Neutral Citation Number: [2024] EWHC 684 (Ch)

Case No: BL-2022-CDF-000019

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

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 26 March 2024

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

- -

Between:

ANDREW EDWARD MCCARTHY	**Claimant**
- and -	
GRAHAM BRIAN PROCTOR	**Defendant**

- -
- -

George McPherson (instructed by **Blake Morgan LLP**) for the **Claimant**
Matthew Parker KC (instructed by **Acuity Law Limited**) for the **Defendant**

Hearing dates: 21 February 2024

- -

Approved Judgment

This judgment was handed down remotely at 10am on 26 March 2024 by circulation to the parties or their representatives by email and by release to the National Archives.

.....

HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Introduction

1. By an order made on 31 July 2023, at a hearing on a without-notice basis, I granted to the claimant permission to serve the claim form in these proceedings on the defendant out of the jurisdiction. By an application notice dated 18 October 2023 the defendant applies for an order setting aside that order and refusing permission to serve out of the jurisdiction or staying the claim on the grounds of *forum non conveniens*. This is my judgment on the defendant's application.

2. The defendant's application was made more than 14 days after he filed his acknowledgment of service, and it included an application for a retrospective extension of time and for relief from the consequences stipulated in CPR r. 11(5). I considered the application for an extension of time at the beginning of the hearing and granted it for reasons explained in an *extempore* judgment.

3. The most relevant facts will be set out below; a summary of the main points will suffice at this stage. The claimant and the defendant are Welsh businessmen. They were formerly business associates, but the relationship between them broke down a few years ago. The present proceedings concern dealings between the parties in respect of a property in Spain ("the Spanish Villa"). The background to the dealings is rather complicated, but the central point is that by an agreement between the parties in May 2016 ("the May 2016 Sale Agreement") the defendant sold or purported to sell the beneficial interest in the Spanish Villa to the claimant for €950,000. The claimant, who had for some years been the legal owner of the Spanish Villa, paid the purchase price to the defendant. In November 2016 the claimant sold the property to a third party. There was no issue or argument between the claimant and the defendant at that stage.

4. However, another former associate of the parties, Mr Allan Jones, then alleged that the claimant's sale of the Spanish Villa to a third party in November 2016 was in breach of an earlier contract between Mr Jones and the claimant, by which Mr Jones had acquired beneficial ownership of the Spanish Villa. Mr Jones brought proceedings in this court against the present claimant ("the Jones Claim"), claiming damages for breach of contract. Underlying Mr Jones' claim was the contention that the present defendant had not had the right or power to sell to the present claimant the beneficial ownership of the Spanish Villa. The present defendant was not a party to the Jones Claim and had no involvement in it; the present claimant did not approach him to be a witness, because their relationship had by that time broken down, and as I understand it no attempt was made to add him to the proceedings as a Part 20 defendant. After a two-day trial of the Jones Claim, His Honour Judge Jarman QC, sitting as a Judge of the High Court, gave judgment for Mr Jones against the present claimant for €1,025,000 for damages for breach of contract: see [2022] EWHC 2186 (Ch). An appeal against that judgment was dismissed by the Court of Appeal: see [2023] EWCA Civ 589.

5. These proceedings were commenced by the issue of a claim form on 26 August 2022, shortly after HHJ Jarman QC gave judgment in the Jones Claim. The claim form alleged three causes of action against the defendant: (1) breach of contract; (2) negligent misstatement; (3) restitution of the price paid under the May 2016 Sale Agreement. At the hearing on 31 July 2023, I refused to permit the claim in breach of contract to proceed, because I was not satisfied that the claimant had a real prospect of success in

relation to that claim: the contract would not have been valid in English law for want of formality and no case had been advanced under the law of any other jurisdiction. (No application has been made for permission to amend to sue on a valid contract under Spanish law.) However, I permitted service out of the jurisdiction of the claims for negligent misstatement and restitution. At that stage, there were no particulars of claim. The claimant served the claim form and particulars of claim on the defendant in Spain on 7 September 2023.

6. Before turning to the detail of the application, I shall summarise the relevant law.

The relevant law

7. In order to obtain permission to serve a claim form out of the jurisdiction pursuant to CPR r. 6.36 a claimant must show (r. 6.37) that

   i. he has a reasonable prospect of success in relation to each claim for which permission is sought,

   ii. he has a good arguable case that the claim falls within a ground (or gateway) in paragraph 3.1 of Practice Direction 6B,

   iii. England and Wales is the proper place to bring the claim.

   These general principles were summarised as follows by Lord Collins of Mapesbury JSC in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, at [71] (citations omitted):

> "On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements … First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success …. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other …. Third, the claimant must satisfy the court that in all the circumstances the [jurisdiction where the case is proceeding] is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

8. For the purposes of this application, the defendant does not dispute that the claimant has a good arguable case that the claims he advances fall within applicable gateways. His application is based on three grounds:

    1) The claim for negligent misstatement has no real prospect of success;

    2) This is not the appropriate jurisdiction in which to bring the claim;

    3) The claimant was in breach of his duty to make full and frank disclosure to the court when he made his without-notice application for permission to serve out of the jurisdiction.

Serious question to be tried

9. As Lord Collins observed in the *Altimo Holdings* case, the test here is the same as that for summary judgment under CPR Part 24. The classic summary of the relevant principles is that of Lewison J in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]; I shall not set it out, though of course I have regard to it. For present purposes, the main points appearing from that and other cases are these. The question is whether the claim has a real, as distinct from a merely fanciful, prospect of success. A case that is merely arguable but carries no conviction will not have a real prospect of success. The court will not conduct a mini trial and, accordingly, where disputed questions of fact arise it will not generally attempt to determine where the probabilities lie. However, the court is not prohibited from carrying out a critical examination of the material, and where it is clear that the factual case is self-contradictory, or inherently incredible, or inconsistent with reliable objective evidence, the court can reject that case. The court will have regard both to the evidence that is currently available and to any further evidence that can reasonably be expected to be available at trial. However, it will not proceed on the basis of mere Micawberism, the chance that something might turn up. If the case turns on a point of law and the court is confident that it has all the necessary evidence and arguments, the court can determine the issue. On the other hand, there will be circumstances when the correct legal position will better be known in the light of a trial than on the basis of the facts as they appear to be on a summary application.

Appropriate forum

10. As for the requirement that the claimant demonstrate that England and Wales is the appropriate forum for the litigation (the *forum conveniens*), the requirement is to show "that England [and Wales] is clearly or distinctly the appropriate forum for determination of the issues in [the] case": *VTB Capital plc v Nutritek International Corpn* [2013] UKSC 5, [2013] 2 AC 337, *per* Lord Mance JSC at [71].

11. In the *Altimo Holdings* case, Lord Collins said at [88]:

> "The principles governing the exercise of discretion set out by Lord Goff of Chieveley in *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460, 475-484, are familiar, and it is only necessary to restate these points: first, in both stay cases and in service out of the jurisdiction cases, the task of the court is to identify the forum in which the case can be suitably tried for the

> interests of all the parties and for the ends of justice; second, in service out of the jurisdiction cases the burden is on the claimant to persuade the court that England … is clearly the appropriate forum; third, where the claim is time-barred in the foreign jurisdiction and the claimant's claim would undoubtedly be defeated if it were brought there, practical justice should be done, so that if the claimant acted reasonably in commencing proceedings in England, and did not act unreasonably in not commencing proceedings in the foreign country, it may not be just to deprive the claimant of the benefit of the English proceedings."

