Neutral Citation Number: [2025] EWHC 12 (Ch)

Case No: PT-2023-000410

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 08/01/2025

Before :

HH JUDGE DAVIS-WHITE KC
(sitting as a Judge of the Chancery Division)

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Between :

TOGETHER COMMERCIAL FINANCE LIMITED	**Claimant**
- and -	
FAY OF LONDON LIMITED	**Defendant**

- -
- -

Mr Jonathan Gaunt KC and Ms Eleanor d'Arcy (instructed by **Eversheds Sutherland International LLP**) for the **Claimant**
Mr Ian Clarke KC and Mr Henry Webb (instructed by **Healys LLP**) for the Applicants, the Defendant and Ms Tatiana Peganova
Hearing date: 5th December 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 8 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HH JUDGE DAVIS-WHITE KC

HH Judge Davis-White KC :

Introduction

1. In these mortgagee possession proceedings, I have before me an application by the Defendant, Fay of London Limited ("FOL") and Ms Tatiana Peganova ("Ms Peganova") for orders (a) adding Ms Peganova as second Defendant; (b) to amend the Defence and to bring a Counterclaim by FOL. The original Defence served on 20 March 2023 was struck out by order of Master Arkush dated 9 July 2024.

2. The history of this matter is a little complicated. The following is a broadbrush overview.

3. By the possession proceedings the Claimant, Together Commercial Finance Limited, a mortgagee, ("TCFL") seeks a possession order against the tenant, FOL in relation to premises being Flat A, 1 Eaton Square (the "Flat"), leased to FOL. That Flat comprises the ground and lower ground floors of No 1.

4. The Defence and Counterclaim that FOL and Ms Peganova wish to adopt and seek permission to amend to is that exhibited in draft to Ms Peganova's second witness statement. I refer to it as the "draft Defence and Counterclaim". The current Defence has been struck out, but without prejudice to the application before me.

5. FOL originally obtained a lease[1] of the Flat by purchase in November 2011. The lease was dated 24 September 1998 and was for a 75-year term commencing on 25 June 1998 (the "Original Lease"). Subsequently, notice was served by FOL claiming an extended lease under Chapter 2 of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993 (the "1993 Act"). FOL is now the tenant under a lease made on 15 September 2015 for a term which expires on 24 June 2163 (the "Current Lease"). Under the 1993 Act, the Current Lease in general, but with limited exceptions, should be on the same terms as the Original Lease (see s57 of the 1993 Act). Title to the Current Lease is registered at HM Land Registry under Title No. NGL954358.

6. FOL is now owned by trustees of a discretionary family settlement (the "Trust") of which Ms Peganova is one of a number of discretionary beneficiaries. She asserts that, either by proprietary estoppel or common intention constructive trust, she owned a beneficial interest in the Original Lease and now the Current Lease.

7. In 2016, the Claimant mortgagee, TCFL, provided a bridging loan to FOL secured on the Current Lease (the "Loan").

8. Ms Peganova says that her beneficial interest in the Current Lease (or the equity arising from the proprietary estoppel) binds the mortgagee.

9. FOL says that, assuming Ms Peganova does indeed have such a beneficial interest (and had it in 2016 at the time that the Loan was made), then the Loan (and associated security) by the Claimant was a regulated mortgage contract under the Financial Services and Markets Act 2000 ("FSMA"). Because the Claimant lacks relevant authorisation by the FCA, the loan agreement, the charge and a related security, a

[1] Technically the relevant leases held by Fay of London Ltd have been or are underleases but nothing turns on that point for present purposes and for simplicity I refer to them as "leases".

debenture granted by FOL, are, says FOL, void under s26 FSMA, but subject to the power of the court under s28 FSMA to allow the agreements to be enforced. As such FOL's defence and counterclaim is dependent upon the validity of Ms Peganova's case.

10. The proposed amendments seek to raise each applicant's case and the proposed counterclaim is by FOL seeking (in broad terms) declaratory relief, a liquidated sum, compensation, interest and the requirement that the Claimant take steps to procure cancellation of relevant registrations at the Land Registry. It was accepted on behalf of Ms Peganova that, were she to be joined and permission given for the draft Defence and Counterclaim to be adopted by amendment, then it might well be necessary for Ms Peganova also to advance a counterclaim, For present purposes nothing turns on this point. If I decide that Ms Peganova's case is sufficiently arguable as to be permitted to be made then the precise pleading position can be considered at that point.

Representation

11. Mr Jonathan Gaunt KC and Ms Eleanor d'Arcy appeared on behalf of the Claimant. Mr Ian Clarke KC and Mr Henry Webb appeared for Ms Peganova and FOL. I am grateful to all Counsel for their helpful written and oral submissions.

The evidence

12. The evidence before me comprised the second witness statement of Ms Peganova dated 1 July 2024, the second and third witness statements of Ms Victoria Savage, Partner in Eversheds Sutherland (International) LLP, the Claimant's solicitors, (dated respectively 24 July 2024 and 31 July 2024) and the third witness statement of Ms Peganova, dated 29 August 2024. Following the hearing, and as ordered by me, Ms Peganova filed a fourth witness statement (which is dated 12 December 2024) dealing over the relevant time period with the identity of the trustees of the Trust, the directors of any corporate Trustees and the directors and shareholders of FOL. The latter witness statement clarified points in the evidence but did not fundamentally change the case and relevant evidence to that case put forward to me.

