

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHC (COM) 2023/0282

BETWEEN:

**ACCESS BANK PLC
(as successor in title and assignee of Diamond Bank plc)**

Claimant/Applicant

and

- [1] DR AMBROSIE BRYANT CHUKWUELOKA ORJIAKO (“Dr Orjiako”)**
- [2] SHEBAH PETROLEUM DEVELOPMENT COMPANY LIMITED (BVI)
 (“Shebah BVI”)**
- [3] ABBEYCOURT ENERGY SERVICES (BVI) LIMITED (“Abbeycourt”)**
- [4] NEVILLE INVESTMENT MANAGEMENT LIMITED (“Neville”)**
- [5] PLUMAGE MANAGEMENT LIMITED (“Plumage”)**
- [6] PURSLEY RESOURCES LTD (Pursley”)**
- [7] SINCLAIR COMMERCIAL LTD (“Sinclair”)**
- [8] SALVIC ENERGY LTD (Salvic Energy”)**
- [9] SALVIC PETROLEUM RESOURCES LTD (Salvic Petroleum BVI”)**
- [10] MRS IGRA CHIOMA HENRIETTA ORJIAKO (“Mrs Orjiako”)**

Defendants/Respondents

- [11] AFRICAN EXPORT-IMPORT BANK (“African Export-Import”)**
- [12] ASSET MANAGEMENT CORPORATION OF NIGERIA (“AMCON”)
 (as successor in title and assignee of Skye Bank plc)**

Nominal Defendants

Appearances:

Mr Steven Thompson KC, instructed by Carey Olsen, and with him Mr Richard Brown and Mr Sean Kinney, both of Carey Olsen, for the Claimant

Mr Robert Weekes KC, instructed by HFW, and with him, Mr Scott Cruickshank, of HFW, for the First to Tenth Defendants

2025: July 28; 29
October 1.

JUDGMENT**Introduction**

- [1] **MITHANI J. [Ag]:** In this Claim (“the Claim”, “this Claim” or “these Proceedings”), issued on 15 December 2023, the Claimant is Access Bank Plc. I will refer to it in this judgment (“this Judgment” or “the Judgment”) as the “Claimant” or “Access Bank”.
- [2] The defendants to the Claim are the ten defendants and the two additional “nominal” defendants referred to as such in the heading of this Judgment. I will refer to the first defendant, Dr Ambrosie Orjiako, as either the “First Defendant” or “Dr Orjiako”; to his wife, the tenth defendant, Mrs Igra Orjiako, as either the “Tenth Defendant” or “Mrs Orjiako”; both Dr Orjiako and Mrs Orjiako together as “the Orjiakos”; and to the corporate defendants by the number in which they appear in the heading of this Judgment or by the abbreviations provided for them in that heading. In addition, unless the context otherwise requires, the expression: (a) “the Claimant” or “Access Bank” shall include its predecessors in title, including the “Original Lenders”; (b) “the Defendants” shall mean either one or all the defendants (other than the nominal defendants) to the Claim; and

(c) “the Shareholding Companies” shall mean any one or more of Abbeycourt, Helko Nigeria Limited (“Helko”), Neville, Plumage, Pursley, and Sinclair.

- [3] Dr Orjiako is indebted to the Claimant for \$220,298,038 (plus interest) under a consent order made in the Claim on 16 April 2024. This followed a judgment obtained by the Claimant in a claim brought by the Claimant against Dr Orjiako in the High Court in England in March 2016.
- [4] Dr Orjiako had given a personal guarantee for a substantial syndicated loan (“the Loan”) made by three lenders, Afrexim Bank (i.e., African Export-Import Bank), Diamond Bank Plc and Skye Bank Plc (referred to individually or collectively in this Judgment as “the Original Lenders” or “the Original Lender”) to a Nigerian company called Shebah Exploration & Petroleum Co. Ltd (“SEPCOL”). SEPCOL was owned or controlled by him and is not a party to these Proceedings.
- [5] In March 2013, SEPCOL defaulted on the Loan. In September 2013, the Original Lenders called in the Loan, and, in February 2014, they called in Dr Orjiako’s personal guarantee and the corporate guarantee that a BVI company, Allenne Ltd, had provided to the Original Lenders to “secure” the indebtedness of SEPCOL to the lenders.
- [6] In 2014, proceedings were commenced in England against SEPCOL as borrower, Dr Orjiako as personal guarantor, and Allenne Limited as corporate guarantor to enforce the Loan. Those proceedings were issued in 2014. They were settled on agreed terms. However, Dr Orjiako breached those terms. As a result, the Original Lenders brought fresh proceedings against Dr Orjiako and obtained summary judgment against him in 2016.
- [7] Two of the Original Lenders assigned their claims to the Claimant. The assignees are the Claimant and the Twelfth Defendant. The sole remaining original lender is the Eleventh Defendant. The Eleventh and Twelfth Defendants have taken no part in this action but are aware of it and do not object to it. They are necessary parties to the Claim, but no relief is sought against them. They are, therefore, joined in the claim and described in it as “nominal defendants”.

The Defendants do not challenge the ability of the Claimant to bring the Claim and to sue the Defendants as successors in title to one or more of the original lenders.

[8] This Claim was brought by the Claimant to enforce the original English judgment. In April 2024, the Claimant obtained an order of this Court (“the BVI Judgment”), to which Dr Orjiako consented, giving effect to the English judgment. The Claimant has taken various consequential proceedings in this Claim in order primarily to obtain further information about its ability to enforce the BVI Judgment, and to prevent any dealing by one or more of the Defendants with any of their assets until the final determination of the Claim by this Court. These consequential proceedings do not require further mention in this Judgment, although I should point out that Dr Orjiako is currently the subject of bankruptcy proceedings in Nigeria. However, there is little likelihood that those proceedings will be concluded anytime soon.

[9] The Claimant alleges that there are various shell companies in this jurisdiction, i.e., one or more of the BVI companies included as defendants in the Claim, which hold tranches of very valuable shares (“the Shares” or “the Shareholding”),¹ either directly or indirectly, in a listed Nigerian oil company, called Seplat Energy Plc (“Seplat”). The Claimant alleges that these shares remain beneficially owned and controlled by Dr Orjiako himself, despite his assertion that he transferred them to Mrs Orjiako (following threats of legal proceedings made against him in 2014). The Claimant asserts that if, contrary to that allegation, Dr Orjiako has transferred the Shares to Mrs Orjiako, that transfer was effected and motivated only by his desire to avoid the Claimant being able to enforce any claim that it has against Dr Orjiako over those shares.

[10] Two issues, therefore, fall to be determined by this Court, which can be formulated in the form of simple questions that the Court has to answer:

¹ Any reference in this Judgment to “the Shares” or “the Shareholding” shall include any part of the shares or shareholding in any of the Shareholding Companies or Seplat or any associated company, alleged to have been transferred by Dr Orjiako to his wife or others.

- (a) Is Dr Orjiako entitled, or does he continue to be entitled, to the beneficial interest in the Shares? If the answer to this question is “Yes”, the Court does not have to decide the second question, identified below. However, for the sake of completeness, it should do so, in case there is an appeal against this Judgment or the respondent to the appeal wishes to serve a respondent’s notice to the appeal.
- (b) If the transfer to Mrs Orjiako, relied upon by Dr Orjiako, was effective to transfer both the legal title and beneficial interest in the Shares to her, was it effected and motivated by his desire to avoid the Claimant being able to enforce any claim that it had against Dr Orjiako over the Shares?

[11] The Claimant maintains that the case against the Defendants on the above two issues is clear and obvious. It asserts that despite Dr Orjiako’s attempt to raise various factual issues, which he claims ought to be determined at the trial of the Claim in order to establish the Claimant’s entitlement to the relief he seeks, on a proper examination of the written evidence so far submitted in the Claim, it is clear that Dr Orjiako has no real defence to the claim or none that would withstand the scrutiny by this Court. Accordingly, the Claimant seeks summary judgment (“SJ”) against the Defendants in relation to those issues pursuant to r. 15.2 of the **ECSC Civil Procedure Rules (Revised Edition) 2023** (“**ECSC CPR**”).

[12] I heard the Claimant’s application for SJ (“the Application”) over a period of two days on 28 and 29 July 2025 (“the SJ Hearing”). I was informed at the SJ Hearing that the Defendants had indicated they wished to enter into negotiations with the Claimant to see if the dispute between them could be resolved. Based on the fact that I have not been told that the parties have come to any resolution of the issues between them, I must assume that the negotiations have fallen through or, at any rate, have not reached the stage where the parties felt that I should defer giving judgment until I knew one way or another whether they were likely to come to a settlement.

Background

- [13] The background facts and matters giving rise to the Claim do not need detailed mention. A full chronology of the relevant events that give rise to the making of the Claim, and the bringing of the Application, is set out in the draft chronology, annexed to the sixth affidavit of Mr Robert Imowo, sworn on 6 January 2025, in support of the Application. Although some of the phraseology used in that chronology is based on what the Claimant says is its case, I do not believe that the Defendants dispute the substance of the chronology. For the purpose of extracting information from it, I have disregarded the narrative and words used in it, which may be perceived as controversial by the Defendants. However, what follows in this Judgment describes the conclusions I have come to, expressed in my own words.
- [14] For the purposes of this Judgment, it suffices if I provide the following short summary of the relevant events.
- [15] I have dealt briefly with the circumstances in which the Loan was made and in which it (together with the guarantees supporting it) was enforced in the High Court in England and, subsequently, made the subject of the BVI Judgment.
- [16] From incorporation in 2009 until 10 March 2014, Shebah BVI had one issued share. That share was owned both legally and beneficially by Dr Orjiako.
- [17] According to the Register of Shares of Shebah BVI, on 10 March 2014 (the day before the first English proceedings), the share structure in Shebah BVI underwent various changes. The Claimant does not accept that the events recording these changes took place on the date or dates on which they are recorded as having taken place. However, for the purposes of the Application, the Court must assume that the dates are correct:
- (a) Dr Orjiako transferred the single share in Shebah BVI to Pursley. The Claimant does not know the terms of that transfer

but maintains that it was at a nil or nominal consideration (and in any event for less than full value). At that time, Pursley was legally and beneficially owned by Dr Orjiako.

- (c) 240,000 new shares were issued in Shebah BVI and allotted to Abbeycourt, which was, at that time, both legally and beneficially owned by Dr Orjiako.
- (d) 119,968 new shares were issued by Shebah BVI and allotted to Helko.
- (e) 124,000 new shares were issued by Shebah BVI and allotted to Neville, which were, at that time, both legally and beneficially owned by Abbeycourt, which was in turn legally and beneficially owned by Dr Orjiako.
- (f) 43,404 new shares were issued by Shebah BVI and allotted to Plumage, which was, at that time, both legally and beneficially owned by Dr Orjiako.
- (g) 119,999 new shares were issued by Shebah BVI and allotted to Pursley, which was, at that time, legally and beneficially owned by Dr Orjiako.
- (h) 80,000 new shares were issued by Shebah BVI and allotted to Sinclair, which was, at that time, legally and beneficially owned by Dr Orjiako.

[18] Subsequent transfers of shares in Shebah BVI occurred between 2014 and 2017:

- (a) On 21 July 2014, Dr Orjiako transferred the sole share in Pursley to Mrs Orjiako (the "Pursley Share Transfer").

- (b) On 29 May 2015, Abbeycourt transferred the sole share in Neville to Dr Orjiako (the "Neville Share Transfer"). Dr Orjiako was, at that time, the legal and beneficial owner of the sole share in Abbeycourt.
- (c) On 22 May 2017, Dr Orjiako transferred the sole share in each of Abbeycourt, Neville and Plumage to Mrs Orjiako (the "22 May 2017 Share Transfers").

[19] The net effect of these allotments and/or transfers (individually or collectively also referred to as "the Transfers", "the Transfer", "the Share Transfers" or "the Share Transfer, as the context may require) was that by 2017, Mrs Orjiako had become the owner of most of the shares in the Shareholding Companies (except for Sinclair), which equated to a majority indirect ownership of Shebah BVI. Shebah BVI, in turn, owned valuable shares in Seplat. Dr Orjiako directly retained ownership of Sinclair and director-control over all the Shareholding Companies.

[20] The Claimant asserts that the Share Transfers, i.e., the transfers and/or allotments, were neither made for any consideration nor for any genuine commercial reasons. The timing coincided with the onset and escalation of creditor actions against Dr Orjiako and others. The Claimant asserts that the changes referred to above were, in effect, manoeuvres which created the appearance — but not the reality — of divestment, with Dr Orjiako retaining beneficial ownership and control, in practical terms, of the Shareholding Companies, often to shield major assets (shares in Shebah BVI and, thus, Seplat) from lender-enforcement.

[21] The basis upon which the Claimant alleges that Dr Orjiako is said to be beneficially entitled to the Shareholding is summarised at paras. 55-63 of the amended Statement of Claim in the following terms:

- “55. As pleaded in paragraph 13 above^[2], the entire issued share capital in Sinclair is legally owned by Dr Orjiako. That shareholding is also owned by him beneficially.
56. It is to be presumed and/or inferred that Dr Orjiako continues to own beneficially the shares in the other Shareholding Companies (namely Abbeycourt, Neville, Plumage, and Pursley), notwithstanding the Pursley Share Transfer and the 22 May 2017 Share Transfers. Such inference is to be drawn from the following facts and matters:
57. First:
- 57.1. Paragraphs 33 to 41 above are repeated³.
- 57.2. There was no commercial reason for the Pursley Share Transfer or the 22 May 2017 Share Transfers. Insofar as the Claimant has been able to ascertain, no consideration was paid by Mrs Orjiako to Dr Orjiako for the said transfers.
- 57.3. It is to be inferred that the transfers and allotments were done merely to give the appearance that the direct and indirect shareholding in Shebah BVI was not held solely by Dr Orjiako without altering the reality, and to enable him to cause to be charged to the Lenders only a one-third holding in Shebah BVI while informing them that he was causing to be charged to them all or substantially all the shares in Shebah BVI (while in fact himself retaining control and indirect beneficial ownership of a two-thirds shareholding not charged to the Lenders).
58. Second, as pleaded above, Neville, Plumage, and Sinclair charged their respective shareholdings in Shebah BVI by the Shebah BVI Share Charge. That charge secured the liabilities of Shebah Nigeria under the Facility. There was no reason for Neville, Plumage, and Sinclair to charge their respective shareholdings if Dr Orjiako, as personal guarantor of the Facility, did not own those companies beneficially. In the Chairman's Letter of Comfort provided by Dr Orjiako to the Original Lenders on or around 11 May 2012 in connection with the amended and restated Facility Agreement, Dr Orjiako represented that he legally and beneficially owned both Sinclair and Plumage.

² This is likely intended to be a reference to para. 13A of the amended Statement of Claim, which sets out the position before Mrs Orjiako became, as the Claimant asserts, the legal owner of the Shares. Paragraph 13 sets out the position regarding the shareholding as of the date the Claim was issued.

³ These paragraphs of the amended Statement of Claim largely set out the shareholding changes to Shebah BVI summarised above.

59. Third, Dr Orjiako is and was at all material times a director of each of the Shareholding Companies (as well as Shebah BVI).
60. Fourth, until May 2022, Dr Orjiako served as chairman of the board of Seplat on the basis that he controlled more than 7% of the shares in Seplat. He could not have controlled that number of shares unless he controlled the shareholdings of the Shareholding Companies in Shebah BVI (control of merely the shareholding in Sinclair would not have sufficed).
61. Fifth, public reports and statements published by Seplat, which were signed by Dr Orjiako as chairman, refer to Dr Orjiako as controlling a stake in Seplat of between 6 and 7%, and record that part of those shares are held via Shebah BVI and Pursley.
62. Sixth, Seplat confirmed in evidence provided to the Nigerian High Court on 16 August 2023 that 30,641,068 shares in Seplat were held by Shebah BVI and 900,000 shares in Seplat were held by Pursley, and described those entities as Dr Orjiako's proxies through which he held his interest in Seplat.
63. Seventh, Dr Orjiako was, after May 2022, able to raise finance by purportedly offering as collateral the shares in Seplat held by Shebah BVI, part of which finance was used to repay part of the Facility, as well as to raise finance to fund the operations of Shebah Nigeria."

[22] Dr Orjiako disputes the above matters. In short, he says three things.

[23] First, he states that it is incorrect to say that the Pursley Share Transfer and the 22 May 2017 Share Transfers did not transfer his beneficial interest in that share to Mrs Orjiako. At para. 33 onwards of his eighth affidavit, sworn on 7 May 2025, he summarises his position in the following terms:

"33 The Claimant alleges that, despite the Pursley Share Transfer and the 22 May 2017 Share Transfers, I continue to beneficially own the shares in Pursley, Abbeycourt BVI, Neville and Plumage. This is certainly not the case.

34. By virtue of the Pursley Share Transfer, my wife became the legal and beneficial owner of the sole share in Pursley, whose only asset was a stake in Shebah BVI which equated to 2.15% of Seplat. Shebah BVI held 2.15% of Seplat as bare trustee for her. This is because my wife had had a 3.92% interest in Seplat via Shebah Nigeria from 2010 as part of my estate planning ... When the Seplat shares were transferred from Shebah Nigeria to Shebah BVI in March 2010 her interest Seplat was transferred to Shebah BVI which held what became a 2.15%

stake in July 2014 post IPO dilution as bare trustee for my wife as recorded in the Declaration of Trust prepared in 2013. While it is important to note that document is not witnessed nor dated, it reflected the position at the time in relation to my wife's stake in Seplat and my view of the position and was entirely consistent with my wife's prior shareholder in Shebah Nigeria in line with my earlier estate planning which had been transferred to Shebah BVI to hold in an omnibus shareholding but always for the benefit of my wife. The Pursley Share transfer simply represented a transfer where the economic reality which was that my wife had owned the beneficial interest of the corresponding stake in Seplat held by Shebah BVI in substance since 2010.