12. In the *Spiliada Maritime* case, Lord Goff of Chieveley said at 480 that the question was "at bottom … to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice." At 480-481 he proceeded to identify three respects in which the position under "service out" applications by (as they now are) claimants differed from that under applications by defendants for a stay on the grounds of forum non conveniens:

> "The first is that … in the [service out] cases the burden of proof rests on the plaintiff, whereas in the forum non conveniens cases that burden rests on the defendant. A second, and more fundamental, point of distinction (from which the first point of distinction in fact flows) is that in the [service out] cases the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service on the defendant outside the jurisdiction. Statutory authority has specified the particular circumstances in which that power may be exercised, but leaves it to the court to decide whether to exercise its discretionary power in a particular case, while providing that leave shall not be granted 'unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction' …
>
> Third, … the jurisdiction exercised under [the service out provisions] may be 'exorbitant'[1]. This has long been the law. In *Société Générale de Paris v. Dreyfus Brothers* (1885) 29 Ch.D. 239, 242-243, Pearson J. said:
>
> > 'it becomes a very serious question ... whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.'

[1] Lord Goff went on to explain that by "exorbitant" was meant that the jurisdiction to permit service out "should be exercised with circumspection in cases where there exists an alternative forum, viz. the courts of the foreign country where the proposed defendant does carry on business, and whose jurisdiction would be recognised under English conflict rules": *per* Lord Diplock in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co.* [1984] AC 50, at 65-66.

> That statement was subsequently approved on many occasions … The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. …"

At 481-482 Lord Goff observed:

> "In addition, the importance to be attached to any particular ground invoked by the plaintiff may vary from case to case. For example, the fact that English law is the putative proper law of the contract may be of very great importance (as in *B.P. Exploration Co. (Libya) Ltd. v. Hunt* [1976] 1 W.L.R. 788, where, in my opinion, Kerr J. rightly granted leave to serve proceedings on the defendant out of the jurisdiction); or it may be of little importance as seen in the context of the whole case. In these circumstances, it is, in my judgment, necessary to include both the residence or place of business of the defendant and the relevant ground invoked by the plaintiff as factors to be considered by the court when deciding whether to exercise its discretion to grant leave; but, in so doing, the court should give to such factors the weight which, in all the circumstances of the case, it considers to be appropriate."

13. In the *VTB Capital* case, at first instance, Arnold J said at [2011] EWHC 3107 (Ch) at [186]:

> "The factors that may be taken into account in determining which is the natural forum for the action include: (a) the personal connections which the parties have to the countries in question; (b) the factual connections which the events relevant to the claim have with those countries; (c) factors affecting convenience or expense such as the location of the witnesses or documents; and (d) the applicable law."

In the Supreme Court, both Lord Mance and Lord Neuberger of Abbotsbury PSC agreed with Arnold J's approach. The Supreme Court confirmed that the governing law was not decisive of the appropriate forum (for example, at [10]) and indeed Lord Mance considered it to be "a factor of very little if any real potency" in that particular case (see [55]). He said at [46]:

> "The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum. Neither of these considerations here applies."

Lord Mance considered that consideration of witnesses was "a factor at the core of the question of appropriate forum": see [62].

14. Lord Collins' remarks in *Altimo Holdings* at [88], quoted above, expressly raise the question of the relevance of a time-bar precluding a claim in a foreign jurisdiction. In this regard I mention two other cases. In *The Pioneer Container* [1994] 2 AC 324, the Judicial Committee of the Privy Council upheld the decision of the Court of Appeal of Hong Kong to stay proceedings that had been brought in Hong Kong despite an exclusive jurisdiction clause that required disputes to be determined in Taiwan. The judge, Sears J, refused the defendants' application for a stay, because the plaintiffs' claims in Taiwan had become time barred, but Lord Goff of Chieveley, delivering the judgment of the Privy Council, considered that the plaintiffs had made a commercial and tactical decision to allow the claims to become time-barred so that they could take advantage of what was for them a preferable jurisdiction; this was unreasonable behaviour and did not justify permitting the claim in Hong Kong to proceed. That decision was an illustration of the statement of principle, expressly relied on by the Privy Council in *The Pioneer Container* and by Lord Collins in the *Altimo Holdings* case, in Lord Goff's speech in the *Spiliada Maritime* case at 483-484:

> "But the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice; and these considerations may lead to a different conclusion in other cases. … Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there. But, in my opinion, this is a case where practical justice should be done. And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for

> example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country."

The current application

15. In *Satfinance Investment Ltd v Athena Art Finance Corpn* [2020] EWHC 3527 (Ch), Morgan J observed:

> "41. It is clearly established that, on an application to set aside the grant of permission to serve out of the jurisdiction, the court decides the issues arising by reference to the position at the time that the permission was originally granted and not by reference to the position at the time the application to set aside is heard. …
>
> 43. In a typical case, the grant of permission to serve out of the jurisdiction will have been granted at an *ex parte* hearing on the basis of the evidence adduced by the claimant alone but when the court considers an application to set aside the original grant of permission, the matter will be considered at an *inter partes* hearing on the basis of evidence adduced by all relevant parties. Nonetheless, the further evidence must be directed at the situation at the date when permission was originally granted: see *Mohammed v Bank of Kuwait* [1994] 1 WLR 1483 at 1492 per Evans LJ and *Microsoft Mobile OY v Sony Europe* [2018] 1 All ER (Comm) 419 at [93] per Marcus Smith J. …"

16. In his submissions to me on behalf of the claimant, Mr McPherson made the point that I granted permission for service out of the jurisdiction after quite a lengthy *ex parte* hearing and gave (quite lengthy) reasons in an *extempore* judgment, and he submitted that the defendant bore "something of a persuasive burden" to show that my decision was wrong. Attractive though such an approach might be, I do not think that it is right. The correct position, in my judgment, is stated in Briggs, *Civil Jurisdiction and Judgments* (7th edition), at para 27.07 (citations omitted):

> "Although the application to dispute the jurisdiction is that of the defendant, the burden of proof lies on the claimant who has to establish, to the appropriate standard, that the jurisdiction of the court is available to him. It could not be correct, for example, that the claimant obtain permission to serve out of the jurisdiction on an application without notice to the intended defendant, and, by doing so, put the defendant, who has not been heard, onto the back foot. The fact that permission was granted to the claimant in the first place is largely irrelevant at this point. It leaves no footprint; no onus is placed upon the defendant who applies to have the permission set aside; the application is in effect a rehearing of an application for permission, with the onus lying on the party who needed the permission in the first place. The court is not inhibited from discharging or varying the order,

> and for which the claimant now in substance (if not in form) reapplies, by reason of the fact that it has already been made."

Full and frank disclosure

17. On a without-notice application for permission to serve out of the jurisdiction, the claimant is under a duty to give full and frank disclosure: that is, to disclose any matters which might reasonably cause the judge to have any doubt whether he should grant permission to serve out of the jurisdiction: *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm), [2004] 1 Lloyd's Rep 731, *per* Toulson J at [29].

18. In *Millhouse Capital UK Ltd v Sibir Energy plc* [2008] EWHC 2614 (Ch), [2009] 1 BCLC 298, where the *ex parte* relief was not permission to serve out of the jurisdiction, Christopher Clarke J referred at [103] to

> "the overriding principle … that the question of whether, in the absence of full and fair disclosure, an order should be set aside and, if so, whether it should be renewed either in the same or in an altered form, is pre-eminently a matter for the court's discretion, to which … the facts (if they be such) that the non-disclosure was innocent and that an injunction or other order could properly have been granted if the relevant facts had been disclosed, are relevant. In exercising that discretion the court, like Janus, looks both backwards and forwards."

He continued:

> "104. The court will look back at what has happened and examine whether, and if so, to what extent, it was not fully informed, and why, in order to decide what sanction to impose in consequence. The obligation of full disclosure, an obligation owed to the court itself, exists in order to secure the integrity of the court's process and to protect the interests of those potentially affected by whatever order the court is invited to make. The court's ability to set its order aside, and to refuse to renew it, is the sanction by which that obligation is enforced and others are deterred from breaking it. Such is the importance of the duty that, in the event of any substantial breach, the court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him. This is particularly so in the case of freezing and seizure orders.
>
> 105. As to the future, the court may well be faced with a situation in which, in the light of all the material to hand after the non-disclosure has become apparent, there remains a case, possibly a strong case, for continuing or re-granting the relief sought. Whilst a strong case can never justify non disclosure, the court will not be blind to the fact that a refusal to continue or renew an order may work a real injustice, which it may wish to avoid.

