

Polyline Development Ltd v Ching Lin Chuen

Date of Judgment: 22 February 2023

Court of Appeal

CA

Civil Appeal No 139 of 2021

CACV 139/2021

Citations: [2023] HKCA 235  
[2023] HKEC 618

Presiding Judges: Kwan V-P, Yuen and Chow JJA

Phrases: Civil procedure - striking-out - appeal against order striking out claim - allowed in part

Counsel in the Case: Mr Horace Wong SC and Mr Michael Lok, instructed by Chung's Lawyers, for the 1st, 7th - 12th, 14th - 16th and 18th defendants  
Mr Barrie Barlow SC, instructed by William K W Leung & Co, for the plaintiff

Cases cited in the judgment: Asgain Co Ltd v Cheng Ka Yan (No 2) [2018] 2 HKLRD 641  
Prime Sight Ltd v Lavarello [2014] AC 436

JUDGMENT:

Yuen JA:

1. This is the plaintiff's appeal from the Judgment of Recorder Manzoni SC given on 3 March 2021 ("the Judgment")<sup>1</sup> striking out its statement of claim against its former director the 1st defendant ("D1"), his wife the 7th defendant, his son the 8th defendant, the 9th - 11th defendants, Polyline International Group Ltd a company in which the plaintiff had no interests but which was controlled by D1 ("D12"), 14th - 16th and 18th defendants (collectively "the WG defendants"), and dismissing the action against them with costs.

The plaintiff

2.1. The plaintiff was a developer of ding houses<sup>2</sup> in the New Territories.

2.2. It paid the entire purchase price<sup>3</sup> for numerous pieces of land spread over three demarcation districts. Apparently, some of the land ended up being developed, and some not. For present purposes, we will refer to the land (whether or not developed) as "properties".

2.3. The plaintiff was wound up on 25 June 2003 on a creditor's petition. Provisional Liquidators were appointed the same day.

2.4. On 18 September 2007, the Provisional Liquidators were appointed as joint and several liquidators.

2.5. On 31 December 2008, the liquidators applied to the court for release. On 1 December 2011, the

court ordered their release.

2.6. It was not until 19 March 2015 that the liquidators were re-appointed by the court.

#### The proceedings

3.1. On 8 November 2019, the court gave leave to the liquidators to commence this action, and on 16 December 2019, the writ was issued.

3.2. On 6 August 2020, Defences were filed by D1 and by D12.

3.3. On 21 August 2020, the WG defendants filed a summons for an order: (a) to strike out the claim on all the Order 18 rule 19 grounds and for abuse of process; alternatively, (b) for the plaintiff to furnish security for costs.

3.4. On 27 October 2020, the plaintiff filed a summons to amend the statement of claim as per the attached draft ("ASOC").

3.5. On 16-17 February 2021, the Recorder heard the strike out application by reference to the ASOC, giving a 70-page judgment on 3 March 2021.

3.6. The plaintiff filed a Notice of Appeal on 31 March 2021. The WG defendants filed a Respondent's Notice on 21 April 2021.

#### The ASOC

4. The following were pleaded in the ASOC:

- (1) The plaintiff was a developer of ding houses.
- (2) D1 was at the material times a director of the plaintiff, and also directly or indirectly controlled some other corporate defendants including D12.
- (3) § 18A pleaded "9 Steps of Ding House Development", referring to the key steps that a developer would usually take for development ("the usual steps").
- (4) Essentially, the developer would acquire lands, find dings willing to divest themselves of their entitlements for payments secured by various documents executed by the dings, apply to the authorities purportedly on the dings' behalf for building concessions, build the houses, and upon obtaining certificates of compliance from the authorities, sell the houses or let them out.
- (5) § 18B pleaded "9 Steps of [the plaintiff's] Ding House Development", with each "Step" given a number ("the plaintiff's steps").
- (6)(a) The main difference between the usual steps in § 18A and the plaintiff's steps in § 18B was the interposition of the plaintiff's special purpose vehicles ("SPVs"), whose names were listed in § 18B(2). Pausing here, it is important to note that D12 (and the other corporate defendants) were not in the list of SPVs.
- (b) Having pleaded in § 18B(1) that the plaintiff would first acquire land for development, it pleaded in § 18B(2):

"[The plaintiff] would designate special purpose vehicles ("SPVs") for them to be exclusively responsible for developing ding houses within a particular village.

