IN THE HIGH COURT OF JUSTICE **BL-2020-001343**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD) AND INSOLVENCY AND COMPANIES LIST (ChD)

BETWEEN

LONDON CAPITAL & FINANCE PLC (in administration)

and others

Claimants

-and-

MICHAEL ANDREW THOMPSON

and others

Defendants

WRITTEN SUBMISSIONS OF THE FIFTH AND SIXTH DEFENDANT

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1. These are the written opening submissions of D5 and D6 for the trial and in response to the written submission of the Cs.

2. This document has been prepared under some considerable pressure of time. It has not been possible to make extensive reference to documents. It is intended as a guide to the Court to the main points of D5 and D6's defence and not as a comprehensive response to the case as put by the Cs through their analysis of the documents. Such a response in any event depends on D5's evidence at trial (and indeed the other live evidence). D5 and D6's defence remains as in their pleaded defence even where no or no extensive reference is made to specific elements of that defence here.

Introduction

3. D5 is a former soldier and policeman. He has for over 20 years been an entrepreneur with a particular focus in online marketing and distribution. D6 is his company in that he owns (and has owned at all material times) 90% of its shares. The other 10% is owned by Mrs Kerry Venn – who will give evidence at trial. They were also both directors of D6 at all material times.

4. This trial concerns a very substantial alleged fraud carried out through the selling by C1 of bonds to investors. The Cs case appears to be that C1 was in fact always operating as (and presumably intended to be) a sort of *ponzi* scheme for the benefit of D1 to D4 at least. Whether C1 was operating a *ponzi* scheme either intentionally or not is not within D5 and D6's knowledge. D5's belief was that C1 was operating a legitimate lending business.

5. D5 and D6 had no knowledge of any fraud – if there was one. As set out in their defence and in D5's witness evidence, D6 was engaged by C1 to provide marketing and sales services. That is what it did in return for an agreed fee. Neither D6 nor D5 had a role in the management of C1, or in the handling and lending of money paid to C1 by investors.

6. In June 2019 D5 was arrested by the Serious Fraud Office and his assets frozen. He was removed from the investigation in June 2022 and the criminal restraint order discharged.

The Claimants' written submissions

7. The Cs' written submissions are a lengthy document but not a comprehensive one. D5/D6 are not in a position to respond with a document of similar length but make the following four observations.

8. **First**, the Cs' submissions use vocabulary regarding D5 and D6's actions that persistently insinuates the idea that D5 and D6 were knowingly party to theft of money belonging to C1's investors, without properly making or substantiating that allegation. Perhaps that is to be expected in litigation of this sort. To take one example at L2.3 of their submissions the Cs write '*RP Digital passed this cost on to D6 with a mark-up to provide additional monies for diversion to D5, Steve Jones and Aston Beckworth Limited ("Aston Beckworth").'*

9. The cost referred to here is D6's costs of advertising and, in particular, using Google to advertise C1's bonds. The insinuation (which the Cs do not support with further evidence and which is not part of their pleaded case) is in the words '*to provide additional monies for diversion*'. This imputes an improper motive to D5. So far as this claim is concerned, the true situation is that D6 was liable to and did pay Google advertising cost from its fee received from C1 and how it chose to do so was a matter for it. The suggestion that this arrangement provided '*additional monies for diversion*' is at best a piece of unhelpful rhetoric.

10. This is a minor example of the rhetorical tone of C1's submissions. It exemplifies a common pattern. It is a pattern which is particularly important to have in mind when considering D5 and D6's defence that the money paid to D6 by C1 was received by them in good faith as the agreed fee for services provided by D6 to C1. C1's monies were not being diverted to D6 and D6 was not being used as a conduit for fraudulent payments. D6 was being paid an agreed sum for providing the services it agreed to provide, and

itself had to bear from the sums it received significant expenses in terms of, at least, advertising, staff and office and other overheads in order to deliver those services.

11. **Second**, a further danger in Cs' submission is the frequent deployment of apparently prejudicial material shorn of much, if any, context. Much of this will be dealt with in oral evidence. For the purpose of these submissions, an example is the use the Cs make of D5's email correspondence, mainly from 2015 and 2016, with his adviser and accountant Mark Partridge. It appears to be the Cs' case that Mr Partridge's emails to D5 are evidence of concerns about C1 that, it is alleged, result in D5 having 'shut-eye' knowledge of fraud. The Cs have chosen not to point out that Mr Partridge was satisfied with C1's accounts when he saw them and specifically noted that EY had audited the level of security.

12. **Third**, a reader of the Cs' submission would be left almost entirely in the dark regarding the involvement of other third parties, and in particular other professionals, with C1. Again, to take but one example, the Cs do not mention the role of Sentient Capital as approver of C1's website pursuant to s. 21 of FSMA or the role of Lewis Silkin in advising C1. The Cs' submissions seek, it appears, to give the incorrect impression that D5 and D6 were responsible for the factual statements made on C1's website.