> 106. As with all discretionary considerations, much depends on the facts. The more serious or culpable the non-disclosure, the more likely the court is to set its order aside and not renew it, however prejudicial the consequences. The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

19. To substantially similar effect, see *per* Sir Geoffrey Vos C in *Punjab National Bank (International) Ltd v Srinivasan* [2019] EWHC 3495 (Ch) at [68]-[70] and the further cases there cited.

The facts

20. In 2004 the defendant and Mr Jones agreed to purchase jointly a property in Dubai. The property ("the Dubai Property") was registered in Mr Jones's sole name and (to simplify somewhat) was held by him on trust for himself and the defendant in equal shares.

21. In 2005 the claimant purchased from the defendant (or one of the defendant's companies) the Spanish Villa (22 Avenida de Mallorca, Bendinat, Spain), with the assistance of a loan from CaixaBank secured by a mortgage.

22. In April 2007 the claimant and the defendant entered (though see the next following paragraph) into a written agreement in respect of the Spanish Villa ("the 2007 Assignment Agreement"). The following features of this agreement may be noted:

- It was written in Spanish. (I refer below to an English translation.)
- It was said to be made in Palma de Mallorca.
- It gave the claimant's address as an address in Cardiff and the defendant's "address for service" as an address in Palma de Mallorca.
- It recorded that the claimant was the owner of the Spanish Villa, that the property was subject to a mortgage for a debt then standing at €700,000, and that the claimant was "interested in assigning the exploitation rights of the property" to the defendant.
- It contained operative clauses to the following effect:
    a) By clause 1, the claimant "assigns and transfers the use and enjoyment of the property" to the defendant, "who accepts the assignment of use, enjoyment and exploitation in his favour" and who from that time onwards would be entitled to let the property and keep the rent.

b) By clause 2, the consideration for this assignment was the assumption by the defendant of all costs related to the property, including utilities, municipal taxes and mortgage payments.

c) By clause 3, delivery of possession would take place upon the signing of the agreement.

d) By clause 4, if the claimant transferred the property to a third party: (i) the amount of the sale price in excess of €700,000 should be divided equally between the claimant and the defendant; (ii) the defendant should be reimbursed from the sale price for all mortgage payments he had made; but (iii) the amount of any rent received by the defendant from letting the property was to be deducted from the amount payable to him.

e) By clause 5, the claimant could terminate the agreement unilaterally, provided he complied with all the payment provisions of clause 4.

f) Clause 7 provided that the agreement should "be governed, interpreted and fulfilled in accordance with Spanish law" and that the parties "expressly submit[ted] to the Courts of Palma de Mallorca, waiving any other jurisdiction which may correspond to them."

23. The effect of the 2007 Assignment Agreement may well be open to argument. It looks, however, as though it was not intended to transfer beneficial ownership as such of the Spanish Villa to the defendant but rather to give him full rights of use, enjoyment and occupation of the property during the continuance of the agreement. It is also right to record that the claimant says that he has no recollection of the 2007 Assignment Agreement. Mr McPherson submitted that there was a serious question as to whether it was a genuine agreement, in circumstances where it was not notarised, there are at present no contemporaneous documents relating to its creation and no metadata, and the first documented reference to it is only in 2016; and he suggested that it might have been created by the Spanish lawyers in 2016 to "square off" what was then being done. At present, this seems to me to be highly speculative.

24. According to the claimant's evidence, on 29 February 2008 he entered into two transactions:

1) He entered into an agreement with Mr Jones ("the 2008 Asset Swap Agreement"), whereby he agreed to transfer to Mr Jones the Spanish Villa and a mooring in exchange for a yacht. The 2008 Asset Swap Agreement was not in writing, and there was no transfer of the legal title to Mr Jones; however, an unexecuted purchase agreement was drawn up for the sale by the claimant to Mr Jones or the Spanish Villa and a mooring for €1,650,000.

2) The claimant executed a Power of Attorney ("the 2008 Power of Attorney"), authorising a Spanish lawyer, Sr Serra, to sell the Spanish Villa and redeem the mortgage.

The defendant was not involved in these transactions, but the evidence filed on his behalf is to the effect that he was told about them by Mr Jones, probably later in 2008.

25. In 2010 Mr Jones wanted to buy a yacht for a price of €8.5 million. In order to pay the price, he would have to raise funds on the security of the Dubai Property. However, the trust on which he held the Dubai Property did not permit him to charge his 50% share. Accordingly, the defendant agreed to sell his own 50% share in the Dubai Property to Mr Jones for a price of €520,748, so that Mr Jones as sole owner could use the Dubai Property as security for the loan he needed to acquire the yacht. However, Mr Jones was not in a position to pay the defendant the €520,748. So they agreed that the sum should constitute an interest-bearing debt owed to the defendant by Mr Jones and be secured on Mr Jones's beneficial interest in the Spanish Villa, an interest that the defendant understood Mr Jones to have acquired under the 2008 Asset Swap Agreement. As the Spanish Villa remained subject to the CaixaBank mortgage, the defendant and Mr Jones further agreed that Mr Jones would continue to make the payments under the mortgage.

26. In 2011 Mr Jones asked the defendant to contribute to the mortgage repayments. In 2014 he asked the defendant to pay the entirety of the mortgage repayments and the other outgoings on the Spanish Villa. The defendant agreed to both requests, on the basis that the payments he made would constitute loans to Mr Jones and would carry interest at the same rate as the unpaid price of €520,748.

27. By 2013 a dispute had arisen between the claimant and Mr Jones. In the course of that dispute, by an email to Mr Serra on 30 August 2013 the claimant purported to revoke the 2008 Power of Attorney. This was a matter of concern to the defendant, who was relying on Mr Jones' rights in the Spanish Villa as security for Mr Jones' debt to him. In the course of 2014, however, the claimant appears to have agreed separately with Mr Jones and with the defendant that a new power of attorney would be executed in order to enable the defendant to sell the Spanish Villa and thereby to protect his security interest in the property.

28. On 18 December 2014 the claimant and the defendant entered into a further written agreement ("the December 2014 Agreement") in respect of the Spanish Villa. The following points may be noted.

- The agreement was in English and was executed by the claimant in Cardiff and by the defendant in Palma de Mallorca.

- It showed the claimant domiciled at an address in Cardiff and the defendant "notification domiciled" at an address in Palma de Mallorca.

- The recitals recorded: that the claimant and Mr Jones had "signed on 29th February 2008 a purchase contract" in respect of the Spanish Villa and the mooring; that the sale of the Spanish Villa "was not recorded in a public deed" but the sale of the mooring was so recorded; that Mr Serra had been granted a power of attorney to sell the Spanish Villa and the mooring; and that the power of attorney had been withdrawn by email.

- By clause 1, the claimant transferred to the defendant "all his rights and obligations" related to the 29th February 2008 purchase contract and agreed or acknowledged that he could not sue the defendant or Mr Jones. (By clause 5 the claimant agreed to abandon his rights of action in respect of that purchase contract.)

- Clause 2 provided that the defendant would pay the claimant €150,000 and would also make all payments in respect of taxes and mortgage concerning the Spanish Villa.

- By clause 3, the claimant accepted that the power of attorney granted to Sr Serra "will be in force and cannot be withdrawal (sic) in the future." (This appears to have been intended to obviate the need for a new power of attorney as had previously been contemplated.)

- By clause 4, the claimant and the defendant agreed that the owner of the Spanish Villa and the mooring was the defendant.

- By clause 6, the claimant authorised the defendant to receive the whole of the purchase price of the Spanish Villa and the mooring, and it was recorded that the defendant "will have the right to distribute the money as he considers."

- By clause 8, the claimant and the defendant agreed to submit any dispute under the December 2014 Agreement to the courts of Palma de Mallorca. (The opening words of the clause—"With express resignation of their own law, if it's different"—might mean that the parties abjured English law in favour of Spanish law. However, I am not certain of this.)