#### PARTICULARS of SPVs

- (i) Wai Hang Cheong Company Limited;
- (ii) Linker Hong Kong Limited; and
- (iii) Newpoly Hong Kong Limited.

[The plaintiff] might then transfer part of the lands to its designated SPV for ding houses development in that particular village, leaving the remaining part of the lands in that particular village to be developed by [the plaintiff] itself. Thus, [the plaintiff] would transfer lands in different villages to different SPVs for ding houses developments in those different villages. At the same time, [the plaintiff's] SPVs held all the lands transferred by [the plaintiff] to them on trust for [the plaintiff] ("Step 2")."

- (c) The plaintiff then pleaded in § 18B(3):

"[The plaintiff] would sub-divide the relevant lands into individual lots capable of ding houses construction, and/or change the zoning of the relevant pieces of agricultural land so acquired from agricultural use to residential use (" Step 3 ").

(sub-paragraphs (1) - (3) hereinabove broadly corresponded to steps 1 and 2 in the 9 Steps of Ding House Development referred to in paragraph 18A hereinabove)".

(7) Then, it was pleaded in § 18B(9):

"If a ding house or land was (to be) sold, [the plaintiff] or its SPV would arrange for the sale proceeds to be paid either to [the plaintiff] direct, or via the relevant SPV (or its servants or agents).

If a ding house or land was not sold, its (legal) title would either be reverted back from the ding to, or be retained by the ding pending further instructions from, [the plaintiff] or its SPV (" Step 9 ")."

(8) The plaintiff purchased a number of pieces of land, listed in Schedules 1, 2 and 3.

(9) Subsequently, on:

- 29 September 1992, the plaintiff assigned the Schedule 2 lots to some individuals <sup>4</sup>;
- 30 May 2001, the plaintiff assigned the Schedule 1 and Schedule 3 lots to D12, which (as mentioned earlier) was a company controlled by D1, but in which the plaintiff had no interest and which was not one of the plaintiff's SPVs <sup>5</sup>.

(10) Thereafter, D12 transferred the Schedule 1 and Schedule 3 lots to other defendants, also not related to the plaintiff <sup>6</sup>.

(11) No consideration was given by D12 or anyone else to the plaintiff for the properties assigned to it, even though the plaintiff acknowledged receipt of purchase prices in the receipt clauses in the assignments; alternatively, the sales were at gross undervalue.

(12) Based on the above, the plaintiff claimed that (of the WG defendants):

- D12-18 held the properties on resulting trust for it, as it had received no consideration, or grossly undervalued consideration;
- further, the WG defendants had been unjustly enriched, or had conspired to cause the plaintiff to make those transfers, and so they hold the properties on constructive trust for it;
- in causing those transfers, D1 as a director of the plaintiff, acted in breach of fiduciary duty;
- the transactions were sham;
- the plaintiff was thus entitled to an account;
- there was an unlawful means conspiracy between (among others) D1 and D12-D16;
- there was an intent to defraud the plaintiff's creditors; and
- D1-D11 were guilty of dishonest assistance and knowing receipt.

5.1. Further, the plaintiff pleaded that its liquidators, despite exercising all reasonable diligence, did not discover the fraud alleged in the ASOC, by reason of the defendants' fraud or deliberate concealment, until 16 November 2016 which was within 6 years before the action was brought in December 2019.

5.2. The plaintiff pleaded (among other things) that on 5 June 2013, a Miss Lam, whose company Pegasus View Investment Ltd had sued D1, made a complaint which caused the liquidators to apply for re-appointment, after which they undertook further investigations.

### The Recorder' s Judgment

6. The Recorder helpfully set out his Judgment in sections as follows:

A.	Introduction	( § § 1- 9)
B.	Principles applicable to strike out applications	( § § 10 - 20)
C.	The Statement of Claim	
C1	The Parties	( § § 21 - 25)
C2	The Fiduciary Duties	( § § 26 - 27)
C3	The Business Model	( § § 28 - 30)
C4	The Transactions	( § 31)
C5	Resulting Trust	( § 32)