The Facts

13. I turn to the facts.

14. Subject to express exceptions, I set out the facts as they are either accepted or, at least for the purpose of this hearing, not contested. Where I refer to matters set out in the Defence and Counterclaim (or in evidence of Ms Peganova), those matters are not necessarily accepted by the Claimant. A number of copy documents that are relevant have been exhibited but by no means all of them.

The Peganovs and the setting up of the Trust

15. Ms Peganova married Mr Vasily Peganov ("Mr Peganov") in Russia in 2003. They originally lived in Moscow, Russia.

16. In about 2005 or 2007 they moved to the UK. It is said in the Draft Defence and Counterclaim that they moved to the UK with the object of making London the permanent home of themselves and their family. Between 2005 and 2013 it is said that

the couple rented accommodation at number 79 and subsequently number 9, Eaton Square, London.

17. By a Deed of Settlement apparently dated 31 March 2008, the Peganov Family Settlement Trust, (the "Trust"), was set up as a discretionary trust in favour of a specified class: Mr Vasily Peganov, Ms Peganova and, at the least their elder son Petr (born in March 2003) ("Petr"). The Deed purports to make their younger son, Mikhail (born in July 2008) ("Mikhail") , also a discretionary beneficiary of this specified class despite his date of birth being after the apparent date of the settlement. Elsewhere in the evidence it is suggested that he was added as a discretionary beneficiary on 30 July 2008. No relevant amending, or supplemental, deed is identified in this respect. It may be that the original Deed of Settlement was backdated. Nothing turns on these points. As well as the specified class, the Deed of Settlement apparently creates a general class of beneficiaries, being the children and remoter issue of Mr Peganov.

18. In the draft Defence and Counterclaim it is said that the Trust was created pursuant to the Nevis Trust Ordinance and that it is registered as an international trust with registration number T3997. I am told that Mr Peganov set up the Trust but I note that the evidence suggests that, although he was the "economic Settlor", the "legal settlor" was Jirehouse Resettlement Foundation, which is confirmed by the copy Deed of Settlement which is in evidence.

19. Clause 17 of Schedule 1 of the Deed of Settlement empowers the trustees to borrow money on the security of the trust fund. Clause 24 of Schedule 1 to the Deed of Settlement empowers the trustees to permit occupation by a beneficiary of any land which might, for the time being, be subject to the Trust.

20. The sole trustee of the Trust when it was set up was Jirehouse Fiduciaries Nevis Limited (a company incorporated in Nevis) ("JFN"). The director of JFN at this time was a Mr Colin Walwyn. The protector of the Trust was Jirehouse Luxembourg SA.

21. Ms Peganova says that the arrangements for the setting up of the Trust were made by an English solicitor, Stephen Jones, who appears later in the story. He appears to be connected to a number of entities with the name "Jirehouse", usually with a connection to an address at 8, John Street, London, WC1. The Deed of Settlement suggests that it is a document prepared by "Jirehouse Capital" of that address.

22. By First Supplemental Deed dated 1 September 2010, Mr Peganov was excluded as a discretionary object of the Trust.

Incorporation of FOL and its acquisition of the Flat

23. The Peganovs had no involvement, direct or indirect, in the incorporation of FOL and its acquisition of the Original Lease.

24. On 23 June 2011, FOL was incorporated in the British Virgin Islands. By licence dated 11 November 2011, the landlord of the Flat, Eaton Square Properties Limited, consented to the then tenant, Sabien McTaggart, assigning the Original Lease of the Flat to FOL (the "Licence"). The copy of the Licence in evidence before me is

incomplete. As I have said, at this point there was no connection between the Peganovs and the Trust on the one hand and FOL and the Flat on the other hand.

25. By clauses 5.1.1 and 5.1.2 of the Licence, FOL covenanted with the landlord:

> " 5.1.1 (save for any period while the Premises are lawfully underlet) to use the Premises only for the personal occupation of as licensees Mudhar Shawkat and the members of his family
> 3.1.2 (subject to Clause 5.1.1 and (subject as aforesaid) save (if at all) as may be provided in the Lease) not to assign underlet hold on trust for another or otherwise part with or share possession or occupation or allow any other person to occupy the whole or any part of the Premises or take in boarders or lodgers"

26. FOL then purchased the Original Lease on or about 18 November 2011 for the sum of £4,250,000. A copy of the Original Lease is not in evidence.

27. Although it is not relevant for present purposes, I infer that Mr Shakwat (or one or more entities connected with him) then owned the shares in FOL and that he and his family occupied the Flat as its licensee.

The Acquisition by the Trust of FOL and thereby (indirectly) the Flat

28. The draft Defence and Counterclaim asserts that, in 2013, Mr Peganov and Ms Peganova began discussing the purchase of a permanent family home in London. It is said that they agreed that they would commit their respective future to living in London and that they would together purchase a property to be their permanent family home in London. In mid-2013, the draft continues, they discovered that the Flat was for sale and determined to buy it "as their permanent family home".