29. The rather complicated interrelationships among the claimant, the defendant and Mr Jones came to a head in early 2016. The claimant wanted to purchase a house in Mallorca; however, for that purpose he needed to obtain discharge from the mortgage on the Spanish Villa, which was still in his name. He told the defendant that he needed the mortgage to be paid off. The defendant in turn sought repayment of Mr Jones' debt, which by then stood at a little over €1 million. Mr Jones was not in a position to pay. Therefore the defendant looked to his security over the Spanish Villa.

30. This brings us to the circumstances leading to the May 2016 Sale Agreement, which are evidenced by a series of emails.

- On 2 May 2016 the claimant sent to the defendant an email in respect of the Spanish Villa. It said in part: "950,000 euros is the amount that I am comfortable to pay you for release of the power of attorney. … I really do feel the offer is fair. If you are mindful to accept I will stay in Palma tomorrow and organise to get completed this week."

- On the same day the defendant forwarded the claimant's email to Mr Jones and wrote: "I need a deal done one way or another[.] As I have cash flow problems in Coil Color I am relying on this money, speak later." On 4 May 2016 the defendant wrote to Mr Jones by email: "This situation has dragged on to[o] long, I need to be paid, if you pay what I am owed 850k€ +- by Friday, if not I will sell to Macarthy (sic) for 950k€, for you to say to me swallow 50k€ is a joke, you have had my money for 8 years without you offering one penny, I am sorry things turned out this way."

- On 6 May 2016 Mr Jones replied: "Why you would want to sell me down the river to McCarthy is beyond me. I have always safeguarded your interests and I would never have done this to you no matter what. I am in for something like

> €1.6m. This was never your house to sell from under me. The POA was put in your name to protect me against McCarthy which in turn was alway (sic) going to protect your interest. McCarthy might be comfortable at €950k but I am not. The deal which we agreed was €1m and nothing less. Over to you."

- The email exchange continued. On 9 May 2016 Mr Jones wrote to the defendant: "My thinking is that everything is up for discussion but it does revolve around my retaining the equity in no. 22." On 14 May 2016 the defendant replied: "One minute you say sell to Macarthy, now you want to retain the equity. The property has passed to Mac for 950k€."

31. The claimant's case about the May 2016 Sale Agreement appears in paragraphs 27 to 29 of the particulars of claim. Paragraph 27 relies on the claimant's email of 2 May 2016 as an offer. Paragraph 28 avers:

> "By no later than 18 May 2016, the Defendant accepted the 2 May 2016 Offer Email orally and/or by his conduct thereby giving rise to an agreement between the Claimant and the Defendant on the terms of the 2 May 2016 Offer Email set out at paragraph 27 above (the 'May 2016 Sale Agreement'). Pursuant to the laws of Spain, the May 2016 Sale Agreement was binding as between the Claimant and the Defendant. …"

Paragraph 29 sets out the conduct relied on, including the emails in May 2016 referred to above.

32. The claimant and the defendant then made a written agreement dated 25 May 2016 ("the 25 May 2016 Agreement").

- The agreement was made in Palma de Mallorca (it was signed in Sr Serra's office) and was in Spanish; again, I refer to the English translation.

- The claimant's address was shown as the Spanish Villa. The defendant's address for service was an address in Palma de Mallorca.

- The recitals recorded: that the parties had entered into the 2007 Assignment Agreement; that the claimant was interested in terminating that agreement; and that the market value of the Spanish Villa was €950,000.

- The operative parts of the 2016 Sale Agreement provided that the claimant must within three months pay to the defendant €950,000 to terminate the 2007 Assignment Agreement

33. According to the claimant, on or about 2 June 2016 he and the defendant spoke jointly to Mr Jones by telephone while they were in a restaurant in Palma de Mallorca and told him that the €950,000 to be paid under the May 2016 Sale Agreement would be applied in partial discharge of the debt owed by Mr Jones to the defendant. The defendant says that he does not recall such a telephone call and doubts that it occurred, but he says that he had already made clear to both the claimant and Mr Jones that the sum would be applied in that manner.

34. On 30 August 2016 the claimant paid the €950,000 to the defendant. There has been some issue as to the mechanics of the payment. The sterling equivalent was paid out of the claimant's account with the Cardiff branch of Allied Irish Bank. On behalf of the defendant, it was formerly suggested that the payment was actually made to the claimant's own account with CaixaBank, from which a payment in euros was then made to the defendant. However, the claimant's position is that there was simply a conversion of currencies. Mr Parker rightly did not suggest that much turned on this dispute. Anyway, the latest evidence appears to show that the payment to the defendant was made from the claimant's account with Allied Irish Bank; I understand this to have been accepted ultimately by the defendant's solicitor

35. As I have mentioned, in November 2016 the claimant sold the Spanish Villa to a third party.

36. The trial in the Jones Claim proceeded on the basis of limited useful documentation and only three witnesses who gave oral evidence: Mr Jones, the present claimant and one other, rather peripheral witness. A number of persons who might reasonably be thought to have been able to give relevant evidence were not called. The trial also proceeded, as did the subsequent appeal, on the assumption that the law of England and Wales applied, a fact that Lewison LJ at [3] regarded as rather unsatisfactory. On the basis of that assumption, it was common ground that the effect of what I have called the 2008 Asset Swap Agreement was that the present claimant retained the legal ownership of the Spanish Villa but Mr Jones obtained the beneficial interest. In a nutshell, HHJ Jarman QC held that the present claimant was in breach of the 2008 Asset Swap Agreement in that (i) in 2013 he revoked Sr Serra's power of attorney, (ii) in 2014 he reinstated the power of attorney in favour of the present defendant rather than Mr Jones, and (iii) in 2016 he sold the Spanish Villa to a third party. On the question of damages, the judge held that no deduction fell to be made in respect of diminution of the amount of Mr Jones's debt to the present defendant, because (a) Mr Jones did not consent to the sale of the Spanish Villa to the present claimant, (b) the amount of the debt was unresolved as between Mr Jones and the present defendant, and, impliedly, (c) Mr Jones had not agreed to the application of the sum of €950,000 to the discharge of his debt. As to liability, the Court of Appeal held that HHJ Jarman QC had been entitled to make the findings of fact that he did make. As to quantum, it agreed with his approach. To the argument that the present defendant had a security interest in the Spanish Villa and, as Mr Jones acknowledged that he owed *some* money to him, he was entitled to sell the Spanish Villa and apply the proceeds of sale in or towards discharge of the debt, Lewison LJ replied:

> "56.The fundamental flaw in the argument is that Mr Proctor did not have a security interest in the villa. Since the appeal fails both on agreement and estoppel, the question of quantum must be approached on the basis Mr Proctor was a stranger to the villa. Thus, in paying him Mr McCarthy falls foul of the basic principle that if A owes money to B, an unauthorised payment to B by C does not discharge A's debt unless A subsequently ratifies the payment, or C is compelled to pay."

37. The findings and decisions in the Jones Claim do not, of course, bind the present defendant.

Negligent misrepresentation: a real prospect of success?

38. The brief details of claim in the claim form averred:

> "[T]he Defendant represented to the Claimant orally and/or by his conduct that (1) the Defendant beneficially owned the Villa and (2) the payment of €950,000 would be applied by the Defendant in diminution of a debt owed by a third party (Mr Allan Jones) to the Defendant ('the Jones Debt'), and the parties contracted on that basis."

39. In the course of oral submissions on 31 July 2023, Mr McPherson observed that this formulation of the second representation was a statement as to what would happen in the future rather than a statement of an existing fact and that the representation would more aptly be framed as a representation that the defendant had a security interest in the Spanish Villa and was entitled to sell the property to the claimant. The note taken by the claimant's solicitors records that I observed that, on that basis, the first and second representations were strictly alternatives and that what they amounted to was a representation that the defendant (whether as owner or as the holder of a security interest) had the power to transfer beneficial ownership in consideration of payment of €950,000; and that Mr McPherson confirmed that my understanding was correct.

