson LJ in Mid-Essex Hospital Services NHS Trust v Compass Group UK [2013] EWCA Civ 200 at [83]. The claimants rely on five contractual discretions at paragraph 15.2 of the particulars of claim (set out above). Taking them briefly in turn:

(a) There is no contractual term upon which what is said to be the exercise of RBS' discretion to remove the company's management can bite.

(b) The discretion to waive any covenant breach by the company is not the type of discretion that engages a 'Socimer' type term. The discretion is merely that the bank could make a choice about whether to enforce a breach of the terms of lending.

(c) The bank did not demand repayment of its loan facilities so the exercise of a discretion to do so does not arise. The claimant's reliance on clause 13 of the facility agreement, which refers to there being a material adverse change, does not assist them.

(d) The bank had only a very limited right to vary interest rates under clause 4 of the facility in the event of a default. This is not the sort of contractual discretion that could be the basis for an implied term.

(e) The facility agreement does not deal with the terms of a refinance package.

Equitable duties

43. The claimants seek to add this element of unlawfulness by their draft amendment:

"18A. As the agent of the mortgagee and/or chargeholder, RBS owed to the company and to the claimants, as persons interested in the business, duties in equity:

(1)
To act in good faith towards the Company and to the Claimants;

(2)
Not to exercise its powers as mortgagee, or to threaten to exercise its powers as mortgagee, for an improper motive;

(3)
To act fairly towards the Company and the Claimants;

(4)
Not to act unconscionably towards the Company or the Claimants;

(5)
Not to act in a manner which unfairly prejudices or wilfully and recklessly sacrifices the interests of the Company or those of the Claimants."

44. The claimants' position starts with reliance on the maxim: "Equity will not suffer a wrong to be without a remedy". They say the equitable duties pleaded at paragraph 18A are necessary in order to prevent the first defendant from abusing its position as mortgagee. But as the authors of Snell's Equity 33rd Ed. point out: "… the maxim operates at such a high level of abstraction, it is of limited practical use."

45. The claimants also rely on a passage in Medforth v Blake [2000] Ch 86 at page 101G. The claimant in that case brought a claim against receivers who were appointed by a bank pursuant to an agricultural charge in favour of the bank. The claimant alleged that the receivers had been negligent in their conduct of the claimant's pig farming business. The issue on the appeal concerned the existence and scope of the receivers' duties:

"The equity of redemption was a Chancery invention, introduced in order to ensure that a conveyance by way of mortgage remained a security for the repayment of money whether or not the date fixed for repayment and reconveyance had passed. The duties imposed on a mortgagee in possession, and on a mortgagee exercising his powers whether or not in possession, were introduced in order to ensure that the mortgagee dealt fairly and equitably with the mortgagor. The duties of a receiver towards the mortgagor have the same origin. They are duties in equity imposed in order to ensure that a receiver, while discharging his duties to manage the property with a view to repayment of the secured debt, nonetheless in doing so takes account of the interests of the mortgagor and others interested in the mortgaged property. These duties are not inflexible. What a mortgagee or a receiver must do to discharge them depends upon the particular facts of the particular case.

…

… the duty in equity appropriate to have been owed by a mortgagee selling in 1888 is not necessarily of the same weight as the duty appropriate to have been owed by a mortgagee selling in 1967. Equity is at least as flexible as the common law in adjusting the duties owed so as to make them fit the requirements of the time." [my emphasis]

46. The claimants draw the following propositions from Medforth v Blake:

(1) Equitable duties are owed by the mortgagee to the mortgagor and any other interested party;

(2) The mortgagee is subject to equitable duties when exercising its powers, whether or not the mortgagee is in possession;

(3) The equitable duties include, butt are not necessarily confined to, a duty of good faith;

(4) Equity is flexible in adjusting the duties owed so as to make them fit the requirements of the time;

(5) The extent and scope of any duty beyond a duty of good faith is dependent on the facts and circumstances of the particular case.

47. The claimants submit that the court cannot conclude that their case based on equitable duties is bound to fail in light of the conclusions they draw from the decision in Medforth v Blake. They point to

the words I have emphasised in the judgment of the Vice Chancellor submit it is clear from this passage that it is at least arguable that a mortgagee owes duties of good faith and a duty to act fairly, whether or not it is in possession. They say that this can be properly regarded as a developing area of law and, all the more so, in light of the discussion in the judgment of Lord Sumption in JSC BTA Bank v Ablyazov and another (No 14) [2018] 2 WLR 1125 at paragraphs [11] to [15] concerning unlawful means.