29. It is asserted that there was a common understanding between Mr Peganov and Ms Peganova and that Mr Peganov represented to Ms Peganova that, following the purchase of the Flat, "each of them would thereafter be entitled to occupy [the Flat] as their permanent home ("the Common Understanding")".

30. The draft Defence and Counterclaim goes on to assert, in effect, that an approach for a loan to buy the Flat was made to a Russian Bank, Bashinvest Bank ("BIB"). BIB indicated that it would be prepared to make the loan (in the sum of $8,500,000) to a company controlled by Mr Peganov in Russia, Bashkirskaya Vystavochnaya Kompaniya ("BNK"), but that it would require security for, and/or personal guarantees of, the loan.

31. The draft Defence and Counterclaim goes on to say that, at Mr Peganov's request and in reliance upon the Common Understanding, Ms Peganova offered to BIB, through Mr Peganov, to grant a mortgage or charge over a property owned by her in Moscow (which is said to have then had an unencumbered value of $10,500,000), and to provide a personal guarantee. However, it is said that in the event BIB did not require security over the Moscow property but only personal guarantees from Mr Peganov and Ms Peganova. In reliance upon the Common Understanding and prior to the making of the loan to BVK, it is said that Ms Peganova executed a personal guarantee in favour of BIB regarding the repayment of the Loan by BVK.

32. The draft Defence and Counterclaim goes on to say that the acquisition of the Flat was effected by the sale and transfer by the vendors of shares in FOL and using the loan facility obtained from BIB. The shares in FOL were then owned by the Trust, the registered shareholder being the then Trustee of the Trust, JFN. In her third witness statement, received after the hearing before me, Ms Peganova asserts that JFN became sole director and shareholder of FOL on 29 August 2013. At that point JFN's sole director was Mr Walwyn.

33. In the draft Defence and Counterclaim it is asserted that on the (indirect) acquisition of the current lease of the Flat by means of the purchase of the shares of the tenant, FOL:

(a) an entity called Jirehouse LLP (acting by its servant or agent, Mr Jones) acted on behalf of the Trustee and thus the Trust;

(b) Mr Jones was informed by Mr Peganov of (inter alia) the Common Understanding that I have referred to and that Ms Peganova had executed the relevant personal guarantee in favour of BIB; and

(c) Mr Peganov decided and instructed Jirehouse LLP that the shares in FOL were to be held as an asset of the Trust by JFN.

(d) In circumstances where Mr Peganov is said to have been the directing mind and will of the Trust and/or JFN, and/or the person to whom the Flat acquisition had been delegated to, JFN adopted/ratified and approved the decision of Mr Peganov or had delegated the decision to him. The decision means the decision to acquire the Flat against the background of the Common Understanding and Ms Peganova's execution of a personal guarantee in reliance upon the same.

34. The factual conclusion pleaded in the draft Defence and Counterclaim is:

> "21. In the premises and in respect of the purchase of the shares in [FOL], Jirehouse LLP, Mr Jones and (through each and both of them) and by virtue of the matters pleaded in paragraph 20 above, [JFN] were aware that:
> a. the purpose of the purchase was to provide a permanent family home for Mr Peganov, the Second Defendant and their children in London;
> b. the funding for the purchase of the shares was to be provided and, after completion, had been provided:
> i. not from assets already settled upon the [Trust]; and
> ii. from the Loan arranged by Mr Peganov; and
> c. each of Mr Peganov and the Second Defendant had given a personal guarantee for the repayment of the Loan."

35. It is then pleaded that JFN thereafter became the sole shareholder and director of FOL and that it authorised and permitted, among others Ms Peganova to enter into occupation of the Flat. She is said to have occupied it since September 2013 as "her principal home".

36. As I have said, the precise terms of the Original Lease are not in evidence. Further there is an absence of evidence as to whether, in connection with and/or after the purchase of

the shares in FOL by JFN, there was any amendment to the Original Lease or to the covenants in Clause 5.1.1 and 5.1.2 of the 2011 Licence to assign to FOL, dealt with above. The suspicion is that there were one or more relevant amendments because of the terms of the 2015 Lease (considered below) and which would normally, in this respect, embody the terms of the Original Lease (see s57 of the 1993 Act, considered below) and because otherwise FOL would have been in breach of covenant.

The 2015 Lease

37. As I have already said, on or about 19 May 2014, FOL served a notice claiming an extended lease under Chapter 2 of Part 1 of the 1993 Act. The Current Lease dated 14 September 2015 contains (among others) the following clauses:

> "Changes to ownership and occupation
> 3.21 (Save by an assignment or underletting of the whole of the Premises complying with Clauses 3.22 to 3.25) not to assign underlet hold on trust for another or otherwise part with or share possession or occupation of or allow any other person to occupy the whole or any part of the Premises and not to take in boarders or lodgers save that if the Tenant is a company other than Fay of London Limited directors employees shareholders agents and representatives of that Tenant company may occupy the Premises as licensee only but PROVIDED FURTHER THAT for so long as the benefit of this lease is vested in Fay of London Limited the Premises may be used for the personal occupation of a director shareholder or representative of Fay of London Limited as licensee only in accordance with the terms of Clause 3.29
> ……
> Permitted user
> 3.29 At all times actually to use and occupy the Premises as a high class single private residence the whole to be in the occupation of only one family or a single individual or people living together as a single family PROVIDED THAT for so long as the benefit of this Lease is vested in Fay of London Limited the Tenant shall (save for any period while the Premises arc lawfully underlet) use the Premises solely for the personal occupation of a director shareholder or representative of Fay of London Limited and the members of his family as licensee only."