40. The particulars of claim set out the following case:

- By his acceptance of the offer made by the claimant on 2 May 2016, the defendant impliedly made the following representations (I paraphrase): (i) that he had the power to give the claimant quiet possession of the Spanish Villa; (ii) that he was authorised and/or entitled as holder of a security interest to transfer Mr Jones' ownership of the Spanish Villa for €950,000 that would be applied in discharge of Mr Jones' debt to the defendant; (iii) that he believed in good faith that he was so empowered, authorised and/or entitled ("the Good Faith Representation"). (Paragraphs 31 and 38)

- By telling Mr Jones and the claimant, in the telephone conversation on 2 June 2016, that the sum of €950,000 received under the May 2016 Sale Agreement would be applied against Mr Jones' debt to him, the defendant impliedly repeated the foregoing representations. (Paragraphs 32 and 38)

- The defendant impliedly repeated the foregoing representations, and confirmed that they remained true at the date of the claimant's payment of the €950,000, by his conduct in reviewing the claimant's Defence in the Jones Claim and not contesting the truth of the claimant's case in those proceedings. (Paragraphs 36, 37 and 38)

- The defendant owed a duty to the claimant to exercise reasonable care to ensure that the representations were true and accurate; further or alternatively, the defendant warranted the truth of the representations; further or alternatively, the defendant assumed responsibility to the claimant for the truth of the representations. (Paragraphs 40 and 41)

- The findings and decision in the Jones Claim show that the representations were false. (Paragraph 42)

- The defendant failed to exercise reasonable care and skill in making the representations. (Paragraph 43)

- The claimant reasonably relied on the representations and suffered loss as a consequence. (Paragraphs 44, 45 and 46)

41. For the defendant, Mr Parker KC submitted that the representations alleged in the particulars of claim go beyond those for which I gave permission to serve out of the jurisdiction and that I ought to proceed on the basis that the only relevant representation was that the defendant had the power to transfer the beneficial ownership in the Spanish Villa in consideration of the payment of €950,000. For the claimant, Mr McPherson submitted that the formulation in the particulars of claim was the appropriate matter to be considered, though he admitted that the Good Faith Representation was not canvassed at the hearing on 31 July 2023. Subject to the Good Faith Representation, in the circumstances of this particular case I do not think that one ought to be too exercised by the different formulations of the representations. The representations are said to be implied by conduct and, on the pleading as it stands, they boil down to the single representation identified by Mr Parker. (The representation in respect of what I have, for brevity and convenience, paraphrased as quiet enjoyment seems to me to be, in present circumstances, only a way of unpacking beneficial ownership.) The Good Faith Representation is rather different. At present it is relied on as a negligent misrepresentation; the particulars of falsity are relied on as indicating negligence. However, it is in the nature of the representation, being a representation as to a state of mind, that falsity implies deceit. It is one thing to allege that a person held a belief without having reasonable grounds for it; it is another to allege that he purported to hold a belief in good faith but did not do so. The former is an allegation of negligence, the latter of deceit. There is no claim in deceit.

42. The second submission made by Mr Parker was that the circumstances of the making of the implied representations as alleged in the particulars of claim differed from those as alleged in the claim form. I do not agree. Paragraph 2 of the brief details of claim in the claim form, as set out above, does not set out the words or conduct said to constitute or imply the representations. The matters relied on in that regard are set out in the particulars of claim. Mr Parker submitted that the representations were "inextricably linked" to the agreement between the parties, which was differently identified in the claim form and the particulars of claim. However, the real point is that the representations were inextricably linked to the payment of €950,000. The further point made by Mr Parker, that the matters relied on in support of the implication of the representations show that the applicable law of tort is Spanish law, will be considered below.

43. Mr Parker's further submissions went to the substance of the case on negligent misrepresentation. He submitted that the claimant had no real prospect of success on this head of claim, for three basic reasons:

    1) The claimant has no real prospect of establishing that the defendant made any implied representation as to his rights in relation to the Spanish Villa in May 2016, because by clause 4 of the December 2014 Agreement the claimant and

the defendant had already *agreed* that the defendant was the owner of the Spanish Villa.

2) The claimant has no real prospect of establishing that he relied on any representation in May 2016 as to the defendant's entitlement to sell the Spanish Villa, because his own evidence is that he already believed that the defendant had that entitlement.

3) The claimant has no real prospect of establishing that the defendant owed him any duty of care in relation to the alleged representations. Two reasons were given for this submission: first, that there was no basis for finding a voluntary assumption of responsibility by the defendant; second, that the existence of a contract, namely the May 2016 Sale Agreement, precluded the implication of a representation. The latter argument, as developed in submissions, seems to me to go to the question of implication rather than duty, and I shall consider it in that context.

44. As regards the implication of representations and reasonable reliance on them, Mr Parker pointed in particular to passages in the claimant's first witness statement, dated 6 December 2023, where he addresses the omission of any mention of the December 2014 Agreement from his original application for permission to serve out of the jurisdiction. Among those passages are the following:

> "17. First, so far as I was concerned, the purpose of the December 2014 Agreement was to settle Mr Jones' liability to me for breaches of the asset swap agreement I had entered into with him in February 2008 … The immediate factual context … was that:
>
> …
>
> 17.3. At the time of revoking the power of attorney in August 2013, I understood that the beneficial interest in the Spanish villa 'was with Mr Proctor and not Allan Jones by this stage' (paragraph 35 of my first witness statement in the Jones Claim). That is because I understood that Mr Jones' beneficial interest had already been conveyed to Mr Proctor, as security for the debt owed by Mr Jones to Mr Proctor, pursuant to an agreement between Mr Jones and Mr Proctor (the 'Jones/Proctor Agreement').
>
> …
>
> 18. Second: I did not regard one of the effects of the December 2014 Agreement as having been to convey beneficial ownership of the Spanish villa from me to Mr Proctor. As stated above, my understanding at the time of the December 2014 Agreement was that Mr Proctor was already the beneficial owner of the Spanish villa or held a security interest over it … However, I was not a party to the agreement between Mr Jones and Mr Proctor, whereby it was agreed that Mr Proctor should acquire a security

interest in the villa for a debt owed to him by Mr Jones, as set out in paragraphs 15 and 16 of the Jones Claim Defence. As I explained in my evidence in the Jones Claim, I only learned about the agreement from Mr Proctor in 2010 or 2011 and I believed that he was the beneficial owner of the villa from this point. It was not therefore necessary for the December 2014 Agreement to transfer ownership of the Spanish villa from me to Mr Proctor, and I did not believe that it had that effect.

19. Third: it is true that clause 4 of the December 2014 Agreement provides as follows: 'Both parties agree that the owner of the house and the mooring stated in declaration I is Mr. BRIAN PROCTOR'. As to this provision:

> 19.1. I cannot recall why this was agreed. However, as regards the ownership of the Spanish villa, I believe it was probably intended to (and did) reflect our common understanding of the legal effect of the dealings between Mr Proctor, Mr Jones and myself in relation to the Spanish villa, up to that point. This was that Mr Proctor already had the right to exercise rights of ownership in relation to the Spanish villa, in order to enforce the security granted to him by Mr Jones, pursuant to the Jones/Proctor Agreement.
>
> 19.2. Apart from the Jones/Proctor Agreement, which I knew about from Mr Proctor at this time, the reason I believed Mr Proctor had these rights was because Mr Toni de Serra had indicated as much in an email dated 4 September 2013. Mr Serra was a Spanish attorney who acted for myself and Mr Proctor from time to time, and who prepared the December 2014 agreement for our signature.
>
> 19.3. Mr Serra sent me this email shortly after I had instructed him, on 30 August 2013, to cancel the power of attorney which he held in relation to the villa, and which had been executed in February 2008 at the time of the February 2008 ASA (the 'February 2008 POA'), so that Mr Jones could give Mr Serra instructions to sell the villa.
> …
>
> 19.4. In the 30 August 2013 email, I referred to Mr Proctor's 'interest' in the Spanish villa. In the 4 September 2013 email, Mr Serra confirmed that the villa had been 'sold' by Mr Jones to Mr Proctor. Therefore, when Mr Proctor came to sell the Spanish villa back to me in May 2016, I understood that he had that right based on the Jones/Proctor Agreement, as confirmed by (1) the 30 August 2013 email and (2) what Mr Serra had told me in the 4 September 2013 email, and not on anything in the

> December 2014 Agreement which post-dated these emails and the Jones/Proctor Agreement."