35. By virtue of the 22 May 2017 Share Transfers, my wife also became the legal and beneficial owner of the sole share in each of Abbeycourt BVI, Neville and Plumage. The transfer was made with the intention and expectation that when the loan under the Facility Agreement and the other loans was repaid, the share pledge given by Neville, Plumage and Abbeycourt BVI (and any other similar security for loans) would be released and my wife would benefit from the corresponding uplift in value of the shares in Shebah BVI.
36. My wife is the sole legal and beneficial owner of each company. She is responsible for carrying out transactions on their behalf, making decisions regarding their assets, signing documents on their behalf, and representing the companies in dealing with third parties in all material respects.
37. Notwithstanding this, the companies in question have not been actively engaged in any corporate activity since ownership was transferred to her. As such, there has been no occasion or need for her to act or make decisions on their behalf in the manner described above. However, had any corporate action been required, she would have dealt with it as the legal and beneficial owner.
38. It is public knowledge that my wife owns Pursley, this fact having been reported in the business press on numerous occasions – for example, Business Day reported on 9 August 2018 that Pursley, "a Company owned by the wife of A.B.C Orjiako" had acquired 900,000 shares in Seplat ... My wife paid for these shares with funds from family assets and they were acquired from the late Chief Macauley Ofurhie."
39. To assist me in raising funds to meet the judgment debt, my wife agreed to the use of both Shebah BVI's and Pursley's shares in Seplat being charged as security for the Providus Facilities. It is not unusual or unexpected that a spouse, as my

wife did, would use her own assets to support the business interests of her husband and, by extension, the success of herself and the family. In fact, why would my wife not help me?

40. Put simply, the Orjiako family is a very close family. I took responsibility for developing the family businesses at my father's request in the 1990's as described in detail below and shared the benefits with my family, including my siblings, in line with my father's wishes. In good times, all members of my family have benefitted. In harder times, my family have rallied behind me when I asked them for help when dealing with the challenges both I and the businesses have faced in recent years..."

[24] Second, Dr Orjiako states that it is untrue that his wife provided no consideration for the Share Transfers. He states that the Share Transfers were made "for consideration of mutual love and affection" and "as recognition for all of the hard work, contribution, dedication and sacrifices she made to support the success of our family's business", which he describes in more detail in his affidavit.

[25] Third, he states that it is incorrect for the Claimant to contend that there was no, or no good, commercial or other proper motive for the Share Transfers. At para. 25(a)(vi) of his affidavit, he summarises his motive for the Share Transfers as being "for the benefit of our family in consideration of mutual love and affection, which was considerable and as part of general estate planning ... and in the hope and expectation that all loans would, one day, be repaid and she may finally benefit from unencumbered assets."

[26] The substance of Dr Orjiako's account is supported by Mrs Orjiako in her affidavit, also sworn on 7 May 2025.

[27] I do not need to elaborate further on the background facts and circumstances, except to mention three key points

[28] First, the application of the Claimant is for SJ against the Defendants. As Mr Robert Weekes KC, who appeared on behalf of the Defendants, states, the Court must assume any disputed questions of fact in favour of the party against whom the application is made, i.e., the Defendants. However, this assumption is not absolute. If the Court is satisfied that the facts and matters relied upon by

the respondent to the application simply do not pass muster, it will, and should, be prepared to reject those facts and matters.

[29] Second, each party has raised every conceivable point to support the case it advances before this Court. As is the case with the substantive trial of a claim, I do not need to decide every point that the parties have raised in connection with the Application: see, by way of examples, **Weymont v Place**;⁴ and **English v Emery Reimbold & Strick Ltd.**⁵ It is only necessary for me to determine whether the Claimant's case on the Application is made out by the documents I have seen and the submissions I have heard, i.e., whether the Claimant's case for SJ is so clear on the papers that it is unnecessary for me to hear the oral evidence of those deponents who have furnished affidavits and those witnesses who have made witness statements, whether because that evidence is weak and tenuous, obviously false or wholly unreliable or for some other valid reason. If the case for granting the Application is clear, I must enter SJ on the Application in favour of the Claimant. If it is not, I must give the Defendants leave to defend the Claim.

[30] Third, it is not for me to judge any part of the Application, based on how Dr Orjiako has behaved in the past. I say this because, in the course of his submissions made at the SJ Hearing, Mr Steven Thompson KC, who appeared on behalf of the Claimant, suggested that Dr Orjiako knew how to "play the system" (my words not his), a fact which he said was reflected by Dr Orjiako arguing every conceivable point and appealing every decision which was made against him. Whether or not that is correct, that sort of (what can only be said to be) "character evidence" is inadmissible in the Claim and, *a fortiori*, the Application: see **Phipson on Evidence**.⁶

The Relevant Law

Substantive Law

⁴ [2015] EWCA Civ 289, at [4]–[6] per Patten LJ.

⁵ [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409.

⁶ Hodge M Malek QC (Ed), 20th Edn, Sweet & Maxwell, 2021, para. 20.05 *et seq.*

[31] Before I consider the principles that govern the grant of SJ, it is necessary for me to set out a brief exposition of the law that relates to the two grounds upon which the Claimant seeks the substantive relief set out in its amended Statement of Claim, viz, the Claimant's assertion that:

- (a) the Share Transfers only transferred the legal title in the Shares to Mrs Orjiako – i.e., that the beneficial interest in the Shares remained vested in Dr Orjiako (Ground 1”); and
- (b) in the alternative, that the Share Transfers to Mrs Orjiako were effected to put those shares out of the reach of Dr Orjiako's creditors, which, of course, included the Claimant (“Ground 2”).

[32] For the purpose of determining the Application, only a brief exposition of the law is necessary. What follows, therefore, is that exposition, so far as it is relevant to the determination of the Application.

Ground 1

[33] The amended Statement of Claim seeks the following relief under this ground:

“A declaration that Dr Orjiako is the sole beneficial owner of the Shareholding Companies and the Salvic Defendants [i.e., Salvic Energy and Salvic Petroleum BVI].”

[34] The basis upon which this head of claim is made is summarised at para. 55 of Mr Thompson's skeleton argument in the following terms:

“The Bank's case is that the lack of consideration for those transfers, combined with the lack of any ostensible commercial purpose for them, and the clear evidence that [Dr Orjiako] has retained the right to deal with the underlying interests in Seplat as his own point to the fact that he retained beneficial title. That is to say, when he transferred legal title to his wife, D1 intended to retain beneficial ownership so that he could control, mortgage and sell the shares, as he thought fit from time.”

[35] The argument continues in para. 57 of that skeleton argument, as follows:

“There are very clear indications that Dr Orjiako did not intend to dispose of his beneficial ownership in the shares:

- a. He remained the sole director of each of the companies and continued to deal with the shares as if they were his, most particularly putting them up as security for borrowing from which he personally benefitted. This [Dr Orjiako] admits, albeit he claims, without any contemporaneous supporting evidence, that his wife agreed to allow him to borrow against her shares; that is a hallmark of a sham transaction (i.e. a transaction which is presented to the world as being something other than it is): see **Midland Bank v Wyatt [1996] BPIR 288, 298-9**;
- b. The newly produced Power of Attorney ... shows that D2 (the majority of whose shares are owned by Ds 3-7) allowed [Dr Orjiako] to exercise, on an irrevocable basis, complete control and ownership of D2's shares in Seplat. Pursuant to the Power of Attorney, D2 grants powers to [Dr Orjiako] tantamount to ownership (he is entitled to attend and vote at meetings of Seplat, is entitled to dividends and bonuses, he can pledge, sell, charge or assign the shares and exercise all the full rights as if the shareholder). It is trite law that a general power as wide as that is to all intents and purposes the same as ownership (see **TMSF v Merrill Lynch Bank and Trust Co [2012] 1 WLR 1721, PC at [42]-[43] and [53]** (citing with approval the decision of **Upjohn J**, as he then was, in **re Triffitt's Settlement [1958] Ch 852**: the Power of Attorney falls into that category, so effectively constituting [Dr Orjiako] the true owner of D2's shares in Seplat. It is clear then that he has secured for himself complete control, tantamount to ownership, of D2 and the economic interest in D3-6.
- c. Until these enforcement proceedings were started against him, D1 advanced no case that any of the shares in BVI entities as have held Seplat shares belonged beneficially to his wife. Until 2018, there was no suggestion to any third party that his wife might be the true owner of any of his business assets. Rather like Mr Wyatt, *'when it was expedient to do so'*, Dr Orjiako has been *'prepared to allow the bank to remain in ignorance of the true position'* (see **Midland Bank v Wyatt at 299**).

(Emphasis in italics included in the skeleton argument).

[36] The basis upon which the Claimant suggests that the Share Transfers only effected the transfer of the legal title to the Shares (and not Dr Orjiako's beneficial interest in them), as Mr Weekes says, usually involves the broader issue of what the law typically implies where one person makes a gift (or a transfer for mutual love and affection) to another. The position is summarised by **Lewin on Trusts**, at 10-002-10-006 (disregarding the footnotes in those paragraphs, unless otherwise stated) in the following terms:

"10-002 If a gratuitous lifetime instrument of transfer contains express or inferred provisions determining the beneficial ownership of the property transferred, effect will be given to those express or inferred provisions and, as is the case generally with the construction of written documents, only limited extraneous evidence is admissible in aid of the construction of the document. Thus if it is apparent from the express or inferred provisions of the document of transfer that the transferee is not to take beneficially, then he is not at liberty to adduce extrinsic evidence to show that he was intended to take beneficially. And if it is apparent from those provisions that the transferee is to hold on trust, but no trusts are effectively declared, or they do not exhaust the beneficial interest, then a resulting trust in favour of the transferor arises in accordance with the principles discussed elsewhere.

10-003 Where there is a gratuitous transfer containing no express or inferred provisions determining beneficial ownership, then the starting point is that there is a *rebuttable presumption of resulting trust*, in that the transferor did not intend to make a gift... he presumption may be rebutted in two ways. First, it may be rebutted by extraneous evidence that the transferor did intend to make a gift. Secondly, it may be rebutted by a counter *rebuttable presumption of advancement*, that is that the transferor did intend to make a gift. There is a presumption of advancement if the transferor is the spouse or parent of the transferee, or in a similar relationship. The presumption of advancement may itself be rebutted by extraneous evidence that the transferor did not intend a gift. In a case where the presumption of advancement does not apply, the transferee is (sometimes misleadingly) described as a *stranger*.

...

- 10-005 The [proposed] abolition of the presumption of advancement [by section 199 of the Equality Act 2010] will not affect the application of the presumption of resulting trust. In those circumstances in which the presumption of advancement has hitherto applied, there will be a presumption of resulting trust. So, where a husband transfers property to his wife it will be presumed that she is to hold the property on trust for him unless there is evidence that a gift was intended. In practice, this presumption of resulting trust in the case of husband and wife may well, in many cases, be as weak as the existing presumption of advancement, with each case in fact usually determined by evidence of the actual intention of the transferor or provider of the purchase moneys. It should be remembered that the presumption of resulting trust has always been the general rule but subject, hitherto, to an exception where the purchaser was under a species of natural obligation to provide for the nominee.
- 10-006 If the evidence establishes that the transferor did not intend to make a gift then effect will be given to that intention, so that there is a resulting trust in favour of the transferor. If this is so, the evidence of the transferor's actual intention precisely accords with what is presumed by the presumption of resulting trust, if applicable, and operates to rebut any presumption of advancement which applies by virtue of the relationship between the transferor and the transferee. On the other hand, if the evidence establishes that the transferor did intend to make a gift, the transfer takes effect as a gift. If this is so, the evidence of the transferor's actual intention precisely accords with what is presumed by the presumption of advancement, should that presumption apply, and operates to rebut the presumption of resulting trust, if applicable. Thus in any case where the transferor's actual intention is established, there is no need to rely on the presumptions to show either that the transferor retains beneficial ownership or that the transfer takes effect as a gift: the resulting trust or the gift, as the case may be, is established by the evidence. The principle is generally invoked in relation to transfers of legal interests in real property, but there is no reason why it should not be invoked also in relation to dispositions of personal property and of equitable interests and rights."

(Emphasis in italics supplied by the authors of **Lewin on Trusts**).

[37] However, the issue in the present case is not which presumption (whether that of a “resulting trust” or “presumption of advancement”) applies or whether those presumptions can be rebutted by oral evidence. Were that the only issue that the Court needed to decide, it is difficult to see how the Court could do so without hearing oral evidence. In the present case, the real issue is whether the Court can conclusively determine, without a full trial, based on the fact that it is clear and obvious from the material placed before the Court on the Application, that the beneficial ownership of the Shares remained with Dr Orjiako at the time of the purported transfer of the Shares to Mrs Orjiako.

[38] The law on sham transactions and sham trusts is summarised in the following paragraphs of **Snell's Equity**⁷ (disregarding the footnotes in those paragraphs, unless otherwise stated):

“22-067

... The classic definition of a sham was given by **Diplock LJ**: ‘[I]t means acts done or documents executed by the parties to the sham which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create; for acts or documents to be a ‘sham’, with whatever consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a ‘shammer’ affect the rights of a party whom he deceived [citing **Snook v London and West Riding Investments Ltd**]⁸.’

The burden of proving the sham lies on the person making the allegation.

(a) Common intention to mislead.

⁷ Steven Elliott KC *et al*, Sweet and Maxwell, 35th Edition

⁸ [1967] 2 Q.B. 786 at 802.

22-068 The person who alleges the sham must prove that the purported settlor and trustee had a common intention to enter into a kind of legal transaction that was different from the trust set out in the relevant document. The aim is to discover ‘the substance and reality of the transaction’, and to establish that it is different from the trust the parties purported to create⁹....

...

(c) Consequences.

22-070 ... The effect of proving that a purported trust is a sham is that the court often holds the parties to the real transaction that they intended. For example, a settlor who transferred property to a trustee to hold on a sham trust for other beneficiaries was found never to have intended to relinquish his beneficial ownership of the property. Proof of the sham did not affect the vesting of the property in the trustee so the trustee held as a bare trustee for the settlor¹⁰.

(d) Shams and certainty of intention.

22-071 The question whether a person intends to declare an express trust is distinct from whether a purported declaration of trust is a sham. The ascertainment of the settlor’s intention to declare a trust depends on the proper construction of the words in the relevant document, taking into account a narrow range of permissible background circumstances. The purpose of the inquiry is to elicit the objective intention of the settlor from the trust instrument.

But when a person alleges that a trust declared in an instrument is a sham, then the reality of the declaration is put in question. He alleges that the declaration should not be given effect in law because it does not reflect the true agreement between the parties about the kind of transaction they intended to enter into. This difference in purpose explains why a wider range of evidence can be used to prove a sham from that which can be used to construe a genuine trust instrument.²⁸³

(Underlined emphasis supplied).

⁹ AG Securities v Vaughan, Antoniadou v Villiers [1990] A.C. 417 at 466.

¹⁰ Minwalla v Minwalla [2004] EWHC 2823 (Fam), [2005] 1 W.L.R. 771; and JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 2426, at [455].

[39] The treatment of the subject provided in the paragraphs referred to below (disregarding the footnotes in those paragraphs, unless otherwise included) in **Lewin on Trust** is also apposite to set out in this context:

“5-020 ...In certain circumstances, the courts have found that a settlor has not created a trust at all, on the ground that what on its face is a declaration of trust was a sham. In those decisions, a declaration of trust is ineffective as a sham, or pretence, if the parties to the declaration intended not to create a trust, but instead to give a false impression to third parties and ultimately the court. Properly understood thus, there is no such thing as a ‘sham trust’, but merely a document purporting to create a trust which does not in fact exist. The question whether a trust is a sham is a different question from the question whether the control of the settlor over the trust fund and its income under the terms of the trust is so extensive that the trust is invalid on the basis that the purported settlor has never parted with the beneficial interest in the trust property; and it does not follow from a decision that a trust is not a sham that such an outcome should not follow where the facts justify it.

5-021 In addition to the intention not to give effect to the trusts, the authorities require an intent to give a false impression. The parties will in the nature of things usually have some side intent or there would be no point in their entering into a document they mean to disregard. It is difficult to establish the necessary intent, [b]ecause a finding of sham carries with it a finding of dishonesty, because innocent third parties may often rely on the genuineness of the provision or agreement, and because the court places great weight on the existence and provisions of a formal signed document. There is a requirement of very clear evidence given the seriousness of the allegation, and a presumption that parties intend to be bound by documents they enter into, but the question of sham is determined on the balance of probabilities. Subsequent actions of the parties in

disregarding the trusts declared are admissible in evidence to establish that they intended at the time when the trusts were declared never to carry them out, though not on any question of interpretation of the trusts. Evidence of effective control by a person other than the trustee is not sufficient to prove a sham, but is admissible to establish that a trust is a sham if it indicates that it was not intended at the outset that the trust take effect according to its terms.

5-022 For a transaction to be genuine, it is sufficient that the parties intended it to be given effect in the form in which it is recorded, and the courts will not inquire into their motives for so intending. As **Knox J** stated in **Chase Manhattan Equities Ltd v Goodman**,¹¹ 'impropriety of motive alone will not provide grounds for treating a transaction as a sham'; and **Megarry J** in **Miles v Bull**¹² stated that 'a transaction is no sham merely because it is carried out with a particular purpose or object. If what is done is genuinely done, it does not remain undone merely because there was an ulterior purpose in doing it.'

5-023 The general rule is that, for a transaction to be a sham, all the parties to it must share the necessary intent ...

...

5-028 The effect of a trust being held to be ineffective as a sham is that third parties can treat the trust property as still belonging to the settlor or the settlor's estate. Third parties who wish to do so might include the settlor's creditors, such as revenue authorities or a trustee in bankruptcy, an estranged spouse or civil partner, or legatees, next of kin, creditors or others who might be interested in the estate of a settlor who has died. As the court will necessarily have made a finding of intentional deceit, it is justified in taking the exceptional step of determining the legal effect of the purported trust instrument on the basis of the parties' subjective intentions, including by reference to extrinsic material, as opposed to the objective meaning of the document. Where the facts justify such a conclusion, therefore, it would seem that the subjective intention to which the court may give effect is that the

¹¹ [1991] B.C.L.C. 897 at 921i.

¹² [1969] 1 Q.B. 258 at 264.

legal effect of the document is a gift to others or a trust for others, rather than (as will usually be the case) that of the property remaining vested in the settlor, or that the terms of the trust are different from those contained in the document...