48. The difficulty for the claimants, as Mr Casey appearing for the defendants points out, is that the decision in Medforth v Blake related to the actions of a receiver in possession. The court concluded that a receiver owes similar duties to the mortgagor when managing the mortgagor's business as when a receiver conducts the sale of mortgaged property. The claimants seek to adapt the general statements made by the Vice Chancellor to a situation in which a bank with security by way of mortgage has not exercised its powers under that security. They have latched onto the words I emphasised in the passage I have cited as a basis for submitting that the duties apply generally. The difficulty for the claimants, however, is that the remarks they rely on were made in the context of a discussion about the equity of redemption. To my mind it is quite impossible to extrapolate from the very specific facts in Medforth v Blake, and the context of the Vice Chancellor's observations, a wide-ranging proposition that will apply to a lender, if it happens to have security by way of mortgage of land but has not exercised, or threatened to exercise, that security. The duties that arise are connected with the security and only indirectly with the lending. Put another way, in this case the security provided by the company was an incident of the facility terms. The claimants' complaint in substance is wholly unrelated to the security.

49. It seems to me there is no basis upon which the claimants' radical proposition about the equitable duties owed by a bank with security has any prospect of success. It has no proper or indeed principled legal (or equitable) foundation and is bound to fail. I do not consider it can be said that there is a developing area of law concerning a decision of the Court of Appeal from nearly 19 years ago without any indication in the intervening period of the principles being taken forward. The claimants do not point to any other case, comment in a textbook or academic article to support this submission. Equally, in this context and more widely in the claimants' case, there is nothing in the judgment of Lord Sumption which disturbs the basic proposition that unlawful conduct, for the purposes of an unlawful means conspiracy, must be unlawful.

Shadow directorship and fiduciary duties

50. It is necessary first, to set out the basis upon which it is said that Mr Sondhi acted as a shadow director, secondly, to set out the duties alleged to have been owed and, thirdly, to set out the breaches that are relied on.

51. At paragraph 30 of the particulars of claim, it is said that Mr Sondhi's role at board meetings went well beyond that of an observer as he gave instructions to the directors that the directors felt obliged to follow. There are nine particulars of Mr Sondhi's actions as a shadow director, which were added as proposed amendments:

"(1) Mr Sondhi demanded to see board meeting agendas in advance and

added items to the said agendas;

(2) Mr Sondhi intervened during board meetings to require information and explanation to his satisfaction with regard to each item;

(3) Mr Sondhi imposed new and onerous contracts of employment on [Mr Standish] and Mr Cullaney as part of the First Restructuring;

(4) In around October 2011, required the instruction of KPMG in lieu of MCR to advise the company as to the terms of a CVA;

(5) In around November 2011, decided, on behalf of the Company, that the Company would engage a turnaround consultant;

(6) In around November 2011, decided, on behalf of the Company, the terms on which a turnaround consultant would be engaged by the Company;

(7) Mr Sondhi insisted, in around December 2011, that the Company appoint a turnaround consultant from a shortlist of three candidates identified by RBS;

(8) In around 2012, Mr Sondhi insisted that the Company appoint Mr Cooper, the turnaround consultant who had been selected, as the chairman of the Company;

(9) In around May 2012, Mr Sondhi instructed Mr Cooper to dismiss [Mr Standish] as managing director of the Company."

52. The defendant's original objection was that the particulars of claim did not provide any details about the basis upon which it was said that Mr Sondhi became a shadow director. That objection has now been removed and, for the purposes of the application, I proceed on the basis that the claimants have a prospect of establishing at a trial that Mr Sondhi (or West Register) was a shadow director.

53. The fiduciary duties that are relied upon by the claimants are set out at paragraph 50 of the particulars of claim:

"(1) A duty to act in the way it/he considers, in good faith, would be most likely to promote the success of the Company for the benefit of its members as a whole.

(2) A duty to avoid a situation in which it/he has an interest that conflicts, or possibly may conflict, with the interest of the Company."

54. The breaches of fiduciary duty are set out at paragraph 51 of the particulars of claim:

"(1) In breach of the duty to promote the success of the Company West Register (acting together with RBS):

(a)
refused reasonable proposals made by the Company which would have allowed it to trade through its difficulties while adequately protecting West Register and RBS's position;

(b)
imposed unnecessarily high rates of interest and additional charges on the Company, which led to a further deterioration in its financial position;

(c)
made excessive demands on management time, which distracted management from taking additional steps to improve the company's position.

(2) In breach of the no conflict duty, West Register (alternatively Mr Sondhi) allowed itself to assume a position where the board were accustomed to acting in accordance with its instructions, in

circumstances where West Register (and Mr Sondhi) was improperly influenced by the Unconscionable Purpose [the defendants' goal of obtaining 80% of the shares of the company].

(3) In breach of both the duty to promote the success of the company and of the no conflict duty, Mr Sondhi, acting as the employee of West Register and/or as the agent of RBS, who are therefore vicariously liable for his actions;

(a) Promoted the Second Restructure;

(b) Refused to agree to alternatives to the Second Restructure."

55. Following the judgment of Newey J (as he then was) in Vivendi SA V Richards [2013] BCC 771, it has become settled law that shadow directors may owe fiduciary duties based upon the analysis at paragraph [142] of his judgment. (In any event, it is right to proceed on that basis for the purposes of the defendants' application). At the outset of that analysis he says he has concluded that shadow directors "… commonly owe fiduciary duties to at least some degree…". At paragraph [143] he addressed the scope of such duties:

"In the end, my own view is that Ultraframe understates the extent to which shadow directors owe fiduciary duties. It seems to me that a shadow director will typically owe such duties in relation at least to the directions or instructions that he gives to the de jure directors. More particularly, I consider that a shadow director will normally owe the duty of good faith … when giving such direction or instructions. The shadow director can, I think, reasonably be expected to act in the company's interests rather than his own separate interests when giving such directions and instructions."