45. These evidential matters do not persuade me that it would be correct to dispose of the claim in negligent misrepresentation summarily on the grounds that the claimant had no real prospect of establishing the implication of the representations relied on. It is by no means clear to me that the parties' prior expression of a common understanding precludes a finding that the party purporting to transfer an interest in property represented that he had a right or power to do so. In *Mellor v Partridge* [2013] EWCA Civ 477, Lewison LJ, with whose judgment McCombe LJ and Sir Stephen Sedley agreed, said at [17]: "What the court must consider is what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context. These are fact sensitive questions which, in my judgment, can only be fairly determined at trial." Of course, that was said in the context of a particular case; there may well be cases where the allegation of implication is unsupportable and capable of summary dismissal. However, in my view Lewison LJ's dictum is in point in this case.

46. Mr Parker's weightier argument, in my view, is his second one. The May 2016 Sale Agreement was a simple agreement to sell the beneficial interest in the Spanish Villa to the claimant. If the defendant was able to and did transfer the beneficial interest to the claimant, no issue would arise. If he was not able to and did not transfer the beneficial interest, he would be in breach of contract. As he contracted to transfer the beneficial interest, there is neither need nor room to find an implied representation that he could do so. Mr Parker did not refer, though he might have done, to what I take to be the general principle that a contractual warranty does not imply a representation of ability to perform: see Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (6th edition, 2022), at paras 3-47 and 8-02, citing the decision of Mann J in *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch) at [200]-[211], which was followed by Mr Andrew Baker QC in *Idemitsu Kosan Co Ltd v Sumitomo Corp* [2016] EWHC 1909 (Comm) at [14]-[23], and my own *dictum* in *Wiggin Osborne Fullerlove (a firm) v Bond* [2021] EWHC 1381 (Comm) at [112].

47. In response, Mr McPherson submitted that "[a] person who offers a chattel for sale or lets a property impliedly represents that he has title to sell" (skeleton argument, paragraph 82). The sole authority cited to me for that proposition was the decision of the Court of Appeal in *Advanced Industrial Technology Corpn Ltd v Bond Street Jewellers Ltd* [2006] EWCA Civ 923. In that case, a necklace was pawned to the claimant but not by or with the authority of the owner. The pawning was effected by the second defendant, who was the sole director of the first defendant, but there were issues of fact as to which defendant was the pawnor and as to whether the second defendant expressly told the claimant that neither he nor the first defendant had title to the necklace. The judge at first instance refused summary judgment on the grounds that (i) as a matter of law the pawnor gives an implied warranty of title, (ii) the implied warranty arises only if the pawnor has said nothing as to title, which was in issue in the case, (iii) the implied warranty binds only the pawnor, whose identity was also in issue in the case, and (iv) the warranty implied by law was quite distinct from any representation, which would be a matter of fact involving a positive assertion. Reversing the judge's decision, the Court of Appeal accepted the submission that the implied warranty of title imposed a duty on the pawnor or the pawnor's agent to disclose

lack of title and that silence amounted to a representation that the pawnor had title. Therefore, as it was incredible that the second defendant had told the claimant that he and the first defendant had no title, he was liable in deceit. The actual decision in the case is readily understandable and may well be justified by the facts, in which the second defendant was either the pawnor (in which case he warranted title) or the agent of the pawnor (in which case he was not privy to the pawnor's warranty but can be taken to have impliedly represented that he had the owner's authority). The basic reasoning seems to me to be less persuasive in a case where only the purported owner is involved. I cannot see that a purported owner's implied warranty of title necessitates any duty to disclose lack of title. As the silent purported owner has warranted title, he is bound by his warranty regardless of his actual lack of title. A duty to disclose lack of title is only required if there is an implied *representation* of title, which is the very thing in issue; so that the argument presupposes the answer to the question. Thus neither the actual decision in the *Advanced Industrial Technology* case nor (in my view) sound reasoning supports the proposition for which Mr McPherson cited that case. I note that the discussion of fraud or misrepresentation by a seller of goods in *Benjamin's Sale of Goods* (12th edition, 2024), at para 4-021, appears to proceed on the basis that misrepresentation by a seller without title is restricted to the case of actual misrepresentation and does not extend to mere non-disclosure.

48. Nevertheless, I am of the view that no summary determination of the issue of implication is appropriate in this case. First, the issues touched on in the preceding paragraph were not argued before me in any detail; I accept that further argument might shed additional light on them. Second, this case is a step removed from the simple case of warranties in a written contract or, indeed, the kind of facts involved in the *Advanced Industrial Technology* case. Here, the agreement is said to have been made by means of an offer by the claimant by email and an acceptance by the defendant "orally and/or by his conduct" in circumstances set out in paragraphs 28 and 29 of the particulars of claim. It must be said that the current particulars do more to evidence that there had been an acceptance than to identify how precisely it was effected. The point, however, is that the very manner of the creation of the contract invites and even necessitates an enquiry into the basis on which it was made. The matter can only be considered in the light of scrutiny of the circumstances in which the agreement came to be made and the interaction between the two protagonists. This is far different from what is involved in asking whether (for example) a contractual warranty that business accounts are accurate involves or implies a representation that they are accurate. Third, one of the alleged representations (namely, the one on 2 June 2016) post-dates the May 2016 Sale Agreement and thus concerns the fact of payment rather than merely the terms of the agreement.

49. As regards reliance, the evidence both from the December 2014 Agreement and from the claimant's witness statement is clearly weighty evidence against him. In particular, the express agreement as to ownership in the December 2014 Agreement and the express statement in paragraph 19.4 of the witness statement that the claimant gained his understanding not from the December 2014 Agreement but from prior matters are in obvious tension with the claimant's claim to have relied on a yet later—and merely implied—representation. However, the requirement of reliance is not a requirement that the representation be the sole cause of the claimant's conduct. It is notoriously difficult to assess the relative weight of different factors in motivating conduct. What is required is only that the representation be an operative cause of the claimant's

conduct, whatever other causes might also have been operative. If the defendant's conduct implied a representation as to his right or power to deal with the Spanish Villa (as to which, see above), it is in my view inappropriate to disregard it summarily as an operative cause. The matter is one to be considered on the evidence at trial.

50. As regards the duty of care, I have considered one strand of Mr Parker's argument in connection with the implication of representations. Beyond that, Mr Parker submitted that there was no proper basis for any finding that the defendant assumed responsibility towards the claimant for any implied statements relied on. The relevant legal framework of his submission was in the familiar line of authorities including *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 and *Commissioners of Customs & Excise v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181. In this regard, Mr Parker relied on the contractual context and on the evidential matters referred to above. However, it seems to me that the question of duty of care is best dealt with at trial, if for other reasons there is to be a trial, where the relevant facts can be examined in more detail and a more informed view can be taken as to whether a duty of care arose. I observe, more generally, that, if a case is otherwise to proceed to a full trial that will involve examination of relevant evidence, it is not necessarily an attractive or even sensible course to "pick off" parts of a case relating to the same or connected matters before trial. See, for example, *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1, *per* Lord Hope of Craighead at 264; and *TFL Management Services Ltd v Lloyds TSB Bank plc* [2013] EWCA Civ 1415, [2014] 1 WLR 2006, where Floyd LJ set out the principles in the *EasyAir* case and said at [27]:

> "I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: see Potter LJ in *Partco v Wragg* [2002] EWCA Civ 594; [2002] 2 Lloyds Rep 343 at 27(3) and cases there cited. Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; see *Partco* at 28(7). Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy: see for example *Hudson and others and HM Treasury and another* [2003] EWCA Civ 1612."