...

5-031 ... [Subject to certain exceptions], a settlor's failure to part with the beneficial interest in the trust property, and trusts which purport to be lifetime trusts but are testamentary in character, and so long as the trusts are intended to take effect according to their terms, the retention of large powers or weighty influence by a settlor does not itself make the trusts void as a sham

...

5-032 The retention by the settlor of extensive powers or interests may mean that economically the settlor is in a similar position to an absolute owner ...

...

...

Reservation by settlor of powers tantamount to ownership

5-035B Particular difficulty arises where the settlor reserves powers which are tantamount to ownership, for example a general power of appointment or a power of revocation, which enable the settlor to make himself absolute owner of the property subject to the power, without regard to the interests of anyone other than the settlor or any fetters on the exercise of the power, by the exercise of the powers at any time from the purported creation of the trust until the power expires. Three cases decided by the Privy Council and New Zealand's highest court [*viz.*, **Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co. (Cayman) Ltd**¹³, **Clayton v Clayton (No.1)**¹⁴, **Webb v Webb**¹⁵] are of considerable importance to the effect of reservation of such powers."

(Underlined emphasis supplied).

¹³ [2011] UKPC 17, [2012] 1 W.L.R. 1721.

¹⁴ [2016] NZSC 29, 19 I.T.E.L.R. 406.

¹⁵ [2020] UKPC 22, [2020] W.T.L.R. 1461.

[40] Referring to those three cases in para. 5-035B, above, **Lewin on Trusts** goes on to state, at para. 5-035C:

“The following questions arise:

- (1) Do settlor reserved powers need to be tantamount to ownership so as to be capable of preventing the settlor from parting with the beneficial interest in the trust property
- (2) What settlor reserved powers are tantamount to ownership?
- (3) Are settlor-reserved powers tantamount to ownership in themselves sufficient to prevent the settlor from parting with the beneficial interest in the trust property?
- (4) What is the position where settlor reserved powers tantamount to ownership are not operative at the time of constitution of trust or terminate during the settlor's lifetime and before the end of the trust period?”

[41] For the purpose of determining the intention of the relevant parties in this context, i.e., the intention of Dr Orjiako and (where appropriate) Mrs Ojiako, the courts, exceptionally, take a subjective rather than an objective view of such intention. As Arden LJ (as she then was) observed in **Hitch v Stone**:¹⁶

“ ... [a]s the passage from **Snook** makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.”

[42] However, although the Court will consider the subjective intention of the parties to the purported transaction in determining the true intention of the parties in entering into the transaction, it will do so by reference to an objective evaluation of the material (including any written evidence) presented to it.

[43] The passages cited from the above practitioner works primarily deal with “express” trusts, where a trust declared by a settlor does not amount to the

¹⁶ [2001] S.T.C. 214, at [66].

creation of a valid trust but rather to the continued retention by the settlor of the subject-matter of the trust. However, the principles are equally applicable where, as here, a party alleges that a purported gift made by the donor to the donee did no more than transfer the legal estate (but not the beneficial interest) in the property, which forms the subject-matter of the purported gift, to the donee.

[44] The above passages also encapsulate the principles that each party sought to derive from the several cases referred to at the SJ Hearing. Those cases do not, therefore, require any further detailed analysis, though I will refer to some of them in the course of this Judgment.

[45] I have not seen the underlying instruments for the Share Transfers, or, at the very least, if they were included in the SJ Hearing bundle, I have not been taken through them.¹⁷ I do not believe it to be suggested by the Claimant that those instruments may provide support or further support for the Claimant's premise that the Share Transfers were a sham. I must, therefore, proceed on the basis that, other than the Claimant being able to establish that the Share Transfers were a sham on this Application, the underlying documents that effected the transfer must, considered on their own, have been sufficient to transfer both the legal title and equitable interest in the Shares to Mrs Orjiako.

[46] Finally, the burden of proof and the standard of proof should be briefly mentioned.

[47] The burden of proving the facts and matters upon which the Claimant relies under this ground is upon it.

[48] Although the primary burden of proving a fact in a claim will invariably lie with the party asserting that fact, there may be situations where the onus of proving certain facts and matters on which reliance is placed by a party will lie upon that party. As the authors of **Halsbury's Laws of England** state:¹⁸

¹⁷ The SJ Bundles contain various resolutions approving share transfers and allotments but not the underlying documents themselves.

¹⁸ See Halsbury's Laws of England, 5th Edition, Reissue, Civil Procedure, Volume 12, 2020, paras. 699 and 700.

“The evidential burden (or the burden of adducing evidence) will rest initially upon the party bearing the legal burden. However, rather than referring to a shifting burden, it may be more accurate to say that it is the need to respond to the other party’s case that changes as the trial progresses according to the balance of evidence given by each party at any particular stage. If the party bearing the legal burden fails to adduce evidence, he has failed to discharge his burden and there will be no need for the other party to respond; however, if the party bearing the legal burden brings evidence tending to prove his claim, the other party may in response wish to raise an issue and must then bear the burden of adducing evidence in respect of all material facts ... Where there is a rebuttable presumption of law in favour of one party, the burden of rebutting it lies upon the other. Therefore, a party suing on a bill of exchange need not initially give any evidence of consideration, or that he is a holder in due course, since there are presumptions to this effect in his favour. Similarly, a presumption of death may assist a party. In negligence claims, a claimant may be able to rely upon the doctrine of *res ipsa loquitur* to introduce a presumption of fact, or in claims where it is relevant to any issue that a person did or did not commit a criminal offence, previous convictions may be pleaded. Where the truth of a party’s allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it often lies upon the latter, but there is no general rule of law to this effect. There is authority contrary to this exception, but it certainly exists and has frequently been applied by the courts. This is particularly the case in magistrates’ courts and in criminal proceedings based on statute, and in some employers’ liability situations. In civil cases, the incidence of the burden of proof may be determined by agreement between the parties, so far as not prohibited by statute.”

[49] The substance of this point has been acknowledged in SJ cases. In **Quid Novi Ltd and another v Innvotec Ltd and others**,¹⁹ Lewison J (as the then was observed):

“ ... the power to order summary judgment under **CPR 24.2** is discretionary and also that I should not enter judgment unless there is no other compelling reason why the case or issue should be disposed of at a trial. Having reached the conclusion that there is no defence to the allegations of copyright infringement, it seems to me that it must be for the Defendant resisting judgment to point to the compelling reasons why there should be a trial.”

¹⁹ [2006] EWHC 370 (Pat), at [17].

[50] There have been numerous cases of the type that have arisen in this Claim, where this principle has been confirmed. Examples include the **Law Society v Southall**,²⁰ **AC v DC and Others (Financial Remedy: Effect of s 37 Avoidance Order)**²¹ and **Erste Group Bank AG v JSC 'VMZ Red October' and Others**.²²

[51] In **Erste Group Bank AG**, Flaux J (as he then was) observed: ²³

“Where a party seeks to establish the existence of a matter that will assist him in persuading the court to exercise its discretion in his favour, the evidential burden in respect of that matter will rest upon the party asserting it.”

[52] This point is crucial in the present case. That is because the Claimant says that the written evidence adduced on the Application demonstrates that there is no substance whatsoever in the matters upon which the Defendants rely to defend the Claim on this ground. In other words, there is simply no material in the possession of the Defendants (and none likely to be available in the future) that would provide an answer to the Claim if unconditional leave to defend the Claim were granted to the Defendants.

[53] It has long been established that where the case against a defendant is clear on the papers, the court will not grant him leave to defend if his position will not be improved at trial, whether by disclosure, oral evidence or otherwise. Accordingly, the defendant must condescend upon sufficient particulars of his case, in his written evidence in opposition to an application for SJ, to demonstrate that the Court is likely to accept the veracity of that evidence and any oral evidence supporting it.

[54] In the context of the type of claim involved in these Proceedings, the above approach of the court has been confirmed in several cases. An example is

²⁰ [2001] BPIR 2023, at [33], per Hart J, reversed on other grounds: see [2001] EWCA Civ 2001.

²¹ [2012] EWHC 2023 (Fam), Mostyn J, applying his own decision in *Kremen v Agrest and Fishman* [2010] EWHC 2571 (Fam), [2011] 2 FLR 478.

²² [2013] EWHC 2926 (Comm).

²³ [2013] EWHC 2926 (Comm), at [16(iv)].

Williams (Trustee in Bankruptcy of Taylor) v Taylor and Raines.²⁴ In that case, Lloyd LJ, with whom Rafferty and Ward LJJ, agreed, said:

“Mr Davies QC [counsel for the appellant-trustee in bankruptcy] criticised the judge for starting with his assessment of the position as regards the contentious aspects of the evidence of Mr Taylor and Dr Raines [i.e., the respondents to the s. 423 claim]. He argued that the judge should have started with the contemporary and objective indicators, which were so clear and powerful as to shift the evidential burden to the respondents, and that only then, and from that standpoint, should he have considered the disputed aspects of the evidence. By proceeding in that way, it was said, he would have been addressing the evidence of Mr Taylor and Dr Raines in the correct context, namely that of the powerful inference which they needed to rebut, and he would have done so with a proper analysis or explanation, if he could, of why (a) he accepted their evidence; and (b) on that basis he held that the statutory purpose was not the purpose, or one of the purposes, of Mr Taylor in entering into the transaction.

I accept Mr Davies QC's point that the objective factors in the case did shift the evidential burden, in the sense that if there had been no evidence in answer to that of the trustee in bankruptcy based on the documents and the objective contemporary circumstances, it would have been a legitimate inference that the statutory purpose was at least a substantial purpose of Mr Taylor in entering into the transaction.”

[55] In **Williams**, the Court of Appeal upheld the decision of the first instance judge who had found that the respondents had adduced sufficient evidence and, therefore, the question was “not to be analysed in the absence of such evidence; it comes to a question of the judge's treatment and assessment of that evidence in that context²⁵.” In the present case, the Claimant argues that the Orjiakos have simply not adduced sufficient evidence in response to the allegations made against them (other than their own denial of the allegations) to suggest that the case advanced by them will be improved at trial if they were to be questioned on what they have said in their written evidence.

[56] The standard of proof in both the situations referred to above is the usual civil standard of proof – the balance of probabilities. There is no heightened standard of proof simply because the allegations made by the Claimant involve

²⁴ [2012] EWCA Civ 1443, at [20] and [21].

²⁵ *Ibid.*, at [21].

dishonesty on the part of both Dr Orjiako and Mrs Orjiako: see the decision of the House of Lords in **Re B**²⁶ and that of the UK Supreme Court in **Re S-B**.²⁷ However, where an allegation of serious impropriety is made, the court will require cogent evidence before it can be satisfied that the allegation is substantiated.

Ground 2

[57] If, contrary to the Claimant's primary claim, the beneficial ownership in the Shares has passed to Dr Orjiako, the Claimant seeks a declaration that the Share Transfers were made with the intent on the part of Dr Orjiako to defraud his creditors (including the Original Lenders), contrary to the provisions of 81 of the **Conveyancing and Law of Property Act 1961** ("the **CLPA 1961**").

[58] Section 81 of the **CLPA 1961** is in the following terms:

- "(1) Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Ordinance, with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.
- (2) This section does not affect the operation of a disentailing assurance, or the law of bankruptcy for the time being in force.
- (3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having at the time of conveyance, notice of the intent to defraud creditors."

[59] This provision replicates the now-repealed provisions of s. 172 of the **Law of Property Act 1925** ("**LPA 1925**"). Section 172 was repealed and replaced in England and Wales by s. 423 of the **Insolvency Act 1986** ("**IA 1986**", as it applies in England and Wales. However, no similar repeal and replacement of s. 81 of the **CLPA 1961** have taken place in this jurisdiction.

²⁶ [2008] UKHL 35.

²⁷ [2009] UKSC 17.

[60] In **Cadogan v Cadogan**,²⁸ at first instance, Slade J (as he then was) stated that:

“... if a person is to apply successfully to set aside a conveyance under **section 172**, he has, according to its terms, to prove two matters: (1) that it was made ‘with intent to defraud creditors,’ within the meaning of the statute; and (2) that the application is being made by a ‘person thereby prejudiced,’ within the meaning of the statute. A plaintiff seeking to prove the first of these two matters does not necessarily have to prove that the conveyance was made with intent to defraud him personally; it suffices if he proves that the conveyance was made with intent to defraud creditors of the disponent, whether or not he was one of those creditors. This is shown by the fact that according to the authorities, even a creditor whose debt has been incurred after the conveyance is given the right to impeach a conveyance made with the relevant intent.”

[61] There is some debate about whether the authorities on s. 172 of the **LPA 1925** support the premise that under s. 172, “intent to defraud” may automatically be presumed from the facts and circumstances that arise from a debtor’s conduct in entering into a transaction that makes his assets unavailable to his creditors. Cases which support this premise include **Re Eichholz**²⁹ and **Lloyds Bank Ltd v Marcan**,³⁰ at first instance.

[62] In **Re Eichholz**,³¹ Harman J (as he then was) observed:

"There is no doubt that the Statute of Elizabeth was available after a man's death to his creditors to recover from a volunteer property of whatever kind ... It was not necessary to prove a fraudulent intent. The mere fact of insolvency was enough: see Lord Hatherley's judgment in **Freeman v Pope**³² ... In my judgment, all this continues to be good law under **section 172 of the Law of Property Act.**"

[63] Likewise, in **Lloyds Bank Ltd v Marcan**,³³ at first instance, Sir John Pennycuik V-C stated:

“The word ‘intent’ denotes a state of mind. A man's intention is a question of fact. Actual intent may unquestionably be proved by direct

²⁸ [1977] 1 W.L.R. 1041. The Court of Appeal reversed the decision of Slade J on different grounds.

²⁹ [1959] Ch. 708 at 722-724.

³⁰ [1973] 1 W.L.R. 339 at 344H.

³¹ [1959] Ch. 708 at 722-724.

³² (1870) LR 5 Ch. App 538.

³³ [1973] 1 W.L.R. 339 at 344H.

evidence or may be inferred from surrounding circumstances. Intent may also be imputed on the basis that a man must be presumed to intend the natural consequences of his own act: see the judgment of **Lord Hatherley LC** and **Giffard LJ** in **Freeman v Pope** ... I would mention that today this imputation might well be considered applicable where there has been a valuable consideration short of full consideration. I do not, however, propose to pursue that point for this reason. In the present case there is evidence of actual intention. That, of course, is by no means always so in cases under this section. Where there is evidence of actual intention, in the nature of things there is very little room for imputing intention. I do not, therefore, propose to pursue the difficult questions which arise as to the circumstances in which intention may be imputed.”

[64] The cases that suggest that the claimant needs to demonstrate subjective intent on the part of the debtor include the various authorities set out in Mr Weekes’ skeleton argument.

[65] The debate about what needs to be proved by a claimant seeking to establish an intent to defraud under s. 172 of the **LPA 1925** (and, by analogy, s. 81 of the **CLPA 1961**) was considered by the Court of Appeal, in **Lloyds Bank Ltd v Marcan**.³⁴ Cairns LJ stated that what the claimant had to prove was dishonest intention, i.e., that the debtor was guilty of subjective dishonesty in putting the asset in question out of the reach of his creditors:

“... under section **172 of the Law of Property Act 1925** it is clear from the words of the enactment that fraud has to be established before a transaction can be avoided. In my opinion, fraud involves dishonesty and I cannot go with **Pennycuik V-C** [the first instance judge] in his observation that the word ‘defraud’ in section 172 ‘is not intended to be confined to cases of fraud in the ordinary modern sense of that word, i.e., as involving actual deceit or dishonesty.’ It is clear enough that deceit is not a necessary element, but in my view dishonest intention is, at any rate when the conveyance is for consideration ... [referring to several cases that purportedly decide that this is so] Other cases make it clear that if the conveyance is voluntary it is easier to infer a dishonest intention than when it is made for consideration or even that no dishonest intention need then be established: see **Freeman v Pope**³⁵, **Ideal Bedding Co. Ltd. v Holland**³⁶, in **Re Eichholz, decd**³⁷. It does, however, appear that a conveyance for good

³⁴ [1973] 1 W.L.R. 1387 at 1392.

³⁵ (1870) 5 Ch. App. 538.

³⁶ [1907] 2 Ch. 157.

³⁷ [1959] 1 Ch. 708.

consideration will be regarded as fraudulent if made with the deliberate intention of hindering creditors and for the benefit of the debtor himself rather than as a bona fide family arrangement or an arrangement which merely prefers one set of creditors to another set. To that effect was in **Re Fasey**³⁸, decided by a very strong Court of Appeal (**Lord Sterndale M.R., Warrington and Atkin LJ**)."

[66] Russell LJ, however, took a different view. He stated that:³⁹

"The [first instance] judge [**Pennycuik V-C**] found that Mr. Marcan 'intended to deprive the bank of recourse to the property charged ... and that such an intention is an intention to defraud the bank within the meaning of section 172.' This, it was argued, would deprive the section of any content of fraud in any sense, having regard to the express finding that, since Mr Marcan did not know that the value of the property would be less without vacant possession, 'the element of depreciation by the mere grant of a lease cannot ... be material in determining Mr. Marcan's intention. Moreover, it was argued that a passage in the judgment below ... indicated that **Pennycuik V-C** considered that perfectly innocent hindrance or delay to a creditor could come within **section 172**, notwithstanding the liberal content of the **Statute 13 Eliz. I, c. 5** [the forbear of **s. 172**], of words indicating dishonesty and fraud ...

I am not sure what is meant by a perfectly innocent defeat, hindrance or delay. It must be remembered that in every case under this section the debtor has done something which in law he has power and is entitled to do: otherwise it would never reach the section. If he disposes of an asset which would be available to his creditors with the intention of prejudicing them by putting it, or its worth, beyond their reach, he is in the ordinary case acting in a fashion not honest in the context of the relationship of debtor and creditor. And in cases of voluntary disposition that intention may be inferred."

[67] Goulding J, who sat as an additional judge of the Court of Appeal in **Marcan**, "approved" both judgments, without deciding whether he agreed with the observations of Cairns LJ or Russell LJ.