56. Support for the limited scope of a shadow director's fiduciary duties can be found in the earlier decision of David Richards J (as he then was) in McKillen v Misland (Cyprus) Investment Ltd and others [2012 EWHC 521 (Ch)] at 142 at [75].

57. The main difficulty for the claimants in its breach of fiduciary duty claim is that the directions or instructions that are relied upon as making Mr Sondhi and/or West Register a shadow director are unrelated to the breaches of fiduciary duty they have pleaded. No other directions or instructions to the board of directors are relied upon. The defendants submit that, absent such a correlation, this aspect of the claim is bound to fail.

58. Turning to the breaches of fiduciary duty that are relied upon:

(1) The defendants say that the allegations at paragraphs 51(1)(a) and 51(3) (failing to accept reasonable proposals to enable the company to trade through the difficult period and acting in breach of a conflict of interest by promoting the second restructure and by refusing to agree alternatives to it) are defective because the claimants have not identified the alternative proposals which they say the defendants should have accepted. Absent the 'counterfactual', the allegation of breach of duty is empty.

(2) In relation to the same allegations, disregarding the defect the defendants identify, they say they are bound to fail because:

(a) The de jure directors of the company were fully aware of Mr Sondhi's conflict of interest.

(b) No duties were owed in relation to the Second Restructure because it is not alleged that either Mr Sondhi or West Register gave any instructions or directions to the company concerning the Second Restructure. What in fact happened was that Mr Sondhi participated in negotiations with the company

on behalf of West Register of terms that the claimants disliked. There is no claim that the claimants' will was overborne. They accepted the terms pressed on them by West Register. This outcome does not involve a breach of fiduciary duty by Mr Sondhi or West Register as a shadow director.

(c) These allegations expose failings on the part of the board of directors that are in equal measure to the failings alleged against the shadow director.

(3) As to the allegation that, in breach of the duty to promote the best interests of the company, excessive interest was charged, there is no allegation, nor could there be, that the bank had no right to charge the interest it levied.

(4) The allegation that Mr Sondhi behaved in a way that was distracting at board meetings overlooks the time the directors were able to spend outside board meetings improving the fortunes of the company and, in any event, it is fanciful to suggest that such behaviour caused loss.

(5) The allegation that there was a breach of the no conflict rule while thinking of a plan to increase West Register's shareholding misses the point that merely thinking about action that may be a breach of duty is not a breach of duty.

59. The claimants say there is some uncertainty about the extent of the duties that are owed by a shadow director and the duties are not limited merely to the directions and instructions given by the shadow director. They rely on part of the passage from Vivendi I have cited where Newey J says: "… a shadow director will typically owe such duties in relation at least to the directions and instructions that he gives …". To my mind the words I have emphasised do not help the claimants. It is an unsurprising proposition that if West Register is to be liable for breaches of duty, it can only be for breaches of duty that arise from steps taken qua shadow director. It matters not, for example, that Mr Sondhi demanded information at board meetings, or pushed through the appointment of a turnaround consultant. These are not in themselves said to be breaches of duty. They merely evidence why the claimants say Mr Sondhi and/or West Register was a shadow director. The claimants have not made out a case that there is a connection between the shadow directorship and the actions about which they complain that is capable of amounting to a breach of fiduciary duty.

60. The overall difficulty for the claimants is that they agreed to, and the company entered into through its board of de jure directors, the First and Second Restructures of their own free will. Neither the claimants, nor the company, were directed or instructed by Mr Sondhi or West Register to do so.

Conclusions

61. The court is naturally cautious before striking out a claim that has been fully pleaded and where serious allegations are made. As I have already indicated, the test is a demanding one. I am satisfied here that the defendants have established that the claim is bound to fail. The claimants have had an opportunity to revise and improve their claim, but it has not assisted them.

62. I remarked earlier in this judgment that an application to strike out a claim under CPR 3.4(2) does not require the court to consider a back-stop test, unlike CPR 24.2. Nevertheless, the court is asked to exercise a discretion on a strike out application. The court may exercise its discretion to decline to strike out a claim despite being satisfied that the claim is bound to fail where the claim is brought in an area of developing jurisprudence. I need only say that despite the criticisms that have been directed towards the GRG by Promontory, and others, the claimants have neither identified a basis for

their claim under the current law, or a relevant area of developing jurisprudence. I can see no proper basis for declining to strike out the claim.

63. I will make the order sought on the defendants' application and dismiss the claimants' application.

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[1] References in this judgment to the particulars of claim are to the draft amended particulars of claim.

[2] The claimants' case is that West Register came to control 80% of the equity in the company.