

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



BL-2021-001905

BETWEEN:-

**(1) TONSTATE GROUP LIMITED (in liquidation)
(2) TONSTATE EDINBURGH LIMITED (in liquidation)
(3) DAN-TON INVESTMENTS LIMITED (in liquidation)
(4) TH HOLDINGS LIMITED (in liquidation)
(5) SUMMERHILL CARDIFF LIMITED (in liquidation)
(6) TONSTATE (BOURNEMOUTH) LIMITED (in liquidation)
(7) TONSTATE (RETAIL) LIMITED (in liquidation)
(8) TONSTATE (ST ANDREW'S SQUARE) LIMITED (in liquidation)
(9) TONSTATE (STAPLE INN) LIMITED (in liquidation)
(10) TONSTATE (YEOVIL LEISURE) LIMITED (in liquidation)
(11) GLASGOW AIRPORT HOTELS HOLDINGS LIMITED (in liquidation)**
Claimants

– and –

MISHCON DE REYA LLP
Defendant

PARTICULARS OF CLAIM

1. The Claimants, companies within the “Tonstate” group (all now in liquidation), together bring proprietary and personal claims against the Defendant firm of solicitors (“**Mishcon**”) in respect of more than £2.9 million which Mishcon’s former client, Edward Wojakowski, misappropriated from the Claimants¹ and paid to Mishcon (“**the Mishcon Payments**”). A breakdown of the Mishcon Payments (insofar as the Claimants are currently able to particularise them) appears at Schedule A.

¹ And possibly also from subsidiaries of the First and/or Fourth Claimants which have since been dissolved. The Judgments and Orders against Mr Wojakowski, and Mr Wojakowski’s own accounting for what became of the sums he took from the group, have thus far proceeded on an aggregated basis. The First and/or Fourth Claimants will account for and apportion any recoveries, as between themselves, and in relation to any other relevant group company, if necessary restoring dissolved companies to the register.



2. The background to this action appears from pleadings in Claim No. BL/2018-000544 (“**the Main Claim**”) and in various judgments of Zacaroli J in the Main Claim, including: [2019] EWHC 587 (Ch); [2019] EWHC 3363 (Ch); [2020] EWHC 325 (Ch); [2020] EWHC 1004 (Ch); [2021] EWHC 1122 (Ch). Mishcon were previously the solicitors on the record for Edward Wojakowski, the First Defendant in the Main Claim. Because Mishcon have resisted being joined as an additional defendant to the Main Claim, the Claimants have commenced this separate action. They do so without prejudice to their contention that their claims against Mishcon should be determined as part of or alongside the Main Claim. The Claimants will apply for consolidation, alternatively for this claim and the Main Claim to be case managed together.
3. By a judgment of 5 December 2019 in the Main Claim ([2019] EWHC 3363 (Ch)), Mr Wojakowski was held to have extracted, unlawfully and in breach of fiduciary duty, approximately £13.5 million from Tonstate group companies of which he was a director (“**the Extractions**”). As reflected in successive Orders in the Main Claim which declared a constructive trust (16 January 2020), granted a proprietary injunction (16 January 2020), appointed a receiver (6 July 2020) and directed the transfer of certain properties to the First Claimant (30 April 2021), all of the Extractions and their traceable proceeds at all times belonged in equity to the relevant Tonstate group companies. Indeed, the Judgment of 16 January 2020 setting out the reasons for granting the proprietary injunction records at [15] that it was sought in support of “*an established right to property*”.
4. By an affidavit of 17 March 2020, served in purported compliance with an Order of 16 January 2020 that he give an account of what had become of the Extractions, Mr Wojakowski admitted to having used some of them to make the Mishcon Payments. Mr Wojakowski’s admission is also recorded in judgments in the Main Claim of 28 April 2020 at [29] ([2020] EWHC 1004 (Ch)) and 30 April 2021 ([2021] EWHC 1122 (Ch)) at [105].
5. The Mishcon Payments were received, first, into a client account held by Mishcon for Mr Wojakowski and thereafter transferred into Mishcon’s office account where they became mixed with other funds. Mishcon have nevertheless explained that after being credited with the Mishcon Payments, their office account has at all times maintained a balance

exceeding the total of the Mishcon Payments. The Claimants can therefore continue to trace their proprietary interest in the Mishcon Payments into the Mishcon office account.



Proprietary Claim

6. In the circumstances set out at paragraphs 3 to 4 above, the Claimants are entitled to and assert a proprietary claim for the return of the Mishcon Payments. The monies used to make the Mishcon Payments belonged in equity to the Claimants at the time of payment to Mishcon and they or their traceable proceeds have continued to belong in equity to the Claimants at all times thereafter. Insofar as Mishcon seek to raise any defence to the Claimants' proprietary claim (e.g. that they acted bona fide and without notice of the Claimants' interest) then those are matters for Mishcon to plead and prove and the Claimants will deal with them by way of Reply.