38. It is not suggested that clauses 3.22 or 3.25 have any bearing on the issues before me.

39. At some point in 2015, says Ms Peganova, Mr Abdou Amadou was appointed an additional director of JFN (Mr Walwyn remaining a director with him).

October 2016: the Loan by the Claimant to FOL

40. In October 2016 the Claimant, then called Lancashire Mortgage Corporation Limited (trading as "Together"), received an application from the solicitor acting for the Trust seeking a bridging loan. On around 18 November 2016, Mr Amadou signed a bridging loan agreement with the Claimant, Mr Amadou acting as a director of JFN (itself the director of FOL). On 28 November 2016 Mr Amadou executed a legal charge in favour of the Claimant securing the bridging loan against the Flat (the "Charge"). In addition to a legal charge over the Flat, FOL (acting by Mr Amadou) entered into a debenture

over its assets and undertaking by way of further security for the Loan. On 1 December 2016, the Claimant's legal charge was registered against the leasehold title to the Flat. The secured loan facility was £3,150,000.

41. In evidence is an undated deed of guarantee and indemnity entered into by Mr Stephen Jones personally in connection with the Loan and as further security for it.

42. Ms Peganova's case is that Jirehouse LLP purported to act at all material times on behalf of FOL in connection with this transaction but that the reasons for it are unknown to both her and FOL and that neither she nor Mr Peganov knew anything about the Loan which was made without their knowledge.

43. The draft Defence and Counterclaim pleads that, prior to the execution of the Bridging Loan Agreement, a Ms Bradbury of the Claimant instructed OCK Chartered Surveyors ("OCK") to carry out a valuation of the Current Lease of the Flat. That Valuation report, it is said, identifies that there were no tenancies but, under the heading "Who resides at the property?, the answer given is: "(Applicant is a company) Directors occupy with family members". Under the heading "Is more than 40% of the property owner or immediate family occupied as a residential dwelling" the answer is "Yes" .

44. In a Leasehold Property Report apparently provided to the Claimant by the borrower's solicitors, it was confirmed that the leasehold property (the Flat) was acceptable for the Lender's lending purposes subject to the comments made below. Under the heading "Alienation: (assignment, Sub-Letting, Charging and Group Companies)" a summary of the clauses on alienation and occupation in the 2015 Lease that I have referred to is set out. At the start of the section it is said:

> "While the tenant is Fay of London Ltd the Property may be used for personal occupation by a director, shareholder or representative of that company as licensee only; if the tenant is a company other than Fay Of London Ltd…."

45. At the end of this section it is said:

> "A representative of Fay of London Ltd occupies the Property as a representative of the tenant. A tenancy agreement has also been entered into with the representative."

The last sentence appears to be inaccurate in referring to a tenancy agreement. I say it appears to be inaccurate; this is because Ms Peganova (subject to her claims on the basis of proprietary estoppel/common intention constructive trust) asserts no interest greater than a licence. Whether or not there is a licence agreement and if so what its terns are is currently unclear on the evidence.

Changes relating to the Trust and the Peganov family

46. In 2018, says Ms Peganova, she and Mr Peganov were divorced.

47. An "Ownership and Corporate Governance Chart" as at 23 April 2019, relied upon by Ms Peganova, confirms FOL as "Sole Proprietor" of the Flat. JFN is shown as Sole Director and Nominee of FOL and the Trust as 100% owner of FOL. Mr Peganov is

shown as "Economic settlor and consultant" to the Trust, The sole Trustee of the Trust is shown as being JFN, with the directors of JFN being Mr Amadou and Mr Walwyn.

48. On 2 May 2019 the original Protector of the Trust (Jirehouse Luxembourg SA) merged with Scotia Enterprises SA and the survivor company (and Protector thereafter) was Scotia Enterprises SA.

49. By a Second Supplemental Deed dated 2 May 2019, Mr Peganov's mother, Natalia, was added as an additional Protector of the Trust and Mr Daniil Peganov (the eldest son of Mr Peganov) was added as a further discretionary beneficiary.

50. On 27 November 2019, the trustee of the Trust was changed from JFN to Baobab Fiduciaries Nevis Ltd ("BFNL") by a Third Supplemental Deed. I am told that on the same date Boabab Group SA ("BG") was appointed sole director of BFNL and on or about that date it also became sole shareholder of FOL.

51. On 19 August 2022, Ms Peganova's evidence is that she and Petr were appointed additional directors of FOL together with Boabab Group SA, BG, which remained a director and the sole shareholder of FOL.

52. By a Fourth Supplemental Deed, additional trustees to the Trust were appointed: Mr Peganov and Mr Petr Peganov. (In evidence is an undated copy of the Deed but executed only by Petr). I am told that the date of the Deed is 26 February 2024.