[68] Subsequent cases have not specifically decided which of the views in **Marcan** is correct or to be preferred: see, for example, **Emirates NBD Bank PJSC v Almakawi**.⁴⁰ That is presumably because s. 172, which was replaced in

³⁸ [1923] 2 Ch. 1.

³⁹ [1973] 1 W.L.R. 1387 at 1390.

⁴⁰ [2023] EWHC 1113 (Comm).

England and Wales by s. 423 of the **IA 1986**, is now largely otiose as s. 423 confers on a creditor, or where the debtor has entered into bankruptcy, administration, or liquidation, an office-holder, a much broader power to challenge transactions that a debtor has entered into to put assets beyond the reach of his creditors.

[69] I do not need to choose which of the views expressed in **Marcan** is correct. As this is an application for SJ, I must proceed on the basis that the Claimant must establish intention in the manner suggested on behalf of Defendants, i.e., that it cannot be inferred from the mere fact that Dr Orjiako transferred the Shares out of the love and affection he had for his wife.

[70] Two further points are necessary for me to mention.

[71] First, there is some authority to suggest that a causal connection must exist between the prejudice to the applicant and the transfer: see **Cadogan v Cadogan**,⁴¹ though in the context of s. 423 of the **IA 1986**, it has been said that such a causal connection is not required: see **Emirates NBD Bank PJSC v Almakawi**,⁴² in which Edwin Johnson J said⁴³:

“So far as **subsection (3)** [of **s. 423**] is concerned, it is clear that what matters is whether the statutory purpose, that is to say the required subjective intention of the transferor, exists. If it does, there is no requirement to show a causative link between that intention and the result of the relevant transaction. Equally, the victim may be a person who has only a contingent claim or a future claim. Such a person, and the nature of the claim of such person may even be unknown. The argument that a claim can only be a claim for the purposes of **s 423** if it can be shown to have a realistic prospect of success, both in terms of outcome and enforcement, seems to me to be inconsistent with the nature of the jurisdiction under **s 423**, as established by the case law to which I have been referred.”

[72] In any event, even if some sort of causal connection is required between the prejudice and the transfer under s. 81 of the **CLPA 1961**, the court will readily

⁴¹ [1977] 1 W.L.R. 1041.

⁴² [2023] EWHC 1113 (Comm).

⁴³ [2023] EWHC 1113 (Comm), at [139].

be willing to find that this requirement is met. As Robert Goff LJ (as he then was) observed in **Cadogan**:⁴⁴

“... it does not seem to me that the bare fact that the damage suffered is not that intended can be sufficient to prevent relief being granted. There must, of course, be some causal connection between the fraud and the damage, but I think the court should not be too astute to divorce the two.”

[73] Mr Weekes states, at para. 7(b) of his skeleton argument, that the “claim in respect of the 22 May 2017 Share Transfers fails, in any event, for want of causation.” He maintains that “[t]he shares that were transferred to Mrs Orjiako were of negligible value and Dr Orjiako believed that to be (as it was) the case. In those circumstances, the transfers cannot have caused prejudice to any creditor, nor, by the same token, can he have had any intent to defraud.”

[74] I respectfully disagree with him. It does not seem to me that the value of an asset that is transferred in breach of s. 81 of the **CLPA 1961** demonstrates any lack of causation. Neither on an application for SJ nor even at trial will the court usually enquire into the value of an asset to assess whether the requirement of causation is made out. The value of an asset will, of course, be taken into account by the court in determining the subjective intention of the debtor. However, to look into the question of its value for the purpose of deciding causation would not only be inconsistent with the observations made by Robert Goff LJ, but would make it necessary for the court to have to enquire in every case what the value of the asset was and whether it was so negligible that even if intent could be proved, causation could not. That is simply not what the authorities say. In addition, in most cases, the whole basis of a claimant’s claim under s. 81 of the **CLPA 1961** is that the impugned transaction was entered into for no consideration or at an undervalue.

[75] The second point relates to the burden of proof and the standard of proof.

⁴⁴ [1977] 1 W.L.R. 1041 at 1062.

- [76] As already stated above under Ground 1, it is for the Claimant to prove that the requirements of s. 81 of the **CLPA 1961** are met, though the evidential burden may shift to Dr Orjiako where he seeks to make good any assertions to challenge any of the allegations made against him that the Claimant has established against him: see the observations of Lewison J in **Quid Novi Ltd**, above.

The principles governing the application for SJ

- [77] Part 15 of **ECSC CPR** sets out the provisions relating to the grant of summary judgment.

- [78] The relevant provisions of Part 15 are in the following terms:

“15.2 The court may give summary judgment on the claim or on a particular issue if it considers that the:

(a) claimant has no real prospect of succeeding on the claim or the issue; or

(b) defendant has no real prospect of successfully defending the claim or the issue ...

15.3 The court may give summary judgment in any type of proceedings except:

(a) admiralty proceedings in rem;

(b) probate proceedings;

(c) proceedings by way of fixed date claim;

(d) [various other proceedings not relevant for present purposes]

...

15.5 (1) An applicant seeking summary judgment must:

(a) ...

- (b) file evidence on affidavit in support of the application; and
 - (c) serve copies of the application and the affidavit evidence on each party against whom summary judgment is sought, not less than 14 days before the date fixed for hearing the application.
- (2) A respondent who wishes to oppose an application for summary judgment may:
- (a) file evidence on affidavit; and
 - (b) serve copies of the affidavit evidence on the applicant and any other respondent to the application not less than 7 days before the date fixed for the summary judgment hearing...

...

- 15.6 (1) The court may give summary judgment on any issue of fact or law, whether or not the judgment will bring the proceedings to an end ...

...”

[79] Part 15 of the **ECSC CPR** is broadly similar to the rather more detailed and elaborate provisions of Part 24 of the **CPR of England and Wales** (“the **E&W CPR**”). For the purposes of this Claim, the differences between the two provisions are largely immaterial.

[80] **ECSC CPR** 15.3 does not expressly or impliedly exclude the availability of summary judgment in a claim which is based on fraud. This reflects the equivalent position under Part 24 of the **E&W CPR**. However, under the original version of the former **Rules of the Supreme Court** of England and Wales, the forbear of the **CPR**, summary judgment could not be obtained in cases based on fraud⁴⁵, though the position was changed with effect from 1 June 1992 by the **Rules of the Supreme Court (Amendment) 1992**.⁴⁶

⁴⁵ See RSC Order 14, r. 1(2)(b).

⁴⁶ SI(E&W)1992/638.

[81] I do not need to set out a detailed exposition of the principles that govern applications for SJ. Most leading works on civil procedure contain excellent summaries of those principles. In addition, a helpful summary of the principles is provided by Lewison J (as he then was) in **Easyair Ltd v Opal Telecom Ltd**,⁴⁷ as approved by the English and Welsh Court of Appeal in **Ward (AC) & Son Ltd v Catlin (Five) Ltd**.⁴⁸

“The correct approach on applications by defendants is, in my judgment, as follows:

- i) The court must consider whether the claimant has a ‘realistic’ as opposed to a ‘fanciful prospect of success: **Swain v Hillman**⁴⁹;
- ii) A ‘realistic’ claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: **ED & F Man Liquid Products Ltd v Patel**⁵⁰;
- iii) In reaching its conclusion the court must not conduct a ‘mini-trial: **Swain v Hillman**;
- iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: **ED & F Man Liquid Products Ltd v Patel**⁵¹;
- v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: **Royal Brompton Hospital NHS Trust v Hammond (No 5)**⁵²;
- vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than

⁴⁷ [2009] EWHC 339 (Ch), at [15].

⁴⁸ [2009] EWCA Civ 1098, [2010] Lloyd’s Rep IR 301, at [24], per Etherton LJ (as he then was).

⁴⁹ [2001] 1 All. E.R. 91.

⁵⁰ [2003] EWCA Civ 472, at [8], per Potter LJ.

⁵¹ [2003] EWCA Civ 472, at [10], per Potter LJ.

⁵² [2001] EWCA Civ 550.

is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: **Doncaster Pharmaceuticals Group v The Bolton Pharmaceutical Company**⁵³;

- vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd*⁵⁴."

[82] For the purposes of determining this Application, it is sufficient to outline the main principles governing the making of an application for SJ that apply, derived from the above and other cases.

[83] The power to grant summary judgment is discretionary, meaning that the choice of whether to exercise this power lies within the jurisdiction of the court. An application under **ECSC** Part 15 requires the court to undertake an exercise of judgment. It must assess the prospects of success of the relevant party and

⁵³ [2006] EWCA Civ 661.

⁵⁴ [2007] EWCA Civ 725.

decide whether to exercise the power to decide the case without a trial. As to the meaning of “no real prospect”, in **Swain v Hillman**,⁵⁵ Lord Woolf MR said:⁵⁶

“The words ‘no real prospect of being successful or succeeding’ do not need any amplification; they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success or, as [counsel] submits, they direct the court to the need to see whether there is a ‘realistic’ as opposed to a ‘fanciful’ prospect of success.”

[84] As noted above, the overall burden of proving the requirements for the grant of SJ lies on the applicant to the application for SJ: see, for example, **ED & F Man Liquid Products Ltd v Patel**.⁵⁷ However, as also noted above, where the underlying allegations are demonstrated to the court's satisfaction on a SJ application, the evidential burden of establishing a real prospect of success, based on the matters relied upon by the respondent in their opposition to the claim, may shift to him. As Lewison J stated in **Easyair**, above⁵⁸:

“In reaching its conclusion the court must not conduct a “mini-trial”: **Swain v Hillman**. ... This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: **ED & F Man Liquid Products v Patel at [10]** ... However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: **Royal Brompton Hospital NHS Trust v Hammond (No 5)**⁵⁹ ...”

[85] SJ may be entered by the court in favour of an applicant even if the allegations upon which he relies against the respondent are based on fraud or fraudulent conduct. As Cockerill J sated in **Foglia v Family Office**:⁶⁰

⁵⁵ [2001] 1 All. E.R. 91.

⁵⁶ *Ibid.*, at 92, cited with approval in the House of Lords in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, and endorsed in various BVI cases, such as *Comodo Holdings Ltd v Renaissance Ventures Ltd BVIHCMAP2014/0032* (Judgment, 3 May 2016). at [93], per Blenman JA.

⁵⁷ [2003] EWCA Civ 472, at [9], per Potter LJ.

⁵⁸ [2009] EWHC 339 (Ch), at [15].

⁵⁹ [2001] EWCA Civ 550.

⁶⁰ [2021] EWHC 650 (Comm).

- “13. This, of course, is a somewhat unusual application – an application for summary judgment in a fraud claim on the merits. As to this, the authorities (perhaps unsurprisingly) say that there is no bar to granting such an application, but that very considerable caution is required.
14. Thus, subject to being satisfied that the test in CPR 24.2 is met, there is no impediment to the Court granting summary judgment where dishonesty is alleged....
15. As to caution, reference was made to the judgment of **Mummery LJ** at [4]-[18] of his judgment in **Doncaster Pharmaceuticals Group v The Bolton Pharmaceutical Company**⁶¹... and in particular:
- [5] The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials....
- [17] It is well settled by the authorities that the Court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment can be given ... A mini-trial on the facts conducted under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice.
- [18] In my judgment, the Court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case’.”

(Emphasis supplied).

[86] In **King v Steifel**,⁶² the same Judge said:

“The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential

⁶¹ [2006] EWCA Civ 661, at [5], [17]-18].

⁶² [2021] EWHC 1045 (Comm), at [21]-[22] and [24].

for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that – even bearing well in mind all of those points – it would be contrary to principle for a case to proceed to trial.

So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up...

The reality is that while the court will be very cautious about granting summary judgment in fraud cases, it will do so in suitable circumstances, and there are numerous cases of the court doing so. This is particularly the case where there is a point of law; but summary judgment may be granted in a fraud case even on the facts."

(Emphasis supplied).

[87] The observations of Cockerill J make it clear that it will usually not be appropriate for an application for SJ to be made where the applicant relies upon allegations of fraud against the respondent. There is a good reason for this: given the now well-established test for dishonesty and the requirement for evidence to support such an allegation to be cogent, the applicant will usually have an uphill task of doing so even at trial, let alone on a summary basis. It is no surprise, therefore, that several English cases, as well as some BVI cases, caution against the use of the SJ procedure in fraud cases.

[88] In **Three Rivers District Council v Governor and Company of the Bank of England**,⁶³ Lord Hope said:

"... The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases, it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler

⁶³ [2001] UKHL 16, at [95].

the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As **Lord Woolf MR** said in **Swain's** case, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.”

[89] In the same case, Lord Hobhouse made it clear that the criterion which the court applied for SJ was one of probability. It was based on the absence of reality. He stated⁶⁴:

“The court may exercise the power [to order SJ] where it considers that the ‘claimant has no real prospect of succeeding on the claim’ ... The important words are ‘no real prospect of succeeding’. It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a ‘discretionary’ power, ie one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is ‘no real prospect’, he may decide the case accordingly ... I stress this aspect because in the course of argument counsel referred to the relevant judgment of Clarke J as if he had made ‘findings’ of fact. He did not do so. ... the judge is making an assessment not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the ‘bottom line’ is what ultimately matters... The criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is absence of reality. The majority in the Court of Appeal used the phrases ‘no realistic possibility’ and distinguished between a practical possibility and ‘what is fanciful or inconceivable’ ... Although used in a slightly different context these phrases appropriately express the same idea.”

[90] These authorities make it clear that a respondent to a summary judgment application is not required to prove their case to a high standard. As Blenheim JA observed in **Comodo Holdings Ltd v Renaissance Ventures Ltd**,⁶⁵ “[i]t is the law that a respondent to a summary judgment application is not required to prove his case to a high standard. It will suffice to show that his case may

⁶⁴ [2001] UKHL 16, at [158].

⁶⁵ BVIHCMAP2014/0032) (Judgment, 3 May 2016), at [91].

succeed even though it is improbable. Authority for this proposition is found in **Swain v Hillman**; and **Three Rivers District Council v Bank of England**.”

- [91] More than one judge has cautioned against the use of the SJ procedure, except in the clearest cases. They include the cases set out in paras. 68-81 of Mr Weekes’ skeleton argument. So far as those cases relate to the power of a court to strike out a statement of case under **ECSC CPR 26.3(1)(b)** (i.e., on the basis that it does not disclose any reasonable ground for bringing or defending a claim), that power is much narrower than the power of the court to grant SJ. The power to strike out under **CPR 3.4** (the rough equivalent of **ECSC CPR 26.3(1)(b)**) is primarily restricted to whether a sufficient case for bringing (or defending) a claim is demonstrated on the face of a statement of case. As Lord Wilson JSC (with whom Baroness Hale, DPSC and Lords Clarke, Lord Hughes and Lord Hodge JSC agreed) observed in **Wyatt v Vince (Nos 1 and 2)**:⁶⁶

“It is indeed common practice in civil proceedings to join an application to strike out under rule 3.4 with an application for summary judgment ... But in **Swain v Hillman**, Lord Woolf MR ... observed that the power under rule 24.2 ... was wider than the power under rule 3.4 and that under the latter, unlike the former, the general focus of the court was only on the statement of case which was alleged to disclose no reasonable grounds for bringing the claim. Or, as my Lady, then **Hale J**, crisply put it three months later, ‘the essence of a strike out is that one does not look at the evidence on the claim’: **Bridgeman v McAlpine-Brown**.”⁶⁷

- [92] The approach of the BVI courts to the granting of SJ reflects that of the courts of England and Wales. Webster JA set out the main principles in **Nam Tai Property Inc v West Ridge Investment Company Ltd**,⁶⁸ in the following terms:

- “4.1. Does the Defence and Counterclaim have a ‘realistic’ as opposed to a ‘fanciful’ prospect of success?
- 4.2. A claim is ‘fanciful’ if it is entirely without substance. A ‘realistic’ prospect of success carries some degree of conviction beyond being merely arguable.

⁶⁶ [2015] UKSC 14, [2015] 2 All. E.R. 755, [2015] 1 W.L.R. 1228, at [24].

⁶⁷ 19 January 2000, unreported; [2000] CA Transcript No 39, at p 4.

⁶⁸ BVIHCMAP2022/0046 (Judgment, 27 July 2023), at [20].

- 4.3. The object is to winnow out cases that are not fit for trial. The Court must avoid conducting a 'mini-trial' without disclosure and oral evidence. The Court should avoid being drawn into an attempt to resolve conflicts of fact. The Court should bear in mind what evidence can reasonably be expected to be available at trial.
- 4.4. The Court should be alive to the warning in **Easyair Ltd (t/a Openair) v Opal Telecom Ltd** that '[i]f it is possible to show by evidence that although material... is not currently before the Court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment ...'!
- 4.5. The Court must assume disputed questions of fact in favour of the party against whom the application is made ... The conclusion that a defence has no real prospect of success ought only to be reached in the clearest of cases, 'where it is clear that a [statement of case] on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court.' This is a high bar."

[93] Webster JA went on to say:

"I will follow this approach and would only add the following qualification from the judgment of Lewison J in **Easyair Ltd (t/a Openair) v Opal Telecom Ltd** (following his reference to the court not conducting a mini trial at this stage) ... This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents ... This qualification is important because it is not every statement that a party, against whom summary judgment is sought, makes in its pleading or evidence that the court should assume in favour of that party. The court must carry out its own analysis to see if there is substance in the statement before assuming it in favour of the party making the statement."

[94] At para. 72 onwards of his skeleton argument, Mr Weekes refers to other propositions which he says are essential for the Court to bear in mind. These propositions are reflected in the numerous authorities cited by both counsel at the SJ Hearing. They can be summarised in a series of a few short points.

[95] First, it is well established that the remedy SJ should not be granted where the argument between the parties involves a substantial point of law which does not admit of a plain and obvious answer, or the law is in a state of development, or

where the strength of the case may not be clear because it has not been thoroughly investigated: see, by way of examples, **Citco Global Custody NV v. Y2K Finance Inc**⁶⁹ and **Didier v Royal Caribbean Cruises Ltd.**⁷⁰

[96] Mr Weekes rightly points out that the reason why it is not appropriate to strike out a claim or grant summary judgment in an area of developing jurisprudence is that, in such areas, decisions as to novel points of law should be based on actual findings of fact: see, for example, **Briefline Assets Ltd v. Falin**.⁷¹ However, I cannot see that the Claim involves any new areas of law or any area of developing jurisprudence.