51. I note, further, that Mr Parker's submission that the claim in negligent misstatement had no real prospect of success was made on the basis of the law of England and Wales, praying in aid three decisions of the House of Lords. However, his arguments on appropriate jurisdiction included the submission that "the proper law of the claimant's claim in negligent misstatement, if he has one, is Spanish law" (skeleton argument, para

47). I was not addressed on Spanish law in the context of the prospect of success of that claim.

52. For the foregoing reasons, I reject the submission that the claim in negligent misstatement has no real prospect of success and should on that ground not be permitted to proceed.

Appropriate Jurisdiction

53. The relevant law has been set out in paragraphs 10 to 16 above.

54. For the defendant, Mr Parker KC submitted that the claimant had not discharged the burden of showing that England and Wales was clearly the most appropriate forum for the proceedings; to the contrary, the appropriate forum was clearly Spain. In summary, and with reference in particular to the various factors mentioned by Arnold J in the *VTB Capital* case, he submitted:

a) The claims arose out of a Spanish transaction, namely the May 2016 Sale Agreement. That agreement was made in Spain. It concerned a property in Spain, namely the Spanish Villa. The price was payable and paid in Spanish currency, namely euros. The price was paid into the defendant's bank account with a Spanish bank in Spain. Any breach of contract took place in Spain. The May 2016 Sale Agreement is governed by Spanish law.

b) The law applicable to the claim in negligent misstatement is Spanish law because either (i) the damage, namely the failure to receive the beneficial interest in the Spanish Villa, occurred in Spain or, if the loss is said to have been suffered in England and Wales, (ii) the tort is manifestly more closely connected with Spain (Rome II, Art 4(3)).

c) The law applicable to the claim for restitution is Spanish law because either (i) the claim concerns and is closely connected with a relationship arising out of contract and/or tort that is governed by Spanish law or (ii) the unjust enrichment took place in Spain by means of the receipt of €950,000 into the defendant's Spanish bank account (Rome II, Art 10(1), (3)).

d) The parties have a long history of dealings with each other in Spain. The main facts are set out above. The claimant purchased the Spanish Villa from the defendant with the assistance of finance provided by a Spanish bank. Prior agreements between them had expressly been made subject to Spanish law (the 2007 Assignment Agreement) or to the exclusive jurisdiction of the Spanish courts (the December 2014 Agreement).

e) The 2008 Asset Swap Agreement between the claimant and Mr Jones was governed by Spanish law (as accepted by the claimant and found by HHJ Jarman QC in the Jones Claim).

f) The defendant, though domiciled in the United Arab Emirates, resides much of the time in Spain and has done for many years, having first acquired a house

there in 1988. His 17-year-old son lives in Mallorca and has always done so. His other two children, who live in the UK, are in late middle age (the implication, as I understood it, being that as such they are less of an attraction).

g) The defendant does not reside at all in England and Wales. He has been registered by HMRC as a non-UK-resident since 2005. During the last six years, he has typically spent less than five days each year in the UK. He "does not personally" own any assets in the UK (witness statement dated 18 October 2023 of his solicitor, Hugh Hitchcock, para 53: the wording is noted). He has no extant business interests in the UK.

h) The claimant too has close connections with Spain. At the time of his original acquisition of the Spanish Villa he was often in Mallorca. Thereafter, on his own account, that property became his second home and he would spend roughly four weeks a year there, as well as other weekends. He looked into buying another property in Spain. He had a personal bank account with CaixaBank in Spain.

i) The convenient location for a trial is Spain. The defendant is now aged 81 years and (it is said) it would be difficult for him to attend a trial in Wales. It is likely that Spanish lawyers, notably Sr Serra, would give evidence. There are no extant proceedings involving the parties in England and Wales: the Jones Claim has ended, and other proceedings between the claimant and the defendant have been settled.

55. For the claimant, Mr McPherson submitted to the following effect.

a) The long history relied on by the defendant is largely no more than background; it does not bear directly on the claim and has little if any weight in identifying the appropriate forum.

b) Although it is true that the claimant's present claims against the defendant arise in connection with the May 2016 Sale Agreement, they relate directly not to that agreement but to the payment of €950,000 euros. Further, the claims arise also in connection with the findings and decision of this court in the Jones Claim.

c) The applicable law for the claim in negligent misstatement is that of England and Wales, as being the place where the damage occurred. (It is said that the damage is either the payment away of the money from the claimant's bank account in Wales or the liability incurred to Mr Jones by reason of the decision of this court in the Jones Claim.)

d) The defendant's claim that it is inconvenient to him to litigate in this country is merely tactical. In December 2021 a company apparently controlled in part by the defendant brought proceedings against the claimant in the Insolvency and Companies List in London. In February 2022 the defendant issued a claim in this court against the claimant. On both occasions the solicitors instructed were those currently acting for the defendant in these proceedings[2]. Further, both in

[2] In fact, there were several sets of proceedings. The details are set out in the first witness statement of the claimant's solicitor, Mr Lee Fisher, dated 22 December 2022. I do not think it necessary to burden this judgment with the precise details.

December 2017 and again in January 2023 he has expressly or by implication intimated an intention or willingness to sue Mr Jones in this jurisdiction, and in his efforts on those occasions to recover payment from Mr Jones he has used solicitors based in Wales. His complaint that travel to Wales and staying here for the duration of any trial is belied by the fact that he continues to divide his time between Dubai and Mallorca.

e) The so-called *Cambridgeshire* factor weighs in favour of permitting proceedings to continue in this country: that is, the familiarity of English and Welsh lawyers, on both sides, with the background of and issues in the case is likely to make the conduct of the proceedings more efficient and proportionate in this jurisdiction than elsewhere.

f) The evidential requirements of the litigation tend to point in favour of a trial in this country. There are formal documents in Spanish, but they can easily be translated. The courts of England and Wales are well used to receiving and analysing evidence of foreign law. While it is possible (though by no means certain) that some evidence from Spanish lawyers will be received in respect of the facts of the case, the central evidence will be that of the claimant and the defendant (and, perhaps, Mr Jones: see below); their communications, both written and oral, were conducted in colloquial English and they will more easily be assessed, and their nuances picked up, by judges in this country than those of another jurisdiction.

g) In proceedings brought by the claimant against the defendant, it is likely that the defendant will seek to join Mr Jones in order to protect his own position in the event that he should lose.

h) The claimant is domiciled in the UK and lives and carries on business in Cardiff. He has only weak connections with Spain.

i) The defendant is not and has never been domiciled in Spain. (Some documents refer to him as being "notification-domiciled" at an address there, but this appears to be no more than the provision of an address for service at his lawyers' offices.) He carried on business in the UK until fairly recently, and in the London proceedings mentioned above the present claimant was alleged to have been in breach of his duties as a director of a UK company in which the present defendant was the beneficial owner of 42% of the shares.

j) There is a risk that a claim in Spain would be time-barred. The evidence of the claimant's solicitor, Mr Lee Fisher, is to the effect that the primary limitation period in Spain expired before the judgment in the Jones Claim was handed down on 17 August 2022. He states that there is "scope for arguing" that the relevant (5-year) limitation period in Spain ought to run from the date when the claimant first became aware that he had a cause of action against the defendant, namely upon hand-down of the judgment in the Jones Claim. He states: "In the circumstances, I understand there is a risk (though by no means a certainty) that, if the claimant brings the claims described above against the defendant in Spain, those claims will be statute-barred."

56. I have formed the view that England and Wales is the appropriate forum for the determination of the dispute raised in this litigation, having regard to the matters raised by the parties and to the following matters in particular.

1) Both parties are British and remain UK subjects. This is true of the defendant as of the claimant. It is relevant to bear in mind that this case does not engage the exercise of an "exorbitant" jurisdiction "to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country" (see paragraph 12 above).

2) Neither party is domiciled in Spain. The claimant lives in Wales. The defendant is domiciled in the United Arab Emirates, albeit that he spends a significant amount of time in Spain.