C6	Constructive Trust	( § § 33 - 35)
C7	Breach of Fiduciary Duty	( § 36)
C8	Sham Transactions	( § 37)
C9	Claim for an Account	( § § 38 - 39)
C10	Unlawful Means Conspiracy	( § § 40 - 43)
C11	Intent to Defraud Creditors	( § 44)
C12	Dishonest Assistance and Knowing Receipt	( § 45)
C13	Limitation	( § 46)
D.	No Reasonable Cause of Action	( § 47)
D1	Pleading Fraud	( § § 48 - 66)
D2	Overall Comments	( § § 67 - 78)
D3	Resulting Trust	( § § 79 - 88)
D4	Constructive Trust	( § § 89 - 94)
D5	Breach of Fiduciary Duty	( § § 95 - 99)
D6	Sham Transactions	( § § 100 - 105)
D7	Claim for an Account	( § 106)
D8	Unlawful Means Conspiracy	( § § 107 - 110)
D9	Intention to Defraud Creditors	( § § 111 - 114)
D10	Dishonest Assistance and Knowing Receipt	( § § 115 - 120)
D11	Summary of Reasonable Cause of Action	( § 121)
E.	The Case is mere Conjecture	( § § 122 - 130)
F.	Limitation	( § § 131 - 133)
F1	Primary Limitation Periods	( § § 134 - 138)
F2	The Extended Limitation Periods	( § § 139 - 162)
G.	Laches	( § § 163 - 168)
H.	Conclusions and The Way Forward	( § § 169 - 176).

7. The Judgment may be summarized as follows.

8.1. The Recorder held that apart from the Resulting Trust claim against D12<sup>7</sup>, all the claims in the ASOC were demurrable<sup>8</sup> for the reason set out in Section D2 at § § 67 - 78, in short, that the assignments of properties to D12, even if for no consideration, were not inconsistent with the plaintiff's business model, and so the plaintiff's directors could not have been in breach of fiduciary duty (" the Demurrability point ").

8.2. The plaintiff's business model had been narrated by the Recorder in Section C3 as follows (" the plaintiff's Business Model "):

28. "Paragraphs 18A and 18B of the statement of claim set out 9 steps which the plaintiff would take to develop Ding Houses, which effectively sets out the business model of the plaintiff.

29. ... the steps to be taken include land acquisition, the assignment of the land to which would then transfer the land to a Ding for no, or a nominal, consideration. There was then the creation of the necessary trusts and other documents from the Dings to ensure that , applications for the necessary licences including the necessary (albeit false) declarations by the Dings as to legal and beneficial ownership, then construction of the house, and ultimately lease or sale.

30. The . If the Ding House was not sold, it is said that at some unspecified point in time (and in some unspecified manner) the property would be transferred back to the plaintiff". (Emphasis added).

9. Coming back to the claims, in relation to the claim for Resulting Trust, the Recorder held:

- in Section D3, that the plaintiff had pleaded a reasonable cause of action for a resulting

trust of the properties in D12's hands if no consideration was paid ( § § 82 - 84 and 86), but not if there was inadequate consideration ( § 85);

- in Section E, that even if no consideration was paid, the receipt clause in each assignment created a contractual estoppel such that the plaintiff could not contend against D12 that there was a passing of the properties for no consideration, and so the Resulting Trust claim was bound to fail ( § § 126 - 128). Although the Recorder accepted that the plaintiff may well be correct in its argument that such an estoppel cannot apply to prevent a claim by a company against a director in breach of fiduciary duty or against any accessories to that breach, he held it did not assist the plaintiff here because of his decision on the Demurrability point ( § 129) (" the Contractual Estoppel point ").

10. As for the claim for Constructive Trust, the Recorder held:

- in Section D4, that following his decision on the Demurrability point, there would be no unconscionability basis for a constructive trust ( § 90);  
- as for the conspiracy basis for a constructive trust, no detail of the alleged conspiracy had been pleaded <sup>9</sup> ( § 93).

11. As for the claim for Breach of Fiduciary Duty, the Recorder held:

- in Section D5, that given the plea in § 19(5) ASOC that the assignments were pursuant to the Business Model, the plea that they were in breach of fiduciary duty was demurrable ( § 96).

12. As for the claim for Sham Transactions, we do not need to summarize the Recorder's finding in relation to it as Mr Barlow SC for the plaintiff said he does not intend to pursue it.