Failure to re-pay the Loan and subsequent court proceedings

53. The Loan and interest on it were not repaid when due. Demand was made to FOL on 31 March 2022, to no effect. On 25 October 2022, the current possession proceedings before me were issued in the Central London County Court (the "Possession Proceedings"). The proceedings seek both possession and a monetary judgment.

54. On or about 25 February 2023, before service overseas of the Possession Proceedings, a Part 7 Claim form was issued in the High Court, Business and Property Courts of England and Wales. The Claimants were Ms Peganova, Petr, Mikhail and the Trust. The Defendants were Stephen Jones, Zulheya Tohtayeva, Jirehouse Partners LLP, Jirehouse (an unlimited body corporate) and, as fifth Defendant, the Claimant before me, TCFL. FOL was not (and is not) a party. The proceedings asserted breach of contract, deceit, breach of fiduciary duty, negligence and a failure to account for the mortgage proceeds in relation to the first four Defendants. As regards the Claimant before me, TCFL, the allegation was that the mortgage was void for undue influence ("the Breach of Duty/Undue Influence Proceedings").

55. As regards Stephen Jones it was said that he was a solicitor trading under the name of Jirehouse. Zulhayeva Tohtayeva was said to be employed by Mr Jones. She, as solicitor of Jirehouse, had signed a certificate dated 21 November 2016, relating to various matters regarding FOL as borrower from TCFL. In due course Ms Tohtayeva, Jirehouse Partners LLP and Jirehhouse ceased to be defendants.

56. By order dated 31 March 2023 the Possession Proceedings were transferred to the High Court to be consolidated with the Breach of Duty Proceedings.

57. The High Court Master expressed the view that the two sets of proceedings were inappropriate to be consolidated but agreed that they should be case managed together.

58. On 17 January 2024, the Claimant's solicitors (Eversheds Sutherland International LLP ("Eversheds")) wrote to FOL's solicitors (Healys LLP ("Healys")), asserting that FOL's defence in the possession proceedings was a mere bare denial without supporting evidence or a coherent statement of facts, that FOL sought to rely on a pleading in proceedings to which it was not a party and advising that they had instructions to apply to strike out the defence unless an application to amend was made by 24 January 2024.

59. By application notice dated 1 February 2024 the Claimant before me applied to strike out the Defence in the Possession Proceedings (which adopted the undue influence case in the Breach of Duty/Undue Influence Proceedings) and for an order for possession and judgment for a monetary sum.

60. By court order made on 7 March 2024 in the Breach of Duty/Undue Influence Proceedings, TCFL was ordered to issue any application to strike out the claim against it in the Breach of Duty/undue influence Proceedings by 21 March 2024, which it duly did.

61. Under cover of a letter and email dated 18 June 2024, Healys sought consent of Eversheds to a proposed amended Defence. As well as a claim that the mortgage Deed was "defective and void" because it had not been properly witnessed, the draft amendments included the following:

> "5. At all material times since Eaton Sq. was purchased until today and continuing Tatian, Petr and Mikhail were the sole and exclusive occupiers of Eaton Sq. to the exclusion of all other. The Claimants occupied Eaton Sq. as beneficiaries of the PFS which was always intended Eaton Sq. to be the beneficiaries' family home for Tatianas life and then for Mikhail and Petr. Their occupation was by virtue of their right to occupy Eaton Sq. for their lifetime."

This right was said to be an overriding interest binding TCFL.

62. By notice dated 2 July 2024, the claim against TCFL in the Breach of Duty /Undue Influence Proceedings was discontinued. On the same day, which was two days before a hearing set before Deputy Master Arkush at which was to be considered (among other applications) TCFL's application to strike out the then existing defence in the Possession Proceedings, a further application was made. This was the application before me. By application notice dated 1 July 2024, the application was made by Ms Peganova and Fay of London seeking permission to join Ms Peganova and to rely upon an amended Defence and to bring a counterclaim, each as set out in the draft Defence and Counterclaim.

63. In her second witness statement, Ms Peganova says that it was as a result of instructing new Counsel in relation to the hearing on 4 July that "attention has been given to other aspects of the defence to the claim" brought by TCFL. It appears that this newly focussed attention by newly instructed Counsel did not include any preparation of or advice on the draft amended Defence before it was sent under cover of the letter/email dated 18 June 2024.

64. At the hearing on 4 July 2024, FOL consented to its then defence being struck out, but without prejudice to its application to amend.,

65. In the Possession Proceedings, by Order of Deputy Master Arkrush dated 9 July 2024, the Defence in the Possession Proceedings was struck out without prejudice to the application to join Ms Peganova and to amend the Defence and bring a Counterclaim. That application was adjourned and is the one that I am currently dealing with.

66. By a further Order dated 9 July 2024, Deputy Master Arkrush also dealt with various applications (primarily costs related) in the Breach of Duty/Undue Influence Proceedings arising from the discontinuance of the claim against TCFL. By that stage, the Claimants in those proceedings were limited to Ms Peganova and Petr and the only remaining defendant was Mr Jones.

67. I deal first with the question of amendment, then the question of joinder and finally the question of a possession order.