13. **Fourth**, the critical section dealing with D5 and D6's knowledge (in M1 to M30 of the Cs' submissions) contains a large number of un-pleaded allegations. In particular:

    (a) At M14 - the allegation that D5 knew that C1 was making payments to Spencer Golding is not pleaded

    (b) At M18 – the allegation that concerns were raised on the MSE forum is not pleaded.

(c) At M20 – the allegation that D5 and D6 had knowledge of the fraud because of Mrs Venn's concerns over D6 becoming C1's appointed representative is not pleaded.

(d) At M21 – there is no pleaded allegation that D5, D6 or Mrs Venn knew that the ISA bonds were not eligible for tax-free status and the claims being made by C1 were untrue.

(e) At M22 and M28 – the allegations regarding involvement with LCF2 (as defined in the written submissions) are not pleaded.

(f) At M30 – the proposed he proposed Isle of Wight deal is not pleaded.

14. The Cs did not include these points either in the Amended Particulars of Claim or in the Further Particulars which they provided regarding knowledge specifically.

15. The general rule, certainly in respect of allegations of fraud, is that the Court will not permit proof of primary facts that have not been pleaded: *Three Rivers DC v Bank of England* [2003] 1 AC 2 at [186] in the well-known speech of Lord Millett. It would not be just for D5 and D6 to be fixed with knowledge of a serious fraud based on matters that do not appear in the statements of case.

D5/D6's defence

16. The background of D5 and D6 is set out in his witness evidence. There is a useful summary of D5/D6's defence at paragraph 5 of their Defence and at paragraph 38 of the Case Memorandum.

17. As noted above D5 and D6 did not have a role handling, lending or distributing C1's moneys. C1 engaged them to provide certain services in the summer of 2015. D6 did that until the FCA intervention in 2018.

18. The critical issue is whether, during that period, D5/D6 had knowledge of the alleged fraud (if indeed there was a fraud). This issue is directly relevant to all the claims, that is the claims based on (a) fraudulent trading (b) knowing receipt (c) dishonest assistance and (d) whether D6 was a *bona fide* purchaser in respect of any proprietary claims. If D5 (and thus in practice D6) had no actual or constructive knowledge of the alleged fraud then all of these claims will fail.

19. Subsidiary legal and factual issues are (a) the extent to which representations made to C1's bondholders were made on behalf of D6 (rather than on behalf of C1 only); (b) the extent to which D7's knowledge can be attributed to D6. The Court will need to hear oral evidence to resolve this.

20. Returning to the question of D5 and D6's knowledge:

    (a) The Court will hear evidence from D5 and Mrs Venn both of whom deny any wrongful conduct.

    (b) It will also hear expert evidence on behalf of D5/D6 regarding the level of fee that was paid to D6.

    (c) It is accepted that the Cs do not need to show either (i) that D5/D6 knew all the details of the fraud or every element of the allegedly fraudulent scheme or (ii) that

they had suspicions which, if investigated, would have led them to discover all the details of the fraud.

(d) But the Cs must prove D5/D6 either had, or would have obtained, sufficient knowledge of the alleged fraud.

(e) So far as claims in knowing receipt are concerned the knowledge must be sufficient to render it unconscionable for D5/D6 to retain what they have received: *Lewin on Trusts* at 42 – 032. It is submitted that the level of knowledge required to be liable for fraudulent trading is the same.

(f) So far as dishonest assistance is concerned the Cs must prove that the knowledge of the fraud led to D5/D6 acting dishonestly.

(g) So far as proprietary claims are concerned the Cs need to show that whatever knowledge D5/D6 had was inconsistent with being a *bona fide* purchaser. Again it is submitted that in substance this test will be the same as those above.

(h) Further, it is not sufficient for the Cs to show that D5 had some concerns or suspicions about C1.

21. The Court will hear oral evidence on these matters (and no doubt receive extensive submissions on documents). It is submitted that the matters relied on in section M of the Cs' written submissions do not amount in any circumstances to actual knowledge of the fraud because, with the exception of the un-pleaded allegation at M14, there is no suggestion that D5 knew that bondholder funds were being improperly paid to D1 – D4. Further the matters relied on do not amount to 'shut-eye' knowledge, ie. a deliberate decision not to investigate a firmly grounded suspicion targeted on specific facts in order

to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe*: The Sea Star* [2003] 1 AC 469 at [116].

D5/D6's case on knowledge in more detail

22. D5 will be cross examined regarding his knowledge and no doubt taken to the relevant documents. The following preliminary points can be made:

(a) C1 was audited by well-known accountancy firms for the entire period that D6 was supplying services to it. Its accounts recorded the value of the security it held. Even accepting that D5 and Mrs Venn had questions, from time to time, about that security, it is ultimately entirely reasonable of them to have taken considerable comfort from the – independent – confirmation of that security.

(b) The Cs' case on this (see M17.4 and following) appears to be that the statements in C1's accounts regarding security somehow did not fall within the auditor's responsibilities.