13. As for the claim for an Account, the Recorder held in Section D7 that it followed from the other causes of action ( § 106). In other words, following his decision on the Demurrability point, there could be no claim for an account.

14.1. As for the claim for Unlawful Means Conspiracy, the Recorder held in Section D8 that although the means were pleaded, the claim should be struck out as there was no pleading of the conspiratorial agreement, when it was reached, between whom or how, and no indication of the nature of the agreement ( § 108).

14.2. We note that the Recorder did not refer to the Demurrability point in his decision to strike out this claim.

15. As for the claim for Intention to Defraud Creditors, we do not need to summarize the Recorder's finding in relation to it as Mr Barlow said he does not intend to pursue this claim either.

16. As for the claim for Dishonest Assistance and Knowing Receipt, the Recorder held in Section D10 that following his decision on the Demurrability point, there was no breach of fiduciary duty which is a necessary element of each of these causes of action ( § § 115 - 117).

17. As a result of the above, the Recorder struck out the claim in its entirety, but nevertheless set out his conclusions on the WG defendants' limitation and laches arguments in case he was subsequently shown to be wrong in his analysis leading to the strike-out.

18.1. As for limitation, the Recorder held in Section F1 that the primary limitation period had expired ( § § 134 - 138).

18.2. However, he held in Section F2 that:

- it was at least arguable that s.26(1)(a) Limitation Ordinance cap 347-10 was capable of being activated in respect of all causes of action ( § § 143 - 148);  
- it was arguable that the liquidators could not with reasonable diligence have discovered the fraud of the defendants before the primary limitation period ( § § 149 - 162).

## Discussion

The "no fair hearing" submission

19.1. Mr Barlow's first submission before us was that the WG defendants' arguments before the

Recorder did not include the argument underlying the Demurrability point, and the plaintiff was not given a hearing on the argument and not given an opportunity to proffer curative amendments.

19.2. Mr Barlow first referred to the section of the WG defendants' skeleton submissions before the Recorder entitled "Overview of WG defendants' Grounds of Striking Out", and pointed out that there was no submission based on the Demurrability point as such.

19.3. Whilst that may be so, we note that the WG defendants' summons sought a strike-out on all the Order 18 r. 19 grounds, including Order 18 rule 19(1)(a), i.e. the pleading did not disclose a reasonable cause of action. We note that that ground was expressly referred to in the WG defendants' skeleton submissions, and thus had clearly not been abandoned <sup>11</sup>.

20.1. Mr Barlow also complained that the Recorder did not indicate to him at the hearing that additional argument was required, or that of his own volition the Recorder was considering not allowing the ASOC on the basis that it still did not disclose a reasonable cause of action.

20.2. We note, however, that the plaintiff's stand at the hearing was recorded in the Judgment as follows (§ 172):

"On the basis that the plaintiff has chosen to stand or fall on the statement of claim as produced to me [the ASOC], I do not look to the possibility of further amendments being forthcoming".

21. That being the case, we do not accept the "no fair hearing" submission.

#### The Demurrability point

22. Essentially, the Recorder held that the claims <sup>12</sup> were demurrable as he considered that the plaintiff's assignments of properties to D12 for no consideration was in accordance with the plaintiff's Business Model (§ § 67 - 78).

23.1. In this regard, we note first that the plaintiff's Business Model pleaded (§ 18B) at Step 2 that:

"... [The plaintiff] might transfer parts of the lands to its designated SPV for ding houses development in that particular village, leaving the remaining part of the lands in that particular village to be developed by the plaintiff itself ...".

23.2. It is clear from that pleading that the options for development of individual properties were either (1) by an SPV, or (2) by the plaintiff itself. The plaintiff's Business Model did not allow for the participation of a third party which was neither the plaintiff's SPV nor the plaintiff. As D12 was not the plaintiff's SPV, the assignments to it could not be in accordance with the plaintiff's express Business Model.

24.1. At § 69, the Recorder said that "the business model itself anticipates that the properties will pass to at least 2 persons other than the plaintiff for no or no adequate consideration".

24.2. However, the passing of properties for no or no adequate consideration in the course of the steps within the plaintiff's Business Model is not to the point. As pleaded in § 18B(9), the transfer of properties by the plaintiff to an SPV, for that SPV to develop some ding houses in a specific village, would result in the plaintiff (through its control of the SPV) retaining control of the properties and their eventual proceeds of sale. There is no such control if the properties are assigned to a non-SPV such as D12 in which the plaintiff had no interests.