Amendment of statements of case: the Law

68. It was common ground that the starting point is that the Court should have regard to all the matters in CPR r1.1(2) so as to deal with the case “justly and at proportionate cost” (see Note 17.3.5 to the White Book). One particular factor that is taken into account is the merits of the proposed amendment.

The merits test

69. In *Kawasaki Kisen Kaisha Limited v James Kemball Limited* [2021] EWCA Civ 33; [2021] 3 All E.R. 978, the Court of Appeal was dealing with an appeal from the Order of Teare J, refusing to set aside an order for service out of a claim form (there was also a question as to amendment). The leading judgment was given by Popplewell LJ with whom Henderson LJ and David Richards LJ (as he then was) agreed. The Court of Appeal allowed the appeal and set aside the order for service out (and the matter was not saved by proposed draft amendments to the Particulars of Claim).

70. As regards the legal test as to the merits, Popplewell put the matter as follows:

> “The merits test
>
> 16. It was common ground that on an application to serve a claim on a defendant out of the jurisdiction, a claimant needs to establish a serious issue to be tried, which means a case which has a real as opposed to fanciful prospect of success, the same test as applies to applications for summary judgment: *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2102] 1 WLR 1804 per Lord Collins JSC.
>
> 17. The Court will apply the same test when considering an application to amend a statement of case, and will also refuse permission to amend to raise a case which does not have a real prospect of success.
>
> 18. In both these contexts:

(1) It is not enough that the claim is merely arguable; it must carry some degree of conviction: *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at paragraph 8; *Global Asset Capital Inc. v Aabar Block SARL* [2017] 4 WLR 164 at paragraph 27(1).

(2) The pleading must be coherent and properly particularised: *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at paragraph [42].

(3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: *Elite Property* at paragraph [41]."

The Claim to a beneficial interest in the Flat

71. Ms Peganova's claim to a beneficial interest in the Flat is, in the draft amended Defence and Counterclaim, pleaded as being based on proprietary estoppel or common interest constructive trust.

72. As regards proprietary estoppel, although it has been said that its elements cannot be treated as sub-divided into watertight compartments and that the court must look at the matter "in the round", the three main elements required to establish a proprietary estoppel are:

(1) A representation or assurance made to the claimant by the defendant;

(2) Reliance upon it by the claimant and

(3) Detriment to the claimant in consequence of his (reasonable) reliance.

(see generally, *Snell on Equity* (35 edn) Chapter 12, Section 3).

73. As regards common intention constructive trust, in this case the Lease is registered in the name of FOL. Further, on the facts of this case any constructive trust must have arisen after the acquisition of that Lease by FOL and at, or about, the time when the shares in FOL were acquired by the trustee of the Trust, for the Trust.

74. The essential elements to establish a common interest constructive trust are as follows:

(1) the claimant must establish an agreement, understanding or arrangement with the person who is acquiring or who acquires title to the property, in this case the Flat, that she was to have a beneficial share in the Flat (usually this will be at the time the property is transferred into the name of one or both of them); and

(2) the claimant must establish that she has acted to her detriment in reliance on the common agreement, understanding or arrangement.

(see generally *Snell on Equity* (35th Edn) Chapter 24 and *Hudson v Hathaway* [2022] EWCA (Civ) 1648).

The alleged promise, assurance, representation, common agreement, understanding or arrangement in this case

75. I have dealt with the draft amended statement of case above. Ms Peganova's evidence goes no further than the draft amended statement of case (if it did, there would be a question as to whether an opportunity should be afforded for the proposed amendments to be further amended).

76. In her second witness statement made on 1 July 2024 she says in paragraph 6 that:

> "the sole purpose of purchasing the Eaton Square flat was to provide a home for me and my family".

77. In the same paragraph she goes on to say that she was willing to grant a charge over her Moscow house because:

> "In short, I was prepared to make my assets available in order to acquire a home for me and my family in London".

78. In paragraph 7 of her second witness statement she goes on to say that in the end she did not have to offer her Moscow house as security but instead entered into a guarantee of a loan from BIB:

> "The reason I was willing to do these things is precisely because Eaton Square was intended to be my forever home".

79. In paragraph 8 of her second witness statement she said that she left it to Mr Peganov "to sort out how this would happen" and he in turn "left the mechanics to Mr Jones" but that:

> "What was clear to everyone, though, was that what was being purchased was a home for me and the family to live in for ever".

80. In her third witness statement made on 29 August 2024 she takes matters no further forward on the question of what the representation, assurance, agreement, common understanding or arrangement was.

81. In my judgment there are two connected and fatal points which mean that Ms Peganova's case is insufficient to pass the test of raising an arguable case with a real prospect of success on the basis of either proprietary estoppel or common intention constructive trust.

82. The first point is dealt with quite pithily by Lord Bridge of Harwich in the well-known case of *Lloyds Bank plc v Rosset* [1991] 1 AC 107. The other four Law Lords agreed with his speech. In that case trust monies in which the husband was interested had been used to purchase what was intended to be the family home. The trustee had insisted that the house be purchased in the name of the husband alone. The wife claimed a beneficial interest in the house on the basis of an alleged agreement, arrangement, understanding or common intention that the property was to be jointly owned. The case was brought both on the basis of common intention constructive trust and proprietary estoppel. Again, the underlying point was that it was said that such interest bound a mortgagee.