Knowing Receipt

7. Further, or in the alternative to their proprietary claim, the Claimants bring a personal claim against Mishcon in knowing receipt: Mishcon received the Mishcon Payments, being proceeds of Mr Wojakovski's breaches of fiduciary duty, in circumstances where Mishcon's actual and/or constructive knowledge that the Mishcon Payments were or were probably the proceeds of Mr Wojakovski's breaches of fiduciary duty makes it unconscionable for Mishcon now to retain the benefit of them.

Receipt

8. As to receipt, Mishcon received the Mishcon Payments beneficially, the sums having been requested and accepted by Mishcon in purported discharge of sums owed to the firm by Mr Wojakovski in respect of fees and disbursements.

Proceeds of a breach of fiduciary duty

9. As to the Mishcon Payments being the proceeds of breaches of fiduciary duty by Mr Wojakovski, the Claimants currently rely as set out at paragraphs 3 and 4 above upon the 5 December 2019 Judgment in the Main Claim ([2019] EWHC 3363 (Ch)) and Mr Wojakovski's formal admission on affidavit.




Knowledge and unconscionability

10. As to Mishcon's actual and/or constructive knowledge that the Mishcon Payments were the proceeds of Mr Wojakowski's breaches of fiduciary duty, the Claimants currently rely upon the following facts and matters:

- a. the Mishcon Payments having been paid from Mr Wojakowski's account with Bank of Singapore, which was known by Kevin Gold, Mishcon's then Managing Partner (now Executive Chairperson), to contain potentially tainted funds, as evidenced by his 28 November 2017 WhatsApp message to Mr Wojakowski's wife, in connection with a proposed payment to her from that account:

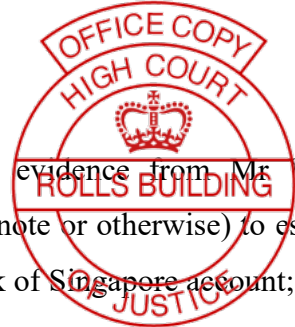
It's not ideal but I don't know of anything else. The funds are potentially tainted but I suspect there is enough around to make sure that everyone is made good

- b. Kevin Gold having personally assisted in Mr Wojakowski's opening of the Bank of Singapore account in 2015, the funds having previously been under Mr Wojakowski's control in one or more Swiss bank accounts, and Mr Gold having made what Mr Wojakowski described in a letter of 4 February 2015 as a "confidential introduction" to Bank of Singapore;
- c. Mishcon's knowledge of Mr Wojakowski's "COP9" disclosure (Code of Practice 9 being a procedure enabling voluntary disclosure of tax fraud to HMRC) in which Mr Wojakowski told HMRC on or about 12 December 2017 that the amounts he had taken without any tax having been paid were "*now in Bank of Singapore and an offshore company called Quastus Ltd*";
- d. Kevin Gold's deliberate decision to withhold from the Claimants' then solicitors Rosling King what he knew about the source of those funds, as evidenced by his WhatsApp message of 12 December 2017 (the same date as Mr Wojakowski's COP9 form) which referred to money under Mr Wojakowski's control in Singapore and Quastus in the context of discussions with Rosling King and stated: "*the source of those funds has not been disclosed*";

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- e. Mishcon's receipt of £500,000 from the Bank of Singapore account on 22 December 2017, just 10 days after Mr Wojakovski's COP9 disclosure and the WhatsApp from Kevin Gold of the same date which made clear that he knew more about the source of those funds than had been disclosed to the Claimants;
- f. Mishcon's knowledge that their client Mr Wojakovski was an admitted fraudster, his own pleaded case in the Main Action (prepared with Mishcon's full involvement) being that he had caused payments to be made from Tonstate group companies to offshore vehicles under his control for the purpose of defrauding, at least, HMRC;
- g. quite apart from Mr Wojakovski's own admission of defrauding HMRC, the inherently suspicious circumstances of millions of pounds having been moved through multiple offshore accounts by a businessman whose residence and main interests were in England;
- h. Mishcon's awareness of the inadequacy of the financial information supplied to them by Mr Wojakovski, as conveyed to Mr Wojakovski in a note dated 16 October 2018:

Despite requests for details, we do not yet have a clear picture of your full asset position...We still need sight of your personal bank statements and credit card position...MDR will need to review whether we are able to receive monies from you for our work from your Bank of Singapore funds in the event those funds are found to be directly attributable (and traceable) back to the extractions you received into the EW Companies (and thence to your Swiss accounts and to Singapore). We cannot receive payment from tainted funds.

- i. the fact that