24.3. Mr Horace Wong SC <sup>13</sup> representing the WG defendants, submitted that it was not pleaded that the SPVs were subsidiaries of the plaintiff. That is correct, but the pleadings in the ASOC of "the plaintiff's SPVs" throughout § 18B (reproduced in § 4(6)(b) above) have sufficiently indicated that under the plaintiff's Business Model, the plaintiff had (even if not de jure) some de facto control over its SPVs.

25.1. Mr Wong also submitted that the Recorder was indeed aware that the plaintiff's Business Model consisted of transfers of the properties to an SPV, but considered that it was irrelevant that D12 was not a SPV.

25.2. First, we note that the Recorder did not express the view that the interposition of the plaintiff's SPVs at Step 2 was an irrelevant or superfluous step in the plaintiff's Business Model. As discussed above, Step 2 was part of a protocol established by the plaintiff that allowed the plaintiff to retain control over the properties and proceeds of sale, and it would be surprising if a view was expressed at a strike-out on the basis of demurrability that the pleaded protocol should or could be ignored.

25.3. On the contrary, the Recorder said that the transfer of properties out of the ownership of the plaintiff "was done expressly pursuant to the plaintiff's own business model " and thus cannot be said to have been done in breach of fiduciary duty, whether it was done for nil consideration or not ( § 77).

25.4. As discussed above, the assignments of properties to a non-SPV such as D12 was not pursuant to the plaintiff's Business Model. However, it would appear that § 77 developed from § 71(2) of the Judgment, where the Recorder said:

(2) "Those transfers [from the plaintiff to D12] are pleaded as having been made with an intent to complete Step 3 of the plaintiff's business model [footnote 21 cites § 19(5) ASOC]. Hence, on the pleaded facts, those transfers cannot be said to have been made in breach of fiduciary duty".

25.5. It must first be acknowledged that the Recorder had the most unenviable task of grappling with a very poorly pleaded ASOC <sup>14</sup>.

25.6. Paragraph 19(5) ASOC had indeed pleaded:

(5) "Thereafter, Polyline [the plaintiff] transferred and/or assigned the Schedules 1 and 3 Lots to the 12th defendant and the Schedule 2 Lots to various individual dings with an intent to complete Step 3".

However, when one examines the definition of Step 3 in § 18B, viz:

"Polyline [the plaintiff] would sub-divide the relevant lands into individual lots capable of ding houses construction, and/or change the zoning of the relevant pieces of agricultural land so acquired from agricultural use to residential use (" Step 3 ")",

it is clear that the assignments of properties from the plaintiff to D12 could not have anything to do with "completing Step 3" as such assignments have nothing to do with sub-division of lots and change of zoning, which are official matters of boundary drawing and land use.

25.7 As mentioned earlier, the SPVs within the plaintiff's Business Model had been named in § 18B(2) in Step 2. Therefore, the words "with an intent to complete Step 3 " cannot be construed to mean that D12 was intended to be an SPV, as SPVs were pleaded in Step 2, not Step 3.

26.1. Mr Wong also sought to argue that § 19(5) ASOC should be construed as including the words "in the course of its business as a Developer, in implementing the 9 steps of Ding Houses Development".

26.2. That argument is rejected as that is taking those words out of context. What was pleaded in § 19 was that "in the course of its business as a Developer, on various dates from 1992 to 2000, in implementing the 9 steps of Ding Houses Development, Polyline [the plaintiff] purchased the following [followed by properties listed in (1), (2) and (3)]". Quite apart from the italicized words that Mr Wong has omitted, the assignments from the plaintiff to D12 was in 2001, which was outside the time frame 1992 to 2000 pleaded above.

27.1. Further, Mr Wong argued that as the properties would ultimately have to be put into the name of a ding, whether the assignment to the ding went through an SPV or not does not matter, as the assignments to D12 were "part and parcel and facilitative of Step 3, and served to satisfy and fulfil the 'business model'". He referred to some other parts of the ASOC (not referred to by the Recorder) such as § 19.51(8) - 19.52(5).