The alleged detrimental reliance was the carrying out of works of renovation on the property, The Judge at first instance had said:

> "In addition, however, it was their common intention that the renovation of the house should be a joint venture, after which the house was to become a family home to be shared by the defendants and their children".

83. Of this comment by the Judge, Lord Bridge commented, [1991] 1 AC 107 at 130D: "I pause to observe that neither a common intention by spouses that a house is to be renovated as a "joint venture" *nor a common intention that the house is to be shared by parents and children as the family home throws any light on their intentions with respect to the beneficial ownership of the property*." (*emphasis supplied*).

84. The facts in this case are not distinguishable from the scenario considered by Lord Bridge. The intention that a property should be a family home (whether or not "forever") does not say anything about beneficial ownership of the property. Rather it focuses on a state of affairs and occupation.

85. The other connected point is that in this case the intention to enable the Peganov family to live in the Flat was given effect to by the arrangement under which title to the Lease of the Flat (and, on the face of it, beneficial ownership of the same) remained with the Tenant, FOL. Instead of any members of the Peganov family having any property interest in the Flat, there was an ability to occupy it which was conferred by (a) the purchase of the shares of the Tenant, FOL by the Trust and (b) the newly appointed director of FOL (appointed in connection with the acquisition of the shares in FOL by the Trust), in accordance with the Lease (and as permitted by the Trust), making a nomination as regards its "representative" and, as a result, the family being permitted to live there accordingly.

86. It would be, to put it mildly, exceedingly strange if the arrangement now asserted by Ms Peganova as the legal consequence of the facts that she asserts occurred, were to apply (either in terms of giving effect to any arrangement/understanding as a matter of constructive trust or as a result of court order determining how to satisfy any proprietary estoppel, if one otherwise arose). The reason for this is that the consequence of Ms Peganova having any beneficial interest in the Lease or in occupying the Flat otherwise than as nominee of FOL as provided for by the Lease, would give rise to an event of forfeiture under the Lease (see clause 6.1 of the Lease). Mr Clarke submitted that forfeiture would not be automatic and would depend on the landlord exercising its contractual right to forfeit under the Lease. This is undoubtedly true but does not, in my judgment, answer the underlying point and the thrust of it. Further, it is unlikely that the Court would grant relief from forfeiture on the basis that a breach of the Lease continued.

Equity operating against FOL

87. There is a further point, Ms Peganova's understanding/ agreement/ arrangement which, with her detrimental reliance, give rise, according to her, to a proprietary estoppel was one reached with/through Mr Peganov. It seems to me that it is an essential step in her case that in someway FOL, the legal owner and (otherwise) the beneficial owner of the Lease is to be treated as party to the same.

88. It is difficult to see why the legal arrangement in fact entered into does not encompass exactly what Ms Peganova expected in terms of creation of a family home. Her real complaint is that by reason of what she says is a fraud involving improper borrowing of funds (backed by security over the Flat), the family home is a less secure arrangement than she would now like. However, even on her own case, if the Flat was to be a "family home" for the whole family (including Mr Peganov) then her ability to live at the flat might have been jeopardised by, for example, the divorce that came later.

89. This consideration bears upon the relief that is said to be appropriate in terms of satisfying the equity (if there is a proprietary estoppel). The proposed pleaded claim is that the relief to be granted by way of proprietary estoppel is, (or that the common intention interest trust gives rise to), a trust for the Second Defendant for life and otherwise subject to the terms of the Trust which means, I suppose, that it is said to be held on trust for Ms Peganova for life and thereafter on the trusts of the Trust.

90. A problem with this analysis is that if the Flat was to be a home for life for the family and if that in some way creates a trust, it is difficult to see why the trust involves a life interest for Ms Peganova and not, for example, any interest in Mr Peganov.

91. At the hearing before me, it was submitted by Mr Clarke that, on a proprietary estoppel analysis, the relevant equity might alternatively be satisfied by the grant of a licence for life. As regards this, first, this possibility seems to me to confirm that there was no relevant common interest constructive trust, or put another way, no common intention as to any proprietary interest that Ms Peganova should acquire in the Flat. Secondly, if this had been the intention at the time and given effect to, it does raise serious questions as to whether and if so how such licence would have bound TCFL.

FOL as "party" to the "Common Understanding"

92. Mr Clarke relied primarily upon the draft Defence and Counterclaim in explaining how the "Common Understanding" binds or take effect on FOL even though the Common Understanding was one reached between Mr Peganov and Ms Peganova or as a result of a representation made by Mr Peganov to Ms Peganova.

93. The problem with this, however, is the dearth of evidence explaining the position. In this respect I do not regard the draft Defence and Counterclaim (even if verified by a statement of truth which, so far as I can tell has been done neither by reference to a signed version of the same nor by being verified by any of Ms Peganova's witness statements) as being "supported by evidence which establishes a factual basis which meets the merits test". The most that Ms Peganova says is that she left it to Mr Peganov to sort matters out and that he left the mechanics to Mr Jones. There is, for example, no evidence of delegation by FOL to Mr Peganov of any relevant decision.