(c) That assertion is not well explained in the Cs' submissions and appears to be wrong. Taking the 2016 accounts as an example (although the same point can be made about the 2017 accounts), note 10 to the financial statements is headed 'Financial Instruments'. It records £9,396,814 in loans secured against assets with a fair value of £60,752,482.

(d) When the 2017 accounts were available in February 2018 Mark Partridge reacted to them with approval.[1] He said that the main thing was that the bond cover (by 20.02.2018

[1] SUR00144686-0001

that point approximately £284 million) looked adequate. He certainly does not appear to have thought that this was inadequate.

(e) The Cs must show more than merely some concerns or cause for suspicion. What they do at the moment is point to emails showing that the D5 had some of his own concerns about C1 and had some concerns drawn to his attention.

(f) This point will be tested during the trial – but the Court might well wish to ask (i) would not the statements in C1's accounts have allayed the suspicions that D5 might otherwise have had; and (ii) given apparently very positive position regarding security in C1's accounts what investigations should D5 have made that would have given him sufficient knowledge of the alleged fraud.

(g) The Cs make reference to '*fake'* comparison websites. D5 will no doubt be asked about this. The court will need to consider closely what these websites were. D5's position is that they were marketing tools which contained accurate information. In any event there is no allegation (as opposed to insinuation) that the websites D6 used for marketing C1's bonds among others led or could have led to D5/D6 to discover that C1 was a *ponzi* scheme.

(h) The importance of the role of Sentient Capital and Lewis Silkin has already been mentioned. The Cs' case appears to be that D5 and Mrs Venn knowingly put false statements on the website D6 provided for C1. Again, Mrs Venn and D5 can be asked about this. But it is reasonable to point out that suggesting material for a website is exactly what C1 might have expected its marketing consultant (ie. D6) to do and that it was for C1 (and indeed Lewis Silkin and Sentient) to be content that the material was true.

(i) The Cs' rely on D5's knowledge of and failure to investigate complaints made on the internet. This is an allegation that seems more persuasive with the benefit of hindsight than it is when D5's position at the time is taken into account and he can give evidence about that.

(j) The Cs invite the Court to infer that D5/D6 must have known that C1's business was fraudulent given the level of the fee they were being paid which was, it is said, uncommercial. There will be both factual and expert evidence on this point. It is important to remember that D5 and D6 had no connection to C1 or D1 to D4 prior to starting to work with C1 and D1 in February 2015. D1 and C1 could have engaged someone else if the amount D6 was charging was uncompetitive. D6's fee was, further, negotiated in line with the fee already being charged by D7.

(k) The Cs also rely on the absence of a written agreement between D6 and C1 regarding payments for D6's services. It is difficult to see why such an absence points towards D6 (or D5) knowing of the fraud. First, there was an oral agreement to pay for what D6 did. Second, there was extensive discussion regarding the written agreement and both parties had legal advice from specialist solicitors. In the end a written agreement was not reached. Had D6 been party to a fraud it is much more likely that it would have simply agreed something convenient with C1. That it did not illustrates the point that D6 was a *bona fide* third party engaged by C1 to provide a specific set of services.

(l) D5 was not a close associate of D1, D2, D3 or D4. He can be asked about this in evidence. He did not meet them often. The Cs' emotively written introduction

gives the impression – perhaps – that such events involving D1/D4 and D5/D6 and D6's employees and consultants were common. They were not.

(m) It is important to remember that the Cs' case against D1 to D4 amounts to saying that they conspired together to set up C1 as a vehicle to defraud members of the public. D5 was clearly not part of that alleged fraud. D5 did not meet D1 or D4 (or indeed D2 and D3) regularly. A reasonable and honest person in D5's position would not have been on notice of a fraud.

Conclusion

23. The Cs' case is put in emotive terms in the introduction and conclusion of their written submissions. It is easy, and perhaps natural, with the benefit of hindsight to be uneasy with the vocabulary in some of the emails sent by D5 (and others with D6). But pleasure at the time in running a successful business (as D6 was) is not evidence of a fraud or evidence of knowledge of a fraud: indeed it is the opposite of how a fraudster might be expected to behave.

24. The evidence the Cs have identified in their opening does not demonstrate that D5 or D6 shut their eyes to (let alone knew of) the fraud which is alleged to have been conducted through C1. Throughout their professional relationship with C1, D5 and D6 made enquiries of their new client. Indeed, the Cs highlight these documents in their submissions. This approach is not characteristic of people or entities wilfully blind to fraudulent conduct.

25. C1's accounts were audited in successive years by both Ernst & Young and PwC. On both occasions the audited accounts included statements regarding the security held by

C1 that gave D5 substantial comfort regarding the legitimacy and security of C1's business. It was entirely reasonable to for D5 to have relied on these accounts (even if some of his earlier queries had not been fully answered). It is unreasonable to suggest that D5 and D6 should have enquired further and that they deliberately failed to do so.

26. The defence of D5 and D6 is that they engaged with C1 in good faith, backed by the reassurances of highly reputable professional firms in relation to the business and the bond offering.

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