3) Both parties are native speakers of English. I have no evidence that either of them is fluent in Spanish, though I can readily infer that each has at least some Spanish and that the defendant is likely to be reasonably proficient in it.

4) Evidentially, the case has in my view much closer connection with this jurisdiction than with Spain. The critical evidential matters are likely to concern the interactions of the claimant, the defendant and Mr Jones. All of these took place in English and most of them in conversation. Assessment of nuance is likely to be more satisfactorily conducted in a court sharing the same language and idiom as the protagonists. There is quite likely to be evidence from one Spanish witness, Sr Serra, but it is unlikely that the same considerations will apply to that evidence. The evidence of what was said to and by Spanish lawyers is likely to have a more formal character than the evidence of the interactions of the Welsh protagonists. Documents in Spanish can easily be translated and, if necessary, their significance explained.

5) Similarly, the convenience of witnesses weighs in favour of a trial in this jurisdiction. The claimant lives in Cardiff. So does another potential witness, whom I have not so far mentioned, Mr Andrew Mallett. (I simply do not know how likely he is to give evidence.) Mr Jones resides in Dubai, but the fact that his claim against the present claimant was brought in this court and not in Spain indicates to me the probability that, if (as I should think likely) he becomes involved as a witness or even a party, he will find this jurisdiction convenient. I accept that Sr Serra would find Spain a more convenient venue; however, I think that any evidence he might give would be relatively short, and it might even be given by video link.

6) As for the defendant, I simply do not accept the protestations on his behalf that it would be inconvenient for him to litigate in Wales. A Welshman who is happy to divide his time between Dubai and Mallorca cannot credibly say (at least, this one has not credibly said) that he is an old man who would find it burdensome to be in Wales for the purposes of litigation. This is the more the case in view of the defendant's willingness to litigate here when it suits him to do so.

7) The matter of the applicable law would tend to favour Spanish jurisdiction but is not, in my view, compelling. The applicable law of restitution seems to me to be more probably the law of Spain than that of England and Wales. The

applicable law of tort is less clear; I tend to think that it is the law of this country as being that of the place where the damage (payment away of the money for nothing) was suffered; the point, however, is arguable, and counsel agreed that I was not called on to determine it. As I have noted, however, the defendant's contention that there was no reasonable cause of action in tort was advanced on the basis of the law of England and Wales. I accept that evidence will probably be required in respect of Spanish law regarding both property and contract; the courts of this jurisdiction are, however, used to receiving evidence of foreign law, and there is nothing before me to indicate that the relevant law will be controversial.

8) The so-called *Cambridgeshire* factor has substantial weight in this case. Both parties have Welsh solicitors and London counsel, all of whom are already very familiar with the issues in the case.

9) The question of limitation has some relevance, in my view. This is not a case where it can simply be said that the claim would be time-barred in Spain. If it were, the point would be of great significance, as there would be no good reason to think that the claimant had allowed time to expire for tactical reasons (that is, as a form of forum-shopping). However, the evidence for the claimant is that there is a real risk that a claim in Spain would be time-barred and the evidence for the defendant has neither accepted nor denied that contention. Therefore, while it cannot be said that the claim could be determined only in this jurisdiction, I proceed on the basis that if it is not determined here there is a risk that it will not receive any determination on the merits.

10) I come back to the fundamental principle, which is that the court must make an evaluative judgment to "identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice": the *Spiliada Maritime* case at 480. In my judgment, the most suitable forum is clearly England and Wales.

Full and frank disclosure

57. The relevant law has been set out in paragraphs 17 to 19 above.

58. For the defendant, Mr Parker submitted that the presentation of the claimant's application for permission to serve out of the jurisdiction failed to make full and frank disclosure in two respects:

1) The claimant failed to bring to the court's attention, whether by evidence or submissions, the 2007 Assignment Agreement, the December 2014 Agreement or the 25 May 2016 Agreement, although each of those agreements was relevant both to the issues in the claim and, in particular, to the question of the appropriate forum.

2) The claimant failed to give satisfactory evidence about the payment of €950,000. One aspect of this complaint relates to the mechanism of payment; as I have said, Mr Parker rightly did not seek to make much of this. The other

> aspect, however, concerns the fact that the claimant's evidence did not make clear that the claimant had two personal bank accounts with CaixaBank; this connection with Spain was material to the question of appropriate forum.

59. I do not regard the second of these matters as having any relevance. The point about the mechanism of payment has fallen away. The fact that the claimant had bank accounts with a Spanish bank seems to me, in the context of this case, to register on the scales barely if at all when it comes to identifying the appropriate forum. I do not regard it as something that might reasonably cause a judge to have any doubt whether he should grant permission to serve out of the jurisdiction.

60. As for the previous agreements, Mr Parker focused on the December 2014 Agreement as being not merely part of the relevant background but of obvious significance because: (a) it stated that the defendant was "domiciled" in Spain, which was plainly relevant and would have saved me from the misapprehension of saying in my earlier judgment that neither party was resident in Spain; (b) it recorded that the defendant was the owner of the Spanish Villa, which was directly relevant to the question whether there was a serious issue to be tried on misrepresentation; and (c) it provided that it was subject to Spanish law and the jurisdiction of the Spanish courts, which was highly material to the question of the appropriate forum for the present case. Mr Parker submitted that, as the December 2014 Agreement had featured prominently in the Jones Claim and was mentioned in the particulars of claim served shortly after the without-notice hearing in these proceedings, and as it had obvious relevance to the question of service out of the jurisdiction, it is a proper inference that the failure of the claimant to refer to it in his evidence and of counsel to refer to it in his skeleton argument and oral submissions was deliberate.

61. In my view: (1) the failure to refer to the December 2014 Agreement (and *a fortiori* the other agreements) was not a breach of the duty to make full and frank disclosure; and (2) even if I considered it to be such it would not be a matter that should lead me to set aside the earlier order for service out of the jurisdiction. I do not think that there was anything in the agreement that should reasonably cause a judge to doubt whether permission for service out of the jurisdiction ought to be granted. The document does not state that the defendant was either resident or domiciled in Spain; it gives what I understand to be an address for service, namely his Spanish lawyer. The record of the defendant's ownership of the Spanish Villa may or may not be material when it comes to an argument at trial about the making of and reliance on a misrepresentation, but it does not seem to me to have a bearing on the question whether there is a serious issue to be tried on that claim. The provision regarding exclusive jurisdiction of the Spanish courts was not, of course, repeated in the May 2016 Sale Agreement. I do not consider that it was a matter requiring disclosure. I also bear in mind that, as Christopher Clarke J observed in the *Millhouse Capital* case, retrospect makes it easier to spot what requires disclosure. If I thought that there had been non-disclosure in the present case, I should have regarded the question as arguable either way and should have accepted (as I do) that those acting for the claimant took an honest and arguable view about the extent of what was required to be disclosed. The suggestion that there was a deliberate failure to make full and frank disclosure seems to me necessarily to imply, in this case, that the deliberate failure was that of the claimant's legal representatives. I have seen nothing to justify any such inference. Even if one were disposed to disagree with the view they

took, one would in my view have no sufficient basis for supposing that they took their view in anything other than good faith.

62. Accordingly, I shall neither set aside the order for service out of the jurisdiction already made nor refuse to permit such service on the grounds of a failure to make full and frank disclosure.

Conclusion

63. For the reasons set out above:

1) I reject the defendant's contention that the claimant shows no reasonable grounds for bringing the claim in tort.

2) I reject the defendant's contention that permission to serve out of the jurisdiction should be refused by reason of a failure to make full and frank disclosure.

3) I confirm the permission to serve out of the jurisdiction.

64. For the reasons indicated in paragraph 41 above, I invite the parties' consideration of what is to be done about the Good Faith Representation.

65. This judgment will be handed down remotely, by email, in the absence of the parties. I shall be glad if the parties will seek to agree suitable terms of order. If there are outstanding matters that require my further decision, will counsel please let me have their proposals for how best to proceed.