[97] Second, it is trite that the summary judgment procedure is unsuitable for claims or issues which would necessitate the court embarking upon a “mini-trial” or resolving issues which ought to be properly tried. It was said in both **Comodo** and **Swain v Hillman** that the summary judgment procedure is, to quote Lord Woolf’s words in **Swain**, “not meant to dispense with the need for a trial where there are issues which should be investigated at trial.”

[98] Mr Weekes makes the obvious point that the jurisdiction to strike out (or grant SJ) should be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial and its ability to strengthen its case through the process of disclosure and other court procedures, such as requests for information. It should also be taken into account that the examination and cross-examination of witnesses often change the complexion of a case: see, by way of example, **Farah v British Airways**,⁷² applying the House of Lords’ decision in **Barrett v Enfield Borough Council**.⁷³ Mr Weekes makes the following obvious points arising from these cases, at para. 77 of his skeleton argument:

“a. A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence: see eg, **Peters v Spencer**⁷⁴ ... The

⁶⁹ BVIHCVAP 2008/0022, Judgment, 19 October 2009.

⁷⁰ SLUHCVP2014/0024, Judgment, 6 June 2016, at [25], [37], per Pereira CJ.

⁷¹ BVI HC (COM) 2020/0223, Judgment, 15 February 2022, at [26], per Jack J.

⁷² [2000] The Times, 26th January, E&W CA.

⁷³ [2001] 2 A.C. 550.

⁷⁴ HCVAP 2009/016, Judgment, 22 December 2009, at [19], per George-Creque JA.

same approach must necessarily apply to an application for summary judgment.

- b. Attempts to seek summary judgment in relation to disputed issues often fail even when the evidence appears very strong, because experience shows that a full investigation at a trial with witnesses occasionally undermines what appears pretty clearly to be the truth when relying on the documents alone. Accordingly, in practice it is only when the documentary evidence is effectively unanswerable that summary judgment can be justified: see, eg, **Gohil v. Gohil**.⁷⁵
- c. There is also a principled reason behind this rule, namely that, at least where there is a bona fide dispute of fact on which oral testimony is available, a party is normally entitled to a trial where he and his witnesses can give evidence, and he can test the reliability of the other party and/or her witnesses by cross-examination.”⁷⁶

[99] The above guidance about the inappropriateness of conducting a mini-trial has been confirmed in several other cases, i.e., other than **Comodo** and **Swain v Hillman**, including in two recent UK Supreme Court cases: see the observations of Lord Briggs JSC in the decision of the Supreme Court in **Lungowe and others v Vedanta Resources plc and another**⁷⁷ and Lord Hamblen JSC in the decision of the Supreme Court in **Okpabi v Royal Dutch Shell Plc**.⁷⁸

[100] Third, Mr Weekes states that certain categories or types of claim are (simply) not well-suited for determination by summary judgment. Claims grounded upon allegations of reprehensible conduct, including fraud or dishonesty, are ill-suited for determination by summary judgment as they are usually fact-sensitive claims, relying on complex facts and involving significant questions of law and fact for determination: see, by for example, **Amstel Investment Holdings Ltd v AMS Holdings Ltd**.⁷⁹ In **Comodo**,⁸⁰ Blenman JA said so as much, stating that SJ “will almost always be inappropriate where there are allegations of reprehensible conduct.”

⁷⁵ [2015] UKSC 61, [2016] A.C. 849, at [49], per Lord Neuberger.

⁷⁶ *Ibid.*, at [50].

⁷⁷ [2019] UKSC 20, at [9].

⁷⁸ [2021] UKSC 3, at [21].

⁷⁹ BVIHMAP2021/0016, Judgment, 8 November 2021, at [43], per Farara JA (Ag).

⁸⁰ BVIHMAP2014/0032), Judgment, 3 May 2016, at [94].

[101] As bare statements of law, the propositions advanced by Mr Weekes are entirely correct. However, what the Court must determine on this Application is whether the written evidence adduced in these Proceedings supports those propositions. For the reasons referred to below, in my judgment, it does not.

[102] I am not sure that Dr Orjiako can derive any assistance from the observations of Lord Briggs in the decision of the Privy Council in **Gany Holdings (PTC) SA v Khan**,⁸¹ referred to in para. 81 of Mr Weekes' skeleton argument. In that case, Lord Briggs was doing little more than restating the principles by which equity provides for the identification of beneficial interests arising from a gratuitous transfer of property. As the learned editors of **Underhill and Hayton, The Law relating to Trusts and Trustees**⁸² observe:

“[26.36] Giving the advice of the **Privy Council in Gany Holdings (PTC) SA v Khan**, Lord Briggs restated the 'basic principles by which equity ... provides for identification of beneficial interests arising from a gratuitous transfer of property' in the following terms:

‘First, if either the transferor or the transferee makes a written (or oral) declaration as to those beneficial interests, or they do so together in an agreed form, that will generally be decisive, regardless of the subjective intentions of either of them. Secondly, and in default of any such declaration, the court looks for evidence from which a common intention as to beneficial ownership may be inferred. This may include evidence of statements made by either party before, at the time of or even after the relevant transfer, the parties' conduct, and the factual context in which the transfer takes place. Sometimes, a choice between possible conclusions as to beneficial interest may properly be arrived at by a process of elimination, whereby the most unlikely conclusions are first removed, leaving the least unlikely as the correct one. Finally, recourse may be had to time-honoured

⁸¹ [2018] UKPC 21, at [17].

⁸² 20th Edition, 2022, LexisNexis, Eds: His Honour Judge Paul Matthews *et al*, at paras [26.36] and [26.37], disregarding the footnotes in those paragraphs.

presumptions, such as the presumption of advancement or the presumed resulting trust, where there really is no evidence from which an inference as to common intention may properly be drawn. But these are, in modern times, a last resort, now that historic restrictions on the admissibility of evidence have been removed, and the forensic tools for the ascertainment and weighing of evidence are more readily available to the court.'

[26.37]

This restatement of the law is the latest signal from senior appellate courts that the use of presumptions has become less important to the resolution of cases where property has been gratuitously transferred to another or purchased in another's name. The reason, as Lord Briggs says in the foregoing passage, is that the courts' attitudes have changed regarding both the evidence which they are willing to consider when making factual findings about the intentions of a transferor or purchaser and the role played by such evidence in the resolution of cases. Nowadays there are very few cases where there is no evidence from which the courts can draw inferences about intention – and once they have done this, there is no need for, and in fact the law will not permit, a presumption to be made. Hence presumptions are only used as a “last resort” and when they are used, they cannot be rebutted by a party leading evidence establishing the transferor's or purchaser's intention because if any such evidence existed, there would *ex hypothesi* be no presumption that had to be rebutted.”

[103] There is no question that, in most cases, identifying the beneficial interests in an asset requires a highly fact-specific enquiry, and presumptions such as the presumption of a resulting trust or of advancement are of less importance now than they were. However, it is a fallacy to think that this means that every case where the beneficial interests in an asset are at stake must go to trial. It is not difficult to see why most disputes between alleged co-owners in cases involving the identification of beneficial interests in an asset will almost always require a trial. Where, as is almost invariably the case in such disputes, a party contends for a higher share in the asset than is provided to him or her by a document

setting out the parties' respective interests in it, or by legal presumptions, either based on what was allegedly orally agreed between them or by their conduct, it is difficult to see how the court could determine such disputes without hearing oral evidence.

[104] But that is not the position in a case such as this, where a claimant, at any rate, will have little to say about a party's interest in an asset other than from the document evidencing ownership of that asset or other contemporaneous documents (if any) setting out whether the party claiming the interest has behaved in a way which is inconsistent with what he contends for. In other words, the dispute between the Claimant and the Defendants does not involve the type of relationship which is nearly as close (and, often, intimate) as the relationship between parties that seek to maintain an interest over an asset or an interest that is greater than is provided to them by a document or by legal presumptions. It is not surprising that case law makes it clear that SJ is not suited for cases in the latter category. In the context of disputes between cohabiting parties, for example, a complex body of jurisprudence has developed in England and Wales regarding when a party may claim to be entitled to a greater interest than that specified in a document declaring their respective interests, or by legal presumptions.⁸³

[105] There can be no universal or even general rule that an application for SJ in a case such as the present one is not appropriate. Applications for SJ are often brought under s. 423 of the **IA 1986**. An example is **The Law Society v Southall**,⁸⁴ in which Mrs S applied for SJ to strike out a claim brought by the Law Society under s. 423 of the **IA 1986**. Mrs S's late husband, a solicitor, had been investigated for serious accounting irregularities. The Law Society had incurred substantial costs in the course of that investigation and sought to claim those costs against the estate of S's late husband. During his lifetime, Mrs S's husband had transferred the matrimonial home and its contents to Mrs S. The Law Society contended that the gift of the house contents to Mrs S had not been perfected or, alternatively, that the gifts had been made with the intention of

⁸³ For a summary of the relevant principles, see Lewin on Trusts, para. 10-050 *et seq.*

⁸⁴ [2001] EWCA Civ 2001.

putting the assets outside the reach of creditors. Mrs S maintained that the gifts had been made for tax-planning purposes. Hart J dismissed Mrs S's application for SJ. However, the Court of Appeal allowed Mrs S's appeal, stating that the Judge had asked the wrong question in declining to grant Mrs S summary judgment. He should have asked whether the Law Society had had any real prospect of showing, in relation to the gifts that Mrs S had known, at the time he had made the gifts, that he was conducting in his business in a risky manner, from which it might be inferred that S intended to put his assets out of reach of potential creditors. There was no evidence to answer that question in a manner favourable to the Law Society. Accordingly, the Court of Appeal granted SJ in favour of Mrs S.

[106] In **Southall**, SJ was granted against the claimant, i.e., the Law Society, in favour of the defendant, i.e., Mrs S. The position in these Proceedings is the reverse of the position that applied in that case. Nonetheless, the Court of Appeal was content to grant SJ to Mrs S. In allowing the appeal, Peter Gibson LJ (with whom Mantell LJ and Wall J (as he then was) agreed) observed:

“[50] Mr Collings [counsel for the Law Society] submitted that disclosure and cross-examination might come to the Law Society's aid. He drew attention to what he called an issue of fact as to whether or not Mr Southall ever ceased to live in Grimshaw Hall, and he suggested that Mrs [S's] credit as a witness might be undermined by being proven to be wrong on that point. In my judgment, it would be quite wrong to allow a case to go ahead on the basis that there was an issue which went to the credit of one of the witnesses. Mrs [S] ... is the person most likely to know who was living in Grimshaw Hall and she has her children's evidence as well to support her.

[51] As for the suggestion that disclosure may produce valuable documents, I am unable to agree. This is not a case where the action is brought against S. He may well have had documents relating to his dealings with property companies and the like, but he has, unfortunately, died. There is no reason to believe that Mrs S would have any such documents. This is a case where the Law Society has intervened in Southall & Co and has had full access to all the practice's documents. In my judgment, it is wishful thinking on the Law Society's part that the pre-trial procedures, or cross-examination, would yield valuable support for its case.”

[107] In proceedings of this type, neither the claimant nor any person acting on their behalf is likely to have first-hand knowledge of the matters that underpin the allegations upon which the claimant relies in obtaining the relief that he seeks. The statement of claim and the written evidence furnished in support of the application for SJ will contain facts and matters that the claimant has established through the enquiries he has made into the affairs of the defendants. However, the claimant will often seek to corroborate those facts with direct evidence from others. The enquiries made by the claimant may have been conducted in several different areas and may have involved obtaining information and documentation from multiple sources. It follows that the most that it would be possible for any written evidence he furnishes in support of the SJ application to do is to place before the court the facts which he has established from the enquiries which he has made and to draw to the attention both of the court and of the defendant those matters upon which he relies in support of his assertion that the allegations are made out. That does not mean that the primary burden of proving the facts and matters upon which the claimant relies shifts to the defendant. It remains with the claimant. However, the evidential burden would shift to the defendant, i.e., the defendant would have to explain why the underlying facts established by the claimant do not support SJ being granted against him.

[108] In addition to the matters mentioned by both counsel, I must mention the following additional matters about the approach of the Court to the Application.

[109] Unlike CPR 24.3 of the **E&W CPR**, there is no provision in Part 15 of the **ECSC CPR** which allows this Court to refuse to grant SJ if it finds that “there is no other compelling reason why the case or issue should be disposed of at a trial.” This means that if the Court is satisfied that a party has no real prospect of succeeding on the claim, defence or issue in a claim, it cannot go on to consider whether the claim should go to trial anyway because there is a compelling reason for it to go to trial. In any event, even if such a provision existed in the **ECSC CPR** Part 15, there would simply be no basis for the Claim to be tried on that ground, based on the English and Welsh authorities on the subject: see **White Book, 2025 Edition**, para. 24.3.4.

[110] Mr Weekes is, of course, correct when he says that the Court can only grant SJ if the Claimant shows a clear and obvious case on the papers that the Orjiakos' case is simply untenable. However, having to demonstrate a clear and obvious case does not mean that this Court cannot, to quote Mr Thompson, "separate the wheat from the chaff". In other words, the Court will, and must, not determine the Application based on those parts of the written evidence only that support the Defendants' assertions and ignore those parts that undermine or provide an explanation for them. It has long been held in SJ cases that if an allegation or assertion does not hold up to the scrutiny of the court either because it is inherently inconsistent with the other evidence adduced in the proceedings or is weak and tenuous, the court will grant summary judgment: see, by way of examples, **National Westminster Bank Plc v Daniel and others**,⁸⁵ **ED & F Man Liquid Products Ltd v Patel**,⁸⁶ **Ostrich Farming Corp Ltd v Wallstreet LLC**,⁸⁷ **Ashworth v Newnote Ltd**,⁸⁸ and **Orange Personal Communications Services Ltd v Squires**.⁸⁹

[111] The Claimant seeks declaratory relief against the Defendants, as opposed to an order for the Share Transfers to be set aside. I have considered whether that is the appropriate relief to grant if I were to accede to the Application. This type of declaratory relief is perfectly within the jurisdiction of this Court to grant. Indeed, **E&W CPR** 40.20, which (so far as I am aware) is not replicated in the **ECSC CPR**, makes it clear that declaratory relief may be granted even if a claimant does not apply for it. In the words of Lord Lane in **Imperial Tobacco Ltd v Attorney-General**,⁹⁰ "[a]nyone is in principle entitled to apply to the court for a declaration as to their rights unless statutorily prohibited expressly or by necessary implication." However, this principle is subject to the well-known exception that the court will not exercise its discretion to grant declaratory relief

⁸⁵ [1994] 1 All ER 156 (a pre-CPR case of the Court of Appeal of England and Wales).

⁸⁶ [2003] EWCA Civ 472.

⁸⁷ [2009] EWHC 2501 (Ch).

⁸⁸ [2007] EWCA Civ 793.

⁸⁹ [1998] Lexis Citation 3751.

⁹⁰ [1981] AC 718 at 742 and 750.

where it is not needed, i.e., the court will not act “in vain”: see, for example, **Pitt v Holt**.⁹¹

[112] I respectfully disagree with the Defendants that this is not an appropriate case to grant a declaration. I do not read the *obiter* remarks of Lewison LJ in **J. P. Morgan International Finance Ltd v Werealize.com Ltd**⁹² that every conceivable party that may be affected by a declaration must be before the court. It suffices, as Lewison LJ said in that case, that the court must be satisfied that “all those affected by the declaration are either before or will have their arguments put before the court.” In the present case, the arguments of all those who may have an interest in the declaration sought have been before this Court or have had their arguments put before it. A company that has been dissolved does not have any existence, so the suggestion that it should have been made a party (which would require it to be restored to the Register of Companies) seems to me to be misconceived. I should add that it would require a counsel of perfection to make every person, however small that person’s interest is in a claim, to be a party to it, simply so that the declaratory judgment made by the court extends to that party. As with any judgment of a court, the circumstances in which a party will be bound by a judgment of the court are now well-established, at least in the context of whether and who can mount a challenge to it and the circumstances in which the court will allow a party to relitigate an issue that it, or another court, has determined against that party: see, the summary of the relevant principles set out in **Re Queen’s Moat House Plc, Secretary of State for Trade and Industry v Bairstow**.⁹³

[113] I can well understand why the Claimant seeks declaratory relief. Setting aside the Share Transfers may create issues if third-party rights (i.e., the rights of third parties other than the Defendants) have been acquired in the Shares as a result of any dealings with them. This is especially so in relation to the claim under Ground 2 because the effect of s. 81 of the **CLPA 1961** is to make the impugned transaction voidable, not void, though several cases on s. 172 of the **LPA 1925**

⁹¹ [2013] UKSC 26, [2013] 2 A.C. 108.

⁹² [2025] EWCA Civ 57, at [118].

⁹³ [2003] EWCA Civ 321, [2004] Ch. 1.

use the expression “void”, rather than “voidable”. In those circumstances, a declaration made by the Court would enable such third parties to assert their rights in priority over the Claimant's rights (assuming they were entitled to claim such priority) by bringing fresh proceedings against the Claimant (if necessary) without needing to apply to set aside the Court's declarations. It would also allow the equivalent of a trustee in bankruptcy (if such a concept exists in Nigerian Law and if Nigerian Law is comparable to BVI Law), if Dr Orjiako is made bankrupt, to deal with such claims as part of the bankruptcy process on the basis that the declarations would be binding on all “interested parties” (or, at any rate, those parties that are before the Court) and that to seek to challenge them in subsequent proceedings would be a collateral attack on the decision of this Court and amount to an abuse of process, based on the principles set out in **Henderson v Henderson**⁹⁴ and **Johnson v Gore Wood & Co.**⁹⁵

[114] Indeed, several authoritative cases on s. 423 of the **IA 1986** have involved the court granting declaratory relief to the applicant. Those cases include **Moon v Franklin**,⁹⁶ **Barclays Bank Plc v Eustice**,⁹⁷ **National Westminster Bank Plc v Jones**,⁹⁸ **Hill v Spread Trustee Company Ltd**,⁹⁹ and, most recently, the decision of the UK Supreme Court in **Invest Bank PSC v El-Husseiny and others**.¹⁰⁰

[115] In those circumstances, I consider the making of the declarations not only to be possible but to amount to the most appropriate remedy that this Court can grant.