27.2. We have discussed above how the assignments from the plaintiff to D12 would not have anything to do with Step 3. We have also discussed above how control of the properties and proceeds of sale are controlled by the plaintiff through its SPVs. As such, contrary to Mr Wong's

arguments, it did matter when the properties left the plaintiff's control whether they were assigned to a non-SPV such as D12.

28. For the reasons set out above, we do not agree, with respect, with the Recorder's Demurrability point.

#### The Contractual Estoppel point

29.1. The Recorder held at § § 83 - 85 that a reasonable cause of action based on a resulting trust was adequately pleaded if no consideration was paid by D12 to the plaintiff, but not if the allegation was only that inadequate consideration was paid. Mr Barlow has not sought to challenge that holding.

29.2. However, the Recorder went on to hold that even if no consideration was paid, the receipt clause in each assignment created a contractual estoppel such that the plaintiff could not contend against D12 that there was a passing of the properties for no consideration, and so the Resulting Trust claim was bound to fail ( § § 126 - 128).

29.3. Even though the Recorder accepted that the plaintiff may well be correct in its argument that such an estoppel cannot apply to prevent a claim by a company against a director in breach of fiduciary duty or against any accessories to that breach, he held it did not assist the plaintiff here because of his decision on the Demurrability point ( § 129).

30. For the reasons discussed above, we do not agree with the Demurrability point.

31.1. However, Mr Wong also argued that insofar as the plaintiff and D12 are concerned, "there is nothing to suggest that the assignments ... (containing the receipt clauses) were not subsisting contracts between them that could ground a contractual estoppel, which could be raised even if the parties knew that the agreed statement is not true".

31.2. In our view, it is not necessary in a pleading of a resulting trust claim for the claimant to pre-empt a possible estoppel point that the defendant might raise in defence, and no authority has been advanced suggesting otherwise.

31.3. Quite apart from that, it is at least arguable that the rationale of "party autonomy" <sup>15</sup> underlying contractual estoppel may not apply where one party was caused to enter into the contract by a director in breach of fiduciary duty and the other party was a company controlled by that very director. As noted in our Judgment on security for costs ([2022] HKCA 787), it is by no means clear that a court in Hong Kong <sup>16</sup> would follow *Prime Sight Ltd v Lavarello* [2014] AC 436 <sup>17</sup>. It is not necessary or desirable for us to say anything more at this stage of the proceedings.

32. For the above reasons, the Resulting Trust claim should not have been struck out on the Contractual Estoppel point.

#### The claim for Unlawful Means Conspiracy

33.1. As mentioned above, the Demurrability point was the foundation of the Recorder's rejection of all the other claims, except for the claim for Unlawful Means Conspiracy.

33.2. The Recorder held as a stand-alone point in Section D8 that although the means were pleaded for that claim, the claim should be struck out as there was no pleading of the conspiratorial agreement, when it was reached, between whom or how, and no indication of the nature of the agreement ( § 108). Mr Barlow did not seriously challenge this holding. Nor was he able to point to any passage in the Replacement ASOC <sup>18</sup> that sought to cure the defective pleading.

33.3. Accordingly, the Recorder was clearly correct to strike out this claim.

#### The Constructive Trust claim

34. The same reasoning applies to that part of the constructive trust claim that was based on conspiracy (as the Recorder correctly held at § § 91 - 93).

35.1. However, Mr Wong also raised in the Respondent's Notice that there was insufficient pleading



of unconscionability and unjust enrichment for the Constructive Trust claim.

35.2. The Recorder rejected this part of the claim only on the Demurrability point (§ 90) with which, as discussed above, we do not agree. The Recorder did not otherwise accept the WG defendants' arguments that unconscionability and unjust enrichment had not been sufficiently pleaded.

36. We would agree with the Recorder that when the ASOC is taken as a whole, it is clear that the case advanced is that D12 and the relevant defendants have been unjustly enriched by obtaining the properties without consideration, and it would be unconscionable for them to retain the properties or the fruits of those assignments.

#### Other extant claims

37. As for the other extant claims <sup>19</sup>, the WG defendants also sought by way of Respondent's Notice to revive arguments which the Recorder had rejected.

38.1. Mr Wong argued that the Recorder should have struck out the fraud claim in any event on the ground of want of particulars which are "consistent only with dishonesty".