94. I have some concerns that, even if there had been evidence supporting the pleaded case of Ms Peganova, there may well not be a case with a real prospect of success on the issue of whether any representation or "Common Understanding" to which Mr Peganov was party is somehow to be attributed to FOL. Thus, for example, I find it difficult to see how Mr Peganov was acting as FOL's agent in this respect as it preceded the Trust having any legal interest in FOL shares in which (at most) Mr Peganov/the Trust was seeking to acquire. I am also unclear what acts of ratification in this respect are relied upon. In part the difficulties in this respect may be said to be caused by the inadequate

particularisation of, or insufficient evidence adduced to support, the case put forward. Having decided the point about the meaning and effect of any representation and the Common Understanding I do not need to rest my decision on this point.

95. I also do not need to deal with the issue regarding the binding nature of any proprietary estoppel upon TCFL. As regards this, I heard no detailed argument and Mr Gaunt reserved his position.

Delay

96. Ms Savage also relied upon delay in advancing the current defence. I am unimpressed by the following assertion in Ms Peganova's second witness statement:

> " Given the complicated nature of the structures set up by Mr Jones, and indeed the frauds subsequently committed by him, it has been very difficult for me to understand what was going on in relation to the property, the shares in Fay of London Ltd and the various loans taken out in its name. I believe it is partly for this reason that it has taken some time for me to appreciate the proper nature of my defence (and that of Fay itself) in relation to the claim brought by Together under the loan."

97. Mr Gaunt, as I understood him, relied before me (the position might have been different had the matter been dealt with by Deputy Master Arkrush) upon the delay not as a factor in itself justifying a refusal of permission to amend but rather as part of the evidence in the case that the proposed defence put forward did not have a real prospect of success.

98. Having already decided that Ms Peganova's defence as advanced in the draft Defence and Counterclaim does not have a real prospect of success, I do not need to rely also on any delay as casting doubt on the same.

Conclusion on Ms Peganova's defence

99. Accordingly, I am not satisfied that Ms Peganova has satisfied the test of having raised a defence which has a real prospect of success nor that there is any adequate evidence supporting such a case. Accordingly, I refuse permission to amend to bring her proposed case in the form of the relevant paragraphs of the draft Defence and Counterclaim. .

The Proposed Defence and Counterclaim of FOL

100. As I have indicated, the proposed defence and counterclaim of FOL is entirely parasitic on the claim of Ms Peganova. The FOL proposed defence depends upon establishing that FOL is a trustee of the Current Lease for Ms Peganova. In that event, the argument goes, the relevant Loan by TCFL and connected mortgage and debenture will form a regulated mortgage contract within Article 61(3)(a) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (the "RAO"), as it applied in November 2016. As TCFL did not have relevant authorisation and was not exempt, the entry by it into the relevant transaction would be prohibited as provided for by s19 Financial Service sand Markets Act 2000 (and see also Article 61(1) of the RAO).

101. In the light of my conclusion that Ms Peganova's case does not have a real prospect of success, it followed that neither does the proposed Defence and Counterclaim of FOL.

102. Accordingly the application to amend is refused.

Joinder of Ms Peganova

103. Obviously if I had held that Ms Peganova's case and evidence raised a case with a real prospect of success, those would be grounds to join her to the Possession Proceedings as a party.

104. Given my findings I do not consider that it is necessary to join her as a party. In my judgment CPR r55 does not require every person to be joined who is in occupation of a mortgaged property in relation to which the mortgagee seeks possession. A possession order operates against the world. The fact that notices must be given to occupiers (see CPR r55.10) and that prior to issue of a warrant of possession, a notice of eviction must be delivered to the premises and addressed to all named persons against whom the possession order was made and to "any other occupiers" (see r83.8A and note in The White Book para 55.8.11), makes clear that not all occupiers must be made defendants to the possession proceedings in relation to which a possession order is sought or made.

105. However, I indicated to Mr Gaunt that I would be prepared to join Ms Peganova as defendant, not least so that she is clearly bound by any determination that a possession order should be made and that the claim is not disputed on grounds that appear to be substantial. This arises particularly as she has raised two very distinct defences to date: one at a very late stage and one that has been discontinued.

106. As I understood it, Mr Gaunt did not object to my joining Ms Peganova as second Defendant but did not consider that it was necessary. I would be reluctant to force a joinder on Mr Gaunt and will hear further argument if that is necessary.

Possession Order

107. In light of the conclusions that I have already reached, it follows that TCFL's possession claim is not disputed on grounds which appear to be substantial and there is no reason why a possession order should not now be made. There was discussion before me as to the terms of such order. If agreement has not been capable of being reached then I will need to hear further submissions.

108. As regards the claim for a monetary judgment, as I understand matters such a judgment is not sought at this stage.

109. If there remain any matters to iron out after any consequential order flowing from this judgment has been finalised, I see no reason why this case should not be transferred back to London Central County Court.

110. The parties should endeavour to agree an order dealing so far as possible with all matters flowing from this judgment and, to the extent that they cannot, then the Claimant should lodge a draft Minute of Order identifying clearly what matters are agreed and which are not and in the latter case, identifying which party advocates which wording. The parties should confirm whether they are content for any dispute to be

determined on the papers or whether they request a further hearing, which can be remote.