Discussion and Analysis

Ground 1

⁹⁴ (1843) 3 Hare 100.

⁹⁵ [2001] 2 A.C. 1.

⁹⁶ [1996] BPIR 196.

⁹⁷ [1995] 4 All E R 511, Court of Appeal of England and Wales.

⁹⁸ [2000] EWHC 1565. Neuberger J (as he then was).

⁹⁹ [2006] EWCA Civ 542, at [117]–[118], and [143].

¹⁰⁰ [2025] UKSC 4.

- [116] The basis upon which the Claimant relies on this ground can be summarised in a few short points.
- [117] The Pursley Share Transfer and the 22 May 2017 Share Transfers are undisputed. The Claimant states that the lack of consideration for those transfers, combined with the lack of any ostensible commercial purpose for them, and the clear evidence that Dr Orjiako has retained the right to deal with the underlying interests in Seplat as his own, point to the fact that he retained beneficial title, i.e., that when he transferred legal title to Mrs Orjiako, Dr Orjiako intended to (and did) retain beneficial ownership so that he could control, mortgage and sell the shares, as he thought fit from time to time.
- [118] The Claimant says that this is obvious from a proper consideration of the written evidence filed in connection with the Application and what it calls the “self-serving evidence” of Dr Orjiako and Mrs Orjiako. The Claimant draws attention to the matters referred to in para. 54 ff of Mr Thompson’s skeleton argument in support of this premise. I have referred to those matters above. For the purpose of analysing Dr Orjiako’s case, it is only necessary for me to refer to some of the matters upon which the Claimant places reliance in support of the Application. These matters are by no means exhaustive.
- [119] First, Dr Orjiako remained the sole director of each of the companies and continued to deal with the shares as if they were his, including providing them as security for borrowing from which he personally benefitted. At para. 39 of his eighth affidavit, sworn on 7 May 2025 in opposition to the Application, Dr Orjiako disputes this. He states that to assist him in raising funds to meet the judgment entered or obtained against him, Mrs Orjiako agreed to the use of both Shebah BVI’s and Pursley’s shares in Seplat being charged as security for the Providus Facilities. He points out that it would not be unusual or unexpected that a spouse, as his wife did, would use her own assets to support the business interests of her husband and, by extension, the success of herself and the family.

- [120] The Claimant states that there is no contemporaneous evidence to support this. That is, of course, correct, but it would be rare to expect evidence of this type to exist between a husband and wife. In my judgment, that fact by itself would not give rise to a clear and obvious case of only the legal interest in the Shares having been transferred by Dr Orjiako to Mrs Orjiako.
- [121] Nor does it seem to me that the power of attorney produced by the Orjiakos, which gives control of Mrs Orjiako's shares in Seplat to Dr Orjiako, by itself, gives rise to the obvious inference that the beneficial interest in the Shares remained with Dr Orjiako. That is what powers of attorney do – i.e., they give the donee overall control of an asset owned by the donor.
- [122] But there is compelling evidence that when taken together with the other matters upon which the Claimant relies in making good this ground, the Claimant makes out a clear and obvious case for granting SJ on this ground.
- [123] As the Claimant rightly points out, until these Proceedings were commenced against Dr Orjiako, he had advanced no case that any of the shares in BVI entities that held Seplat's shares belonged beneficially to his wife. Nor until 2018 had Dr Orjiako suggested to any third party that Mrs Orjiako might be the true owner of any of his business assets.
- [124] Instead, all the contemporary documents demonstrate the precise opposite of the case advanced by the Orjiakos. For example, none of Seplat's official RNS announcements make any reference to a transfer of shares in Shebah BVI from Dr Orjiako to Mrs Orjiako, nor is there any reference to shares being charged or transferred to Providus. The way Shebah BVI is described both before and after the 22 May 2017 Share Transfers remains the same in the RNS announcements over that period. Thus, an RNS announcement released on 21 November 2016 stated that:

"Following the sale of a portion of the shares registered in the name of Shebah Petroleum Development Company Limited actioned by Zenith Securities Limited in connection with the collateral agreement granted by Shebah Petroleum Development Company Limited to Zenith Bank

plc which was previously notified by the Company on 27 May 2015, Dr. Ambrosie Bryant Chukwueloka Orjiako, who holds an indirect interest in the shares of Shebah Petroleum Development Company Limited and is the Chairman of the Company, now holds a combined direct and indirect interest in 77,962,680 ordinary shares in the Company representing approximately 13.84% of the voting rights of the Company's issued share capital."

- [125] Subsequent announcements were also to similar effect: see the announcement dated 19 June 2017, after the 22 May 2017 Share Transfers, in the following terms:

"Petroleum Development Company Limited actioned by Zenith Securities Limited in connection with the collateral agreement granted by Shebah Petroleum Development Company Limited to Zenith Bank plc which was previously notified by the Company on 27 May 2015, Dr. Ambrosie Bryant Chukwueloka Orjiako, who holds an indirect interest in the shares of Shebah Petroleum Development Company Limited and is the Chairman of the Company, now holds a combined direct and indirect interest in 47,251,325 ordinary shares in the Company representing approximately 8.39% of the voting rights of the Company's issued share capital."

And an announcement made on 27 November 2018:

"Dr. Orjiako now holds a direct interest in 16,151,325 ordinary shares and an indirect interest in 29,800,000 ordinary shares of the Company totalling 45,951,325 shares which equates to a voting interest of 7.81% (based on Issued Share Capital of 588,444,561)."

- [126] Nor, for the reasons mentioned below, is there any substance in the point made by Dr Orjiako that the Pursley Share Transfer and the 22 May 2017 Share Transfers were carried out in "continuation and part execution of that asset structuring and financial/estate planning" relating to his personal financial affairs.
- [127] Leaving aside the various points that Mr Thompson makes about the alleged inconsistent positions adopted by Dr Orjiako in his amended Defence and in his written evidence in opposition, it is not easy to know what Dr Orjiako now has to say about these matters.

[128] In his affidavit dated 7 May 2025, he provides the following explanation:

- “34. By virtue of the Pursley Share Transfer, my wife became the legal and beneficial owner of the sole share in Pursley, whose only asset was a stake in Shebah BVI which equated to 2.15% of Seplat. Shebah BVI held 2.15% of Seplat as bare trustee for her. This is because my wife had had a 3.92% interest in Seplat via Shebah Nigeria from 2010 as part of my estate planning (as described further below). When the Seplat shares were transferred from Shebah Nigeria to Shebah BVI in March 2010 her interest Seplat was transferred to Shebah BVI which held what became a 2.15% stake in July 2014 post IPO dilution as bare trustee for my wife as recorded in the Declaration of Trust prepared in 2013. While it is important to note that document is not witnessed nor dated, it reflected the position at the time in relation to my wife's stake in Seplat and my view of the position and was entirely consistent with my wife's prior shareholder in Shebah Nigeria in line with my earlier estate planning which had been transferred to Shebah BVI to hold in an omnibus shareholding but always for the benefit of my wife. The Pursley Share transfer simply represented a transfer where the economic reality which was that my wife had owned the beneficial interest of the corresponding stake in Seplat held by Shebah BVI in substance since 2010.
35. By virtue of the 22 May 2017 Share Transfers, my wife also became the legal and beneficial owner of the sole share in each of Abbeycourt BVI, Neville and Plumage. The transfer was made with the intention and expectation that when the loan under the Facility Agreement and the other loans was repaid, the share pledge given by Neville, Plumage and Abbeycourt BVI (and any other similar security for loans) would be released and my wife would benefit from the corresponding uplift in value of the shares in Shebah BVI.
36. My wife is the sole legal and beneficial owner of each company. She is responsible for carrying out transactions on their behalf, making decisions regarding their assets, signing documents on their behalf, and representing the companies in dealing with third parties in all material respects.
37. Notwithstanding this, the companies in question have not been actively engaged in any corporate activity since ownership was transferred to her. As such, there has been no occasion or need for her to act or make decisions on their behalf in the manner described above. However, had any corporate action been required, she would have dealt with it as the legal and beneficial owner.”

[129] As Mr Thompson rightly states, these statements are largely bare denials. They do not address any of the allegations made by the Claimant. Even where Dr Orjiako can produce a document which potentially assists him, he fails to address the evidence and documents that undermine what that document says. A prime example of this is what Dr Orjiako says in paras. 38 and 39 of his 7 May 2025 affidavit:

“38 It is public knowledge that my wife owns Pursley, this fact having been reported in the business press on numerous occasions - for example, Business Day reported on 9 August 2018 that Pursley, ‘a Company owned by the wife of A.B.C Orjiako’ had acquired 900,000 shares in Seplat. My wife paid for these shares with funds from family assets and they were acquired from the late Chief Macauley Ofurhie.

39. To assist me in raising funds to meet the judgment debt, my wife agreed to the use of both Shebah BVI's and Pursley's shares in Seplat being charged as security for the Providus Facilities. It is not unusual or unexpected that a spouse, as my wife did, would use her own assets to support the business interests of her husband and, by extension, the success of herself and the family. In fact, why would my wife not help me?”

[130] It is difficult to see how these paragraphs of the affidavit can be consistent with the RNS announcement on 27 November 2018.

[131] There is nothing in Mrs Orjiako's affidavit that takes matters any further. The substance of her affidavit merely supports the affidavit of Dr Orjiako.

[132] Nor does the written evidence of Dr Orjiako's sister, Professor Christine Nwuche, assist on this or, indeed, any other issue.

[133] Additionally, it is unclear to me when the Share Transfers to Mrs Orjiako took place. For a person to allege that the transfers took place for the purpose of estate tax or duty planning, one would expect the underlying share transfer instruments to be produced. No form of transfers or allotments, if they exist, have (so far as I know) been included in the SJ Bundles. Furthermore, none of

the other “numerous documents” referred to in the above paragraphs of the affidavit has been produced by Dr Orjiako.

[134] I have already referred to the approach that this Court must take on the Application. The first stage in the process is for me to decide whether, but for the Orjiakos’ written evidence in opposition to the Application, the underlying allegations made by the Claimant against the Defendants are established, based on the material presented to the Court. Put differently, the question for the Court is that if there had been no evidence adduced on the Application by the Defendants, based on the documents and the objective contemporary circumstances, would the case against the Defendants in Ground 1 have been made out?

[135] There is no question in my mind that they would be, and indeed are, made out, based on what I have said above.

[136] The second stage is for me to decide whether the Defendants have raised a sufficient case on the papers for me to conclude that there is a real prospect of the Defendants succeeding at trial or, put more accurately, that there is “no real prospect of the Defendants being successful or succeeding” in the sense explained by Lord Woolf MR in **Swain**.

[137] There is a clear requirement on the part of a respondent to a SJ application to provide sufficient detail in his written evidence in opposition to the application to demonstrate that the claim or issue upon which SJ is sought should be tried. I have touched upon this above. However, it requires further mention at this stage.

[138] As already noted above, if an applicant for summary judgment adduces credible evidence in support of the application, the respondent then comes under an evidential burden to prove some real prospect of success or other reason for having a trial. In addition, as Stuart-Smith J (as he then was) observed in **Sainsbury’s Supermarkets Ltd v Condek Holdings Ltd**:¹⁰¹

¹⁰¹ [2014] EWHC 2016 (TCC), at [13].

“ ... on an application for summary judgment the court should consider the evidence that could reasonably be expected to be available at trial. However, the Court is not required simply to take all evidence at face value or to accept without question any assertion that may be made: the question is whether the respondent's case carries some degree of conviction.”

- [139] A respondent to a summary judgment application who claims that further evidence will be available at trial must serve written evidence substantiating that claim. In **Korea National Insurance Corp v Allianz Global Corporate & Specialty AG (formerly Allianz Marine & Aviation Versicherungs AG)**,¹⁰² Moore-Bick LJ observed:

“It is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial. If it wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up. It is not sufficient, therefore, for a party simply to say that further evidence will or may be available, especially when that evidence is, or can be expected to be, already within its possession, as is the case here ...”

- [140] Put simply, this means that the respondent must demonstrate that:

- (a) the underlying allegations made by the Claimant (including any inferences sought to be drawn by the Claimant from those allegations) will not withstand scrutiny when they are put to the test at trial by the cross-examination of its witnesses;
- (b) the oral evidence that the Defendants’ witnesses give at trial, based on the material adduced by them in opposition to the Application, may support the case that they wish to advance to the Court; or

¹⁰² [2007] EWCA Civ 1066, at [14].

- (c) there is likely to be some benefit from hearing oral evidence at trial, i.e., that it may support what the Defendants are likely to say at trial, based on that evidence. Thus, for example, if the oral evidence cannot improve on the written material that the Defendants have adduced because that material is inconsistent, weak, tenuous or otherwise incapable of supporting the Defendants' case, the Court will not grant leave to defend. There would be no point in doing so if the cross-examination did not improve the Defendants' position at trial.

[141] In this context, it is important to make the following points.

[142] First, the SJ application is not intended to be exercised through a minute and protracted examination of the documents and facts of the case to determine whether a party truly has a cause of action or defence. This is because to do so is to quote Danckwerts LJ in **Wenlock v Moloney**¹⁰³ is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power." However, the judge may determine a matter summarily not only if he harbours doubts about the soundness of the pleading of the respondent but, in addition, is satisfied that summary disposal will obviate the necessity for a trial or will substantially reduce the burden of preparing for the trial or the burden of the trial itself. As observed in **Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd, Rumasa SA v Multinvest (UK) Ltd**:¹⁰⁴

"But there are special circumstances which, in my view, made it right for the judge to proceed and to make the order which he made. If the appellants' pleadings and particulars had not been struck out, the appellants would have proceeded to demand discovery before trial and to lead evidence at the trial, harassing to the plaintiffs and embarrassing to the court and designed to support the allegations and insinuations of oppression and bad faith on the part of the Spanish authorities which

¹⁰³ [1965] 1 W.L.R. 1238 at 1244.

¹⁰⁴ [1986] A.C. 368 at 436.

appear in the amended defences and particulars. These allegations are irrelevant to the trade marks action and the banks' action and are inadmissible as a matter of law and comity and were rightly disposed of at the first opportunity.”

[143] Second, it is not appropriate for a court to grant leave to defend to a respondent where the respondent alleges that further documents may come to light before trial, when, as here, there is no evidence of that. As Lord Hamblen JSC observed in **Okpabi v Royal Dutch Shell Plc**,¹⁰⁵ when asking whether the position might change from how it appears at the summary judgment stage to what might happen at trial, the judge “was [should] not ask whether there [is] ... a clear prospect that new material will become available before the trial which is likely to give the claimants a real prospect of success”, but rather to ask whether “there are reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success.”

[144] The substance of this approach has been approved in several subsequent cases. For example, in **Steifel**,¹⁰⁶ Cockerill J observed:

“The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that -even bearing well in mind all of those points – it would be contrary to principle for a case to proceed to trial... So, when faced with a summary judgment application, it is not enough to say, with Mr Micawber, that something may turn up.”

[145] There is simply no basis for the Defendants to claim that their case at trial may be improved by disclosure or in any other way. On the basis that the Claimant is likely to have little actual knowledge about why and what the Orjiakos decided to do about the Shares, it will almost certainly have no documents, either undermining its case or supporting the case that the Orjiakos advance to this

¹⁰⁵ [2021] UKSC 3, at [127]-[128].

¹⁰⁶ [2021] EWHC 1045 (Comm), at [21]-[22].

Court. It follows that to suggest that the Claimant may have disclosable documents which may assist the Defendants' case is a complete fallacy. If there are documents in the possession or control of the Defendants that assist the Orjiakos, they should have disclosed them in connection with their opposition to the Application or explained why they cannot be produced. They have done neither.

[146] The plain fact is that as soon as the writing on the wall became clear to Dr Orjiako, i.e., at the very latest, when he knew that he was not going to be able to pay off the Loan when it was called in, he sought to put his assets beyond the reach of his creditors. This occurred in early 2014, but, in my judgment, more likely in March 2013 (or even earlier) when SEPCOL defaulted on the payment of the Loan.

[147] Dr Orjiako then provided different accounts about his position relating to the Share Transfers, believing that somewhere along the line, he might convince the Claimant that what he was saying was true. To counter the inevitable weaknesses in his case, he has sought to bury his case in a morass of irrelevant information and documents going back many years, hoping that neither the Claimant nor the Court would be able to get to the bottom of his case at the stage of the hearing of the Application. He believed that because of the overwhelming and confusing nature of that information and documentation, which he thought would be difficult to manage, understand, or resolve at the hearing of the Application, due to its sheer volume and complexity, it would inevitably mean that he would get unconditional leave to defend the Claim. The intention on his part, in my judgment, was designed to delay and obfuscate matters in the hope that by doing so, he would delay the determination of the Claim and, as a consequence, steal a march on the Claimant and Dr Orjiako's other creditors by hindering their ability to enforce the BVI Judgment. In doing so, Dr Orjiako has been somewhat hoisted by his own petard. By flip-flopping on his position, the conclusion for the Court on the Application is clear. As I have pointed out throughout this Judgment, his case, and that of the other Defendants, simply cannot be improved at trial. That is because, whatever their position, the inconsistency in their case will, based on what they have said in

their written evidence, simply not be satisfactorily explained by an oral explanation given by them at trial.

[148] The Defendants rely on a declaration of trust signed by Dr Orjiako in June 2013 to support the premise that well before the Pursley Share Transfer, Dr Orjiako intended to hold a substantial shareholding in Shebah BVI on trust for Mrs Orjiako. They maintain that this document cannot be reconciled with the Claimant's claim either under Ground 1 or Ground 2.

[149] The Claimant challenged the authenticity of this document. However, sufficient evidence has been produced by the Defendants (from a London firm of solicitors) to suggest that the document was genuine. I have not seen all the underlying communication that resulted in this document being signed by Dr Orjiako. However, for the purpose of the Application, I accept that the document is authentic.

[150] The Defendants say that this document is evidence of the fact that the case of the Claimant (whether under Ground 1 or Ground 2) can simply not be made out, at least so far as the Application is concerned.

[151] I do not regard the Claimant's request to see the original of the document to satisfy itself that the document was authentic as amounting to any concession on the part of the Claimant that the Orjiakos had the intention to transfer the Shares legally and beneficially to Mrs Orjiako.

[152] In essence, the Defendants' position on the effect of the declaration of the trust is summarised at paras. 39 onwards of Mr Weekes' skeleton argument:

"39 Some provision had to be made for the shareholders in Shebah Nigeria, since the valuable asset of that company (ie, the Seplat shares) had been transferred to a different company (Shebah BVI), in which they were not also shareholders. Such provision was originally to be made by Shebah BVI declaring that it was holding certain holdings of the Seplat shares on trust for them. This was to be effected by a Declaration of Trust which records (on its face) that it was to be executed in June 2013 ...

40. The ... deed provides that Shebah BVI would declare that it held shares in Seplat on trust for beneficiaries named in the Schedule to the deed. Those beneficiaries comprised:
- a. Mrs Orjiako (being one of the original shareholders in Shebah Nigeria). Pursuant to the Declaration of Trust, Shebah BVI was to declare a trust over 3,000,000 Seplat shares in her favour. This corresponded to:
 - i. 9.672% of Shebah BVI's total shares in Seplat. This was equivalent to her proportionate interest in Shebah Nigeria: she held 10,000,000 Shebah Nigeria shares, that corresponded to 10% of Shebah Nigeria's total shares in Seplat. This analysis is recorded in a table in §89 of Orjiako 8;
 - ii. This was equivalent to a 3% 'look-through interest' (or indirect interest) in Seplat.
 - b. The other 7 original shareholders in Shebah Nigeria (or their nominees); and
 - c. 10 other individuals, including some of Dr Orjiako's siblings.
41. The Declaration of Trust was signed by Dr Orjiako but the [Defendants] do not contend that it was properly executed. For present purposes, its significance is what it shows that Dr Orjiako intended and believed that (i) his wife, Mrs Orjiako already had an indirect interest in Seplat shares; (ii) more particularly, a 3% indirect (or look-through) interest in that company; and (iii) Shebah BVI was holding Seplat shares for her.
42. As regards four of the other proposed beneficiaries under the Declaration of Trust, who were siblings of Dr Orjiako, they were simply allotted shares in Seplat: see §44 below (and thus acquired direct ownership of those shares).
43. On 31 January 2014, a corporate reorganisation of Shebah BVI was commenced with the passing of the written resolutions for the allotment and ultimately effected in March 2014. This was for the purpose of family estate planning, in anticipation of the Seplat IPO.⁴⁶ This reorganisation involved the following steps:
- a. The directors of Shebah BVI (including Dr Orjiako) authorised the transfer of the single share in that company from him to Pursley;

- b. The share capital in Shebah BVI was increased from 50,000 shares to 1 million shares;
- c. Dr Orjiako, as sole director of Abbeycourt BVI, passed a resolution permitting it (in summary) to subscribe for 240,000 shares in Shebah BVI; Neville to subscribe for 124,000 shares; Plumage to subscribe for 43,404 shares; Pursley to subscribe for 119,999 shares and Sinclair to subscribe for 80,000 shares

[153] Paragraph 43(d) of Mr Weekes' skeleton argument sets out how the above shares were allotted, and para. 44 sets out the new allotment of shares that Dr Orjiako effected at or about the same time.

[154] The Claimant states that the position advanced by the Defendants is contrary to the Defendants' pleaded position. Whether or not it is does not appear to be relevant on an application of this nature, i.e., an application for SJ. However, even if one accepts – as I must – the authenticity of the declaration of trust for the purpose of the Application, I am unable to see how it supports the case advanced by the Defendants.

[155] The issue here is not the authenticity of the declaration of trust, but whether it provides any support for the premise that the Share Transfers transferred both the legal and beneficial interests to Mrs Orjiako (Ground 1), or whether those transfers were made with the intent to defraud creditors (Ground 2). On those issues, the declaration provides no assistance to the Defendants. That is because the Orjiakos have provided no explanation whatsoever about the contemporaneous documents pointing to the contrary position referred to in this Judgment.

[156] Mr Weekes states at para. 8 of his skeleton argument that the discovery of the declaration of trust is "a salutary example of the hazard of summarily determining a claim, rather than at trial with the benefit of disclosure." That seems to me to look at matters from the wrong end of the telescope. The critical point here is that the only meaningful disclosure that could assist the Orjiakos at trial is the disclosure of documents that they have in their possession or control. If they do have such documents, they should have disclosed them at

this stage. It is difficult to see how the Claimant can have documents which will advance the Defendants' case at trial.

[157] Of course, the Orjiakos may have other documents which may provide information about Dr Orjiako's underlying intention to transfer the Shares to Mrs Orjiako. It has long been established that, if a respondent does have such documents, for example, documentation relating to the estate planning advice they received, those documents are disclosable. This is based on the principle that the court will usually order the disclosure of documents exchanged between a party to a transaction under challenge and their legal advisers, where the documents relate to the setting up of a transaction that is under challenge. The overriding of legal professional privilege is justifiable where there is *prima facie* evidence of fraud, which is widely defined for these purposes as including underhand behaviour or sharp practice: see, for example, **Barclays Bank Plc v Eustice**,¹⁰⁷ a case under s. 423 of the **IA 1986**.

[158] I have not been taken through the orders for disclosure that the Court made in this case, and whether they expressly or impliedly included any communication passing between Dr Orjiako and his legal advisers about the transfer of the Shares. However, the vital point here is whether disclosable or not, if the Orjiakos had any documents in their possession or control that supported the position they maintain in the Claim, they would, or should, have disclosed those documents as part of their written evidence in opposition to the Application. They plainly either do not have those documents or, if they do, those documents, rather than supporting their case, almost certainly undermine it.

[159] Third, as can be seen from the above authorities, the same principle applies where the respondent argues that the cross-examination of witnesses at trial may reveal evidence that supports the case he advances, as opposed to the case advanced by the applicant, to the court. As Warby LJ, sitting as an additional Judge of the High Court, observed in **Duchess of Sussex v Associated Newspapers Ltd**:¹⁰⁸

¹⁰⁷ [1995] 4 All. E. R. 511, Court of Appeal of England and Wales.

¹⁰⁸ [2021] EWHC 273 (Ch), at [14]-[16].

- “14. **Easyair** principles (vi) and (vii) contain echoes of the law traditional disapproval of a desire to investigate alleged obscurities and a hope that something will turn up...’ as a basis for defending a summary judgment application; a case that is ‘all surmise and Micawberism will not do: see **The Lady Anne Tennant v Associated Newspapers Ltd**¹⁰⁹. The focus is not just on whether something more might emerge, but also – and crucially – on whether, if so, it might affect the outcome of the case; and the court’s task is to assess whether there are ‘reasonable grounds’ for believing that both these things would occur: see **Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Company**¹¹⁰.
15. As **Mummery LJ** warned in the **Doncaster** case at [10], on applications for summary judgment the court must be alert to the defendant, who seeks to avoid summary judgment by making a case look more complicated and difficult than it really is. But as he also said at [11], the court should beware the cocky claimant who ...confidently presents the factual and legal issues as simpler and easier than they really are and urges the court to be efficient...’. Efficiency is not a ground for entering summary judgment. Judgment without a trial may sometimes result in huge savings of time and costs; that would have been so in the hugely expensive litigation in **Three Rivers District Council v Bank of England**. But neither Part 24, nor the overriding objective, permits the court to enter judgment on the basis that the claimant has a strong case, the defence is not likely to succeed, and the time and costs involved in a trial are disproportionate to the potential gains.
16. The overriding objective of ‘deciding cases justly and at proportionate cost’ does have a role to play if the court concludes there is no realistic prospect of a successful defence ... At that point, the court would be bound to have regard to considerations such as saving expense, proportionality, and the competing demands on the scarce resources ... It is rare for the court to find a compelling reason for a trial, when it has concluded there is only one realistic outcome. The defendant has not suggested that this is such a case. My focus must be on whether it is realistic or fanciful to suppose the claims might fail at trial.”

[160] As noted at various places in this Judgment, the Claimant’s witnesses cannot say anything more at trial than the written evidence which they have provided

¹⁰⁹ [1979] F.S.R. 298 303, per Sir Robert Megarry V-C.

¹¹⁰ [2006] EWCA Civ 661,

on behalf of the Claimant. They simply would not have first-hand knowledge of the reasons for the purported transfer of the Shares. In addition, the position of the Orjiakos is unlikely to be improved at trial by their cross-examination or the cross-examination of their witnesses. The Orjiakos have purported to provide an account of why they say that they did not form the intention contended for by the Claimant in the Claim in relation to the transfer of the Shares, and why the written evidence provided by the Claimant does not undermine that account. Their evidence on this and any other issue will primarily be judged by the existence of contemporaneous documents. As also pointed out above, those documents do not support the case that they advance to this Court.

- [161] The overall assessment of the evidence in connection with a claim is within the sole province of a trial judge. However, it has been held that the presence of contemporaneous documents (and their contents) will be of substantial importance in that assessment, particularly in cases where the allegations date back many years. As Leggatt J (as he then was) observed in **Gestmin SGPS SA v Credit Suisse (UK) Ltd and another**:¹¹¹

“...the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.”

- [162] These remarks have not received full approval in every judicial quarter: see, for example, **Francis and another v Knapper and others**¹¹² and **Kogan v**

¹¹¹ [2013] EWHC 3560 (Comm), at [22].

¹¹² [2016] EWHC 3093 (QB), at [79(ii)], per Andrew Baker J.

Martin.¹¹³ Nonetheless, the substance of this approach has been endorsed in several cases, including by the Supreme Court: see, by way of examples, **R. (on the application of Dutta) v General Medical Council**¹¹⁴ where the relevant authorities are mentioned and summarised; **Re Bright Future Software Ltd, Manolete Partners plc v Ellis**,¹¹⁵ **Barrow v Merrett**,¹¹⁶ **MJF v University Hospitals Birmingham NHS Foundation Trust**,¹¹⁷ **Kinled Investments Ltd v Zopa Group Ltd**,¹¹⁸ **Mohammed and others v Daji and others**,¹¹⁹ and **R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs**.¹²⁰

[163] The observations of Leggatt J in **Gestmin** must not be read as suggesting that one simply disregards the oral evidence of the parties. However, the critical point here is that if there are contemporaneous documents supporting an account put forward by one party, there must be convincing evidence to demonstrate that those documents do not accurately reflect what happened. That is not to say that the burden of proof switches from one party to another or that the standard of proof is higher than the usual standard of proof. It simply means that the court must regard that as an essential consideration in its evaluation of the evidence (both written and oral) that has been adduced in the proceedings.

[164] In the context of the conclusion of an oral contract – a very much different context to the present context, but nonetheless appropriate for mention because the guidance stated is roughly the same as here – the position was emphasised in the following terms by Eyre J in **Mansion Place Ltd v Fox Industrial Services Ltd**.¹²¹

‘In determining whether there is an enforceable contract, the court must look at the witnesses’ evidence through the prism of the contemporaneous documents; of their subsequent actions; of those events which are accepted or clearly demonstrated to have happened;

¹¹³ [2019] EWCA Civ 1645.

¹¹⁴ [2020] EWHC 1974 (Admin).

¹¹⁵ [2020] EWHC 1674 (Ch).

¹¹⁶ [2022] EWCA Civ 1241.

¹¹⁷ [2024] EWHC 3156 (KB).

¹¹⁸ [2022] EWHC 1194 (Comm).

¹¹⁹ [2024] EWCA Civ 1247.

¹²⁰ [2018] UKSC 3, at [103], per Lord Kerr.

¹²¹ [2021] EWHC 2972 (TCC), at [55].

and of inherent likelihood. The impression made by the demeanour of a witness must be set against those matters and to the extent that the contemporaneous documents in particular show a picture different from that depicted by a particular witness it is the former and not the latter which I should regard as more likely to be an accurate account of what happened.'

[165] The long and short of all of this is that it is inconceivable that the Court will accept what the Defendants and their witnesses say at trial in the face of the compelling contemporaneous documents to the contrary which exist against the case that they are advancing to the Court. This is so even if the demeanour of the Defendants and their witnesses suggests that they are attempting to provide a truthful account of their position in the Claim. The reason for that is obvious. The account they provide must give a proper explanation as to why the contents of those documents offer a completely different account of the events that took place. The plain fact is that the Orjiakos will simply not be able to do this.

[166] It is well established that an impression as to the demeanour of a witness ought not to be adopted by a judge without testing it against the whole of the evidence of the witness in question. The dangers of a court relying wholly, mainly or even significantly on the demeanour of a witness, in evaluating the overall evidence which it has heard, have been emphasised in many cases: see, for example, **R. (on the application of SS (Sri Lanka)) v Secretary of State for the Home Department**¹²² and **Goodman v Faber Prest Steel**.¹²³ In the latter case, Moore-Bick LJ observed:¹²⁴

"The only evidence that Mr. Goodman had experienced pain in his knees and his back immediately after the accident came from him. Although much emphasis is quite properly placed on the advantage given to the trial judge of seeing and hearing a witness give evidence, it is generally acknowledged that it is difficult even for experienced judges to decide by reference to the witness's demeanour whether his evidence is reliable. Memory often plays tricks and even a confident witness who honestly believes in the accuracy of his recollection may be mistaken. That is why in such cases the court looks to other evidence to see to what extent it supports or undermines what the witness says

¹²² [2018] EWCA Civ 1391.

¹²³ [2013] EWCA Civ 153.

¹²⁴ [2013] EWCA Civ 153, at [17].

and for that purpose contemporary documents often provide a valuable guide to the truth.”

- [167] In **Armagas Ltd v Mundogas SA**,¹²⁵ Robert Goff LJ described why this approach was essential, particularly in a case involving fraud:¹²⁶

“Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses’ motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.”

- [168] By parity of reasoning, and in line with some of the authorities cited above, the absence of relevant documents when they should have existed (and the explanation given by a party for such absence) may also be of substantial importance in the Court having to decide about the truthfulness of the account given by that party. For example, in the context of the present case, one would expect some documentation to exist that supports the assertion that the Share Transfers to Mrs Orjiako were made for “estate planning” purposes. There is no document supporting this assertion, either in the form of advice that the Orjiakos received from their advisers or even by way of an account in their written evidence of how the Share Transfers would avoid or mitigate any potential tax or other liability to which Dr Orjiako or his estate might otherwise be subject.

- [169] The upshot of all of this is that however truthful the oral evidence of the Orjiakos and their other witnesses may appear (by their demeanour) to the Court, it would simply not survive any proper analysis undertaken by the Court when set against

¹²⁵ [1985] 1 Lloyd’s Rep. 1, CA.

¹²⁶ [1985] 1 Lloyd’s Rep. 1 at 57. This approach has been approved in several subsequent fraud and non-fraud cases: see, by way of examples, *Heffer v Tiffin Green* (1998) *The Times*, 28 December; *Gow v Harker* [2003] EWCA Civ 1160; *Shah v Shah* [2018] EWHC 2075 (Ch); *Nuttall v Kerr* [2019] EWHC 1977 (QB); *Re Brunt* (dec’d), *Wrangle v Brunt* [2021] EWHC 368 (Ch); *Singh v Singh Jhutti* [2021] EWHC 2272 (Ch); *Hotel Portfolio II UK Ltd (in liq) v Ruhan* [2022] EWHC 383 (Comm); *Re International Automotive Engineering Projects Ltd* [2022] EWHC 1751 (Ch); and *MW (a child by his litigation friend DW) and another v Wilkinson and another company* [2025] EWHC 2300 (KB).

the contemporaneous documents (or lack of them) which show a picture different that is different from the oral evidence given by a particular witness. In my judgment, therefore, it would be a pointless waste of time for the Court to hear what the Orjiakos and their witnesses had to say about matters from the witness box.

[170] In those circumstances, I consider it appropriate to grant SJ under Ground 1.

[171] On this basis, I do not need to consider the Claimant's case under Ground 2. However, it is appropriate for the sake of completeness (and in case of an appeal against this Judgment) that I do.

Ground 2

[172] The relief in Ground 2 is sought alternatively to the relief sought in Ground 1.

[173] The issue for the Court under this ground is to decide whether, if the Court is wrong about Ground 1 – i.e., that the Share Transfers were only effective to transfer the legal estate in the Shares to Mrs Orjiako – the Claimant nonetheless shows a sufficient case for SJ to be granted on the basis that the transfer of the legal title to, and beneficial interest in, the Shares were made with intent to defraud creditors under s. 81 of the **CLPA 1961**.

[174] The Orjiakos admit the underlying transfer of the Shares. The principal issue for this Court to determine is whether the transfer of the Shares by Dr Orjiako to Mrs Orjiako was made with "intent to defraud" his creditors. A subsidiary issue for the Court to determine is whether the consideration provided for the Share Transfers was, to quote the words of s. 81(3) of the **CLPA 1961**, for "valuable consideration and in good faith or upon good consideration and in good faith to any person not having at the time of conveyance, notice of the intent to defraud creditors."

[175] Unlike the position that applies under Ground 1, where the Court considers the intention of both the donor and donee in deciding whether the donor retained

the beneficial interest in the Shares, the only intention under consideration under Ground 2 is that of the donor. If the requisite intention is established, the transfer is voidable under s. 81 of the **CLPA 1961**, subject to the other provisions of that section.

[176] The Claimant has amply established the intent to defraud for the purposes of the Application.

[177] It has been held that a fraudulent intent may readily be established if the debtor cannot pay his debts without the asset transferred by him being available for the payment of his debts.¹²⁷ However, that will not usually, by itself, be sufficient to impugn the transaction in question. In the present case, the chronology of events summarised above shows a deliberate, systematic and fraudulent attempt, calculated to put the Shares beyond the reach of the Claimant and Dr Orjiako's other creditors.

[178] One need only consider the brief chronology set out above to reach the unavoidable conclusion that this is the case.

[179] By May 2014, Dr Orjiako had been sued personally for \$150m and settled that claim on the basis that he would pay the sums outstanding in two tranches, the first of which (for \$50m) would be paid by 30 April 2014. However, in my judgment, the writing must have been on the wall for Dr Orjiako very substantially earlier. By at least March 2013, he must have known that he had no reasonable prospect of paying his guarantee liability to the Claimant. When he failed to make the two payments above, there would have been no doubt in his mind that he would be unable to do so without recourse to the Shares.

[180] By 2014 (but, in my judgment, much earlier), Dr Orjiako was insolvent (in the sense that he was unable to pay his debts as and when they fell due), and he must have known that. One would have expected him to obtain specialist advice on how to implement a scheme (formal or informal) for paying off all his creditors or to compound for their debts, using his available assets to do so.

¹²⁷ For examples, see *Mackay v Douglas* (1872) LR 14 Eq 106 and *Re Butterworth, ex p Russell* (1882) 19 Ch D 588.

- [181] There is no evidence that he did. However, whether or not he did, he claims that he sought estate planning advice to transfer his assets to his wife and others. It is remarkable that, at a time when he was under pressure from creditors to pay his debts, he sought estate planning advice. The assertion is not just fanciful but false. It is not clear when he sought or obtained that advice. However, even if he did, he must have known that he was insolvent on a “cash flow” basis at the time. As a result of acting on that advice, he would also be insolvent on the basis that, other than the Shareholding, he would have insufficient assets to meet his liabilities in full.
- [182] Even if one accepts the written evidence of the Orjiakos in full, the most that can be said about it is that a subsidiary purpose of transferring the Shares may have been to obtain a tax benefit upon his death. It is clear, in my judgment, that the dominant purpose for the transfer was to defraud his creditors by putting his assets out of their reach.
- [183] It has long been held, in the context of s. 423 of the **IA 1986**, at any rate, that where a debtor has entered into a transaction for more than one purpose, the court does not have to be satisfied that the statutory prohibited purpose of putting assets out of the reach of creditors need not be the sole or dominant purpose of the transaction.
- [184] In **Inland Revenue Commissioners v Hashmi**,¹²⁸ the court found that the debtor had two purposes in entering into the relevant transaction; he wanted to secure the future of his son financially, and he wanted to put the relevant property beyond the reach of creditors should they emerge. Hart J, at first instance, observed that it will often be the case that the motive to ensure family financial protection and the motive to defeat creditors will co-exist. They may indeed be two sides of the same coin, with the transferor unable to say which was the more important in their own mind.

¹²⁸ [2002] EWCA Civ 981.

[185] Giving the leading judgment in the Court of Appeal, Arden LJ (as she then was) observed:¹²⁹

"In my judgment there is no warrant for excluding the situation where purposes of equal potency are concerned ... One purpose can co-exist with another ... the section does not require the inquiry to be made whether the purpose was a dominant purpose. It is sufficient if the statutory purpose can properly be described as a purpose and not merely as a consequence, rather than something which was indeed positively intended."

[186] The other members of the Court of Appeal (Laws and Simon Brown LJJ) also made it clear that there was no room for the argument that the statutory purpose had to be one which caused the transaction to be entered into before the court could intervene. Where the court is satisfied that, in truth, the statutory purpose motivated the debtor, it will intervene and make an appropriate order even though the debtor would have entered into the transaction for legitimate purposes in any event.

[187] The position could not have been stated with more clarity by Simon Brown LJ in **Hashmi**. He observed:¹³⁰

"Assume, say, that the debtor makes a gift partly out of a wish to avoid inheritance tax and partly to escape his creditors; and assume further that he would have made it in any event purely for inheritance tax purposes. That, to my mind, should not save the gift from being set aside. Escaping the creditors may well, after all, have been a substantial factor in the donor's thinking. No more should a gift, in my opinion, be saved merely because the debtor would in any event have made it to benefit the donee."

[188] The observations of Simon Brown LJ are particularly apposite in this case, where Dr Orjiako asserts that the Transfers were made to his wife for estate planning purposes or out of the natural love and affection that he has for her. Whether or not what he says is correct – and I have already indicated that I do not accept his claims – the fact is that he was clearly motivated to transfer the Shares to put his assets beyond the reach of his creditors.

¹²⁹ *Ibid*, at [23].

¹³⁰ *Ibid*, at [38].

- [189] In **JSC BTA Bank v Ablyazov**,¹³¹ Leggatt LJ (with whom Coulson and Gloster LJJ agreed) cast doubt on the formulation in **Hashmi** concerning the need for there to be a substantial purpose and said that “[t]he description of the requisite purpose as a ‘substantial’ purpose was not necessary to the decision of the Court of Appeal in the **Hashmi** case and to my mind it risks causing confusion. The word ‘substantial’ is not used in section 423 and I can see no necessity or warrant for reading this (or any other) adjective into the wording of the section. At best it introduces unnecessary complication and at worst introduces an additional requirement which makes the test stricter than Parliament intended.”
- [190] Leggatt LJ went on to say¹³² that “it is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, then the transaction falls within section 423(3), even if it was also entered into for one or more other purposes. The test is no more complicated than that.”
- [191] The Court of Appeal in **Hashmi** affirmed the decision at first instance in which the Judge had said that the debtor's purpose need not be his dominant purpose but must play more than a trivial role in what he decided to do in the sense that it made a contribution of importance to the debtor's purpose in entering into the transaction.¹³³ The Judge had held that provided the statutory purpose constituted a purpose of the debtor in entering into the transaction, the fact that he might also have had some other purpose in entering into the transaction will not prevent s. 423(3) being applied, and this was the case even if that other purpose was in fact the debtor's dominant purpose in entering into the transaction.¹³⁴
- [192] It follows from the above cases that putting assets beyond the reach of creditors need not be shown to be the sole or dominant purpose or intention of the transaction before the court will intervene under s. 423. Whether the same position applies under s. 81 of the **CLPA 1961** is not altogether clear from the

¹³¹ [2018] EWCA Civ 1176, at [14].

¹³² *Ibid.*

¹³³ *JSC BTA Bank v Ablyazov* [2016] EWHC 2071 (Comm), at [128].

¹³⁴ *Ibid.*, at [128].

authorities on the subject, although I have not looked into the matter in any detail. However, even if I need to be satisfied that it was the sole intent of transferring the Shares, I am so satisfied, *a fortiori*, if that intent was simply the dominant intent for the transfer.

- [193] I readily accept that under s. 81 of the **CLPA 1961**, the test for avoiding a transaction is not the insolvency of the debtor. Indeed, it has been held, even in the case of s. 423 of the **IA 1986**, that the issue for the court is not whether the debtor was insolvent or on the verge of insolvency, but rather the discrete question of what his intention was at the time of the transaction, which is the subject of challenge: see **BTI 2014 LLC v Sequana SA**.¹³⁵
- [194] It follows that the applicant must prove an intent to defraud. While the debtor's insolvency may provide some support for such an intention, it is not sufficient by itself. Nor is the fact that there was no consideration for money or money's worth an indication, whether by itself or combined with the insolvency of the debtor, a sufficient basis to impugn a transaction under s. 81. However, the insolvency of the debtor may lead a court to infer the existence of the requisite purpose, just as the absence of insolvency might cause a court to lean towards finding that the requisite purpose was lacking.
- [195] Nonetheless, in the absence of any evidence suggesting that there was any other intent, it is difficult to see how the transaction can be said not to be with the intent to defraud creditors in the face of Dr Orjiako's clear and obvious insolvency. The only other purposes given by Dr Orjiako for the transfer (estate planning and a desire to benefit his wife for the substantial contribution she made to his various businesses, and out of love and affection for her and to his sister for similar reasons) simply do not come up to scratch.
- [196] In favour of the Defendants, reference must be made to the decision in **Purkiss v Kennedy**,¹³⁶ in which a transaction was entered into with the intention of mitigating any liability to tax that would arise from it. The court held that the

¹³⁵ [2016] EWHC 1686 (Ch), at [494], upheld by the E&W Court of Appeal: [2019] EWCA Civ 112. The subsequent appeal to the Supreme Court did not concern this issue: [2022] UKSC 25.

¹³⁶ [2024] EWHC 1081 (Ch).

transaction did not constitute an intention to prejudice a claim for that tax liability within the purposes of s. 423(3)(b). Rajah J said:¹³⁷

[The applicant] relies on the fact that by transferring the full balance of the monies received from end users to the Trust (without deducting income tax and NIC on those monies), the Company was left with insufficient funds to meet the tax liabilities which would (and did) fall upon it in the event (as transpired) that the Scheme was ineffective. There is, however, a difference between a consequence of the scheme and its purpose. This is clearly demonstrated by the decisions in **Re Marylebone Warwick Balfour Management**¹³⁸ and **Asertis Ltd v Heathcote**¹³⁹. In both these cases, applications for relief under s 423 were made by the liquidators of companies which had entered into a tax avoidance scheme which had failed leaving the companies insolvent, and HMRC unpaid in respect of the tax which was due. In both of these cases, the applications failed because, while the consequences of the failed scheme was that HMRC was prejudiced, and assets placed out of HMRC's reach, the companies did not have a prohibited purpose having entered into the tax avoidance scheme with a genuine belief that it was tax effective.”

[197] I am not convinced by the reasoning in **Purkiss**. I am not sure that, on the facts, the respondents in that case, could not have been found to have had, as part of their purpose, the requisite statutory intention to move assets out of the reach of their creditors. Be that as it may, that case was decided on its own unusual facts, and, restricting it to its own facts, the Judge was perhaps entitled to conclude that the statutory purpose was not made out.

[198] In any event, there is no similarity between **Purkiss** and the present case. In **Purkiss**, the court found, on the facts, that the prejudice to HMRC arose from a transaction which was part of a scheme that was entered *bona fide* for the purpose of avoiding tax. As a result of the scheme's failure, the debtor became liable to pay the tax it had sought to avoid paying. The Judge held that the purpose did not constitute an intention to prejudice a claim for that tax liability for the purposes of s. 423(3)(b). That was because, in entering into the scheme, the debtor had a genuine belief that the scheme was tax effective, and it did not matter if the consequence of the scheme was to put assets out of the reach of

¹³⁷ *Ibid*, at [51].

¹³⁸ [2022] EWHC 784 (Ch).

¹³⁹ [2022] EWHC 2498 (Ch).

HMRC. The position in the present case is different. The transfer of the Shares had one purpose and one purpose only: it was designed to put them outside the reach of Dr Orjiako's creditors. At the time of the transfer, Dr Orjiako was hopelessly insolvent.

- [199] The only basis relied upon by Dr Orjiako to dispute the inevitable "intent to defraud" is his own word. That counts for nothing against the overwhelming evidence which points to the contrary. Nor for the reasons already given will any oral evidence on the point assist Dr Orjiako. As Peter Gibson LJ observed in **Southall**,¹⁴⁰ in which a similar argument was raised (on behalf of the applicant, as opposed to the respondent, in that case):

"Mr Collings [counsel for the Law Society] submitted that disclosure and cross-examination might come to the Law Society's aid ... he suggested that Mrs Southall's credit as a witness might be undermined by being proven to be wrong on that point. In my judgment, it would be quite wrong to allow a case to go ahead on the basis that there was an issue which went to the credit of one of the witnesses."

- [200] Wall J (as he then was) was equally emphatic about why the cross-examination of the respondent at the trial of the application would not assist, commenting¹⁴¹:

"I regard with particular distaste the suggestion that Mrs Southall, in her late 70s, should be cross-examined as to credibility only on her husband's infidelity some 30 years ago. I, like my Lord, am entirely satisfied that the judge should have ... given summary judgment on Part 24 of the Civil Procedure Rules 1998 in favour of the defendant."

- [201] In the same way as Peter Gibson LJ described that it would be "wishful thinking on the [applicant's] part that the pre-trial procedures, or cross-examination, would yield valuable support for its case"¹⁴², it would equally be "wishful thinking" for Dr Orjiako to believe that his case might be improved if the Claim were tried.

- [202] In the amended Defence, the Defendants raise a "limitation" defence. This was not pursued at the SJ hearing. So far as I must determine the issue, I agree with

¹⁴⁰ [2001] EWCA Civ 2001, at [50].

¹⁴¹ *Ibid*, at [59].

¹⁴² *Ibid*, at [51].

Mr Thompson that there can be no limitation defence available to the Defendants for the reasons he gives: see **Hill v Spread Trustee Company Ltd**¹⁴³ and the principles relating to the extension of the limitation period set out in **Giles v Rhind**.¹⁴⁴

[203] Section 81(3) of the **Conveyancing and Law of Property Act 1961** states that s. 81 “does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having at the time of conveyance, notice of the intent to defraud creditors.” Accordingly, an innocent transferee who takes an estate or interest in the property in good faith for valuable consideration and without notice of the intent to defraud has statutory protection. Similarly, a bona fide purchaser from the transferee without notice of the fraudulent intent is protected against an order. Neither the **Conveyancing and Law of Property Act 1961** nor any other statutory provision applicable in this jurisdiction to which I have been referred sets out the meaning of the expression “valuable consideration” or “good consideration”. This may be contrasted with s. 205(1)(xxi) of the **LPA 1925**, which states that for the purposes of the meaning of the expression “purchaser” in the **LPA 1925**, the expression “valuable consideration” includes “marriage, and formation of a civil partnership, but does not include a nominal consideration in money.”

[204] It is not clear whether the Orjiakos contend that the transfer of the Shares made by Dr Orjiako to Mrs Orjiako, out of the natural love and affection that he has for her, amounts to valuable or good consideration. Whether or not it constitutes valuable or good consideration for the purposes of Ground 1, I am satisfied that it does not amount to valuable or good consideration for the purposes of s. 81.

[205] There is some slight basis for suggesting that a transfer for natural love and affection can amount to valuable consideration. For example, in **Re Yates**,¹⁴⁵ Charles J stated that the transfer of a half share in a matrimonial home by a

¹⁴³ [2006] EWCA Civ 542, at [117]–[118], and [143].

¹⁴⁴ [2008] EWCA Civ 118.

¹⁴⁵ [2005] BPIR 476.

husband in favour of his wife in consideration of the natural love and affection which he had for her could “amount to ‘valuable or good consideration’ for the purposes of s. 172(3)” ... and that if the transfer was a genuine gift and not a sham or pretence I would accept that it was made, or can properly be said to have been made, because of the natural love and affection of [the husband] for [his wife].”¹⁴⁶ However, on the facts, Charles J decided that the wife did not have the protection of s. 172(3) because she did not receive the husband’s half share in good faith, and the wife had notice that the husband intended to put his share in the matrimonial home beyond the reach of his creditors, particularly the Inland Revenue.

[206] The preponderance of authority is against the natural love and affection that a husband has for his wife, constituting valuable or good consideration. These authorities include **Moffat v Moffat**,¹⁴⁷ in which McBride J expressly stated that an assignment ... made in consideration of ‘natural love and affection’ ... is not valuable consideration.”

[207] In **Re Abbott**,¹⁴⁸ Sir Robert Megarry V-C, sitting in the Divisional Court with Peter Gibson J (as he then was), was clear that the meaning of “purchaser for valuable consideration” in s. 42 (1) of the **Bankruptcy Act 1914**, the forebear of the **IA 1986**, so far as it concerned the insolvency of individuals. He observed:

“Plainly ‘good consideration’, in the sense of the natural love and affection that a man has for his wife and children, is not enough. Nor is a merely nominal consideration, even though it would suffice to support a simple contract at common law. In the context of the avoidance of settlements by a trustee in bankruptcy, a ‘purchaser ... for valuable consideration’ must be someone who can not only be described as being a ‘purchaser’ but can also be said to have given a consideration for his purchase which has a real and substantial value, and not one which is merely nominal or trivial or colourable.”

[208] In any event, even if the natural love and affection that Dr Orjiako had for his wife constitutes valuable or good consideration, the statutory protection in s.

¹⁴⁶ [2005] BPIR 476, at [190].

¹⁴⁷ [2020] NICH 17, a decision of the Northern Ireland Chancery Division.

¹⁴⁸ [1983] Ch. 45.

81(3) is not available to her. The protection is only available to an innocent transferee who takes an estate or interest in the property in good faith for valuable consideration and without notice of the intent to defraud. It is clear from Mrs Orjiako's written evidence that, at all material times, she well knew what was going on and specifically knew that what her husband was doing was seeking to put his assets out of the reach of his creditors.

- [209] It must follow from the above that the Claimant is also entitled to succeed under Ground 2 if my analysis under Ground 1 is incorrect.

Conclusion

- [210] The substantive order I will make is that proposed by the Claimant in relation to the primary relief it claims, i.e., a declaration that Dr Orjiako is the sole beneficial owner of the Shareholding Companies and the Salvic Defendants, i.e., Salvic Energy and Salvic Petroleum BVI. I will leave it to the parties to agree an appropriate form of declaration for this purpose.
- [211] On that basis, there is no need for me to concern myself with the relief sought by the Claimant under Ground 2.

Matters outstanding and arising

- [212] There are several matters that the Court will need to deal with arising from my judgment, such as costs, including the costs of any interlocutory matter that may have been held over to be determined at, or following, the SJ Hearing.
- [213] I invite counsel to lodge an approved minute of an order to reflect my judgment as soon as possible and, in any event, within 5 days of the circulation of this Judgment in draft form.

Acknowledgments

[214] I again express my deep and sincere gratitude to counsel, both for the manner of the presentation of their clients' cases and for their cooperation throughout the SJ Hearing. The skeleton arguments were not just comprehensive but prepared to the highest possible standard. I do not say this out of politeness, convention, or courtesy. I say it because it is true.

[215] I regret the length of this judgment. However, it reflects the excellent quality of both the skeleton arguments and the oral submissions that were advanced before me at the SJ Hearing. While the Judgment does not (and does not need to) deal with every conceivable point that arose in the course of the hearing of the Application, its length also reflects the very many points that arose from some of the arguments that the Defendants had raised in their skeleton argument, which were not advanced at the SJ hearing.

Abbas Mithani KC
High Court Judge (Ag)

By the Court

Registrar