38.2. The Recorder discussed the pleading of fraud at § § 48 - 65 and decided that "at the interlocutory stage, when the court is considering whether the plea of fraud or dishonesty is a proper one, or whether to strike it out on the basis of it disclosing no reasonable cause of action, the court is concerned only with whether facts are pleaded which would justify the plea of fraud" (§ 63).

38.3. We respectfully agree that the strike-out stage is not the time to explore subtle nuances of the language used to see if a pleaded fact would sufficiently justify an inference of dishonesty or not. The plaintiff's case is sufficiently clear on the pleading. Insofar as the WG defendants' argument is an objection based on the lack of particulars, it would appear that they had not sought further and better particulars of the plea of fraud before making the application to strike out.

#### Limitation and Laches

39. Finally, the WG defendants raised by way of Respondent's Notice that the Recorder was wrong to have rejected their arguments on limitation and laches.

40. As mentioned earlier, the Recorder accepted that the primary limitation period had passed but held that:

- it was at least arguable that s.26(1)(a) Limitation Ordinance was capable of being activated in respect of all causes of action (§ § 143 - 148);
- it was arguable that the liquidators could not with reasonable diligence have discovered the fraud of the defendants before the primary limitation period (§ § 149 - 162).

41. Mr Wong argued that the Recorder erred in law in fixing upon the lack of evidence as to the actual timing of discovery of the fraud, disregarding the question when the plaintiff could with reasonable diligence have discovered it (which Mr Wong termed "objective timing").

42.1. When the Judgment is read in context, it is clear in our view that the Recorder was well aware of the law regarding objective timing. Thus at § 149, the Recorder held:

"But in addition, it has to be arguable that the plaintiff could not, with reasonable diligence have discovered the fraud of the relevant defendant. In paragraph 85 of their skeleton, the WG defendants set out 8 sub-paragraphs as to why the plaintiff could, with reasonable diligence, have discovered the fraud more than 6 years prior to 16 December 2019". (Emphasis added).

Again, at § 152, the Recorder said:

"In response the Liquidators, both in the statement of claim and in the affidavits of Mr William Leung dispute what Mr Arab <sup>20</sup> says, and dispute what the WG defendants say they knew, and what Mr Arab says they ought to have known had they acted with reasonable diligence . . . ." (emphasis added).

Again, at § 157, the Recorder said:

".. I cannot resolve disputes on affidavit, and I cannot take the voluminous expert evidence as to what a reasonable liquidator ought to have done, and ought to have known, as being manifestly and immediately destructive of the plaintiff's plea of ignorance. …" (emphasis added).

42.2. The Recorder was thus well aware that the focus of the law was the objective timing, and thus there is no error of law which would justify an appellate court interfering with his exercise of discretion.

43.1. Although the WG defendants did not in their Respondent's Notice rely on the "plainly wrong" ground to challenge the Recorder's exercise of discretion, Mr Wong nevertheless argued this ground before us by reference to the same materials.

43.2. We do not think the failure to include the "plainly wrong" ground in the Respondent's Notice is merely a technicality, but in any event, we do not think that the Recorder was plainly wrong in refusing to strike out on the limitation ground. Whether or not there was a direction for expert evidence to be adduced at the strike-out, he had nevertheless considered Mr Arab's opinion. Although the Recorder did say he could not "pinpoint" an "indisputable" moment when time started to run (§ 157), that was in the context of the arguments presented before him that time started to run when the liquidators sent two letters to the Official Receivers' Office in August and September 2007 asking for the plaintiff's directors to be prosecuted, or "at some point thereafter". The question was, of course, whether that point "thereafter" came before or after the limitation period expired.

43.3. The Recorder said (§ 160 - 161):

160. "I do not think that the letters in 2007 demonstrate an actual discovery of the fraud. What the letters demonstrate is suspicion. But on the basis that I am proceeding on, that is not enough. The letters may allow one to say that the liquidators could, with reasonable diligence have discovered the fraud, but it is disputed that they could have discovered the fraud until 16 November 2016, and I cannot determine that dispute on a strike out application.

161. Consequently having read everything that has been said in the statement of claim and in the evidence, and being mindful of the very limited scope that I have to strike out a statement of claim in respect of which there are disputes on material facts, I do not believe that this is a case in which I can strike out the statement of claim on this basis. I must take any disputes as being resolved in favour of the plaintiff, and I should not in any event strike out a claim, the legal viability of which is factually dependent". (Emphasis added).

43.4. The Recorder was of course entitled to take into account the fact that the liquidators had to reconstitute the company's knowledge in respect of many properties and numerous transactions, and the difficulties presented when (among other things);

- D1 had resigned as a director shortly before the petition was presented, and was replaced by PRC residents without an address in Hong Kong,
- no statement of affairs was filed,
- both the auditors and the former directors said they did not possess any documents of the company,
- public documents (eg assignments registered in the Land Office) were unreliable, if not misleading, in stating that funds had been received when they had not, and
- the plaintiff was insolvent (on the plaintiff's case, having been rendered so by the conduct of the defendants).

43.5. Accordingly, even if the WG defendants had included the "plainly wrong" argument in the Respondent's Notice, we would not disturb the Recorder's exercise of his discretion on this ground.

44. As for laches, this is an equitable defence. Given the allegations of breach of fiduciary duty, it is clear that the Recorder could not have struck out the claims on this ground.

Order

45.1. For the above reasons, we would allow the plaintiff's appeal and set aside the Recorder's order striking out the statement of claim save in respect of the claim for Unlawful Means Conspiracy and

that part of the Constructive Trust claim based on conspiracy (the plaintiff having abandoned its claims on Sham Transactions and Intent to Defraud Creditors <sup>1</sup>).

45.2. In the Notice of Appeal, the plaintiff sought an order that the plaintiff be permitted to amend the statement of claim either in the form of the ASOC or in the form of the Replacement ASOC which seeks to clarify the ASOC. To save time and costs, we would permit the plaintiff to amend the statement of claim along the lines of the Replacement ASOC (taking into account this Judgment).

45.3. Although the plaintiff has succeeded on appeal, the poor drafting of the ASOC has contributed in no small part to the Recorder's holding of the Demurrability point. Accordingly, we would make an order nisi that the WG defendants pay only half of the costs of the strike-out proceedings before the Recorder and half of the costs of the appeal.

45.4. The Respondent's Notice is dismissed with an order nisi that the WG defendants pay the plaintiff's costs.

45.5. Finally, as the WG defendants' summons for security for costs has not been determined by the Recorder, we would indicate out of an abundance of caution that they are at liberty if they wish to set it down for hearing before a judge of the Court of First Instance.

<sup>1</sup> [2021] HKCFI 483 .

<sup>2</sup> That is, houses in the New Territories built for occupation by "dings" (adult male descendants of indigenous villagers) who are entitled to building concessions granted by the government under the Small House Policy.

<sup>3</sup> ASOC (defined in § 3.4 below), § 19(4).

<sup>4</sup> These individuals were not defendants, but the lots "passed through the hands of at least one defendant": Judgment, § 31(6).

<sup>5</sup> This was referred to as a "1st layer transfer".

<sup>6</sup> This was referred to as "2nd layer transfers", with subsequent transfers down the line referred to as "3rd layer transfers" etc.

<sup>7</sup> As to which, see § 9 below.

<sup>8</sup> Judgment, § 121. We understand the use of this term to mean that the Recorder considered that the facts pleaded did not support the claims.

<sup>9</sup> See § 33 below.

<sup>10</sup> Where the claim is based on fraud of the defendants.

<sup>11</sup> § § 31 and 35 referred to the no reasonable cause of action ground.

<sup>12</sup> (Other than the Resulting Trust claim).

<sup>13</sup> With Mr Michael Lok.

<sup>14</sup> Replacement ASOC It was not pleaded by Mr Barlow, who sought an order to replace it with another draft ASOC annexed to the Notice of Appeal (" ").

<sup>15</sup> Contractual Estoppel, Trukhtanov, 2nd ed. § 2.22.

<sup>16</sup> Asgain Co Ltd v Cheng Ka Yan (No.2) [2018] 2 HKLRD 641 See , § 48.

<sup>17</sup> [2014] AC 436 .

<sup>18</sup> See fn. 14 above.

<sup>19</sup> That is, those not abandoned by the plaintiff either before the Recorder or before this court.

<sup>20</sup> The "liquidation expert" for the WG defendants (even though apparently, no leave or directions had been given for expert evidence to be adduced at the strike-out).

<sup>21</sup> The plaintiff had abandoned its claim under the Conveyancing and Property Ordinance before the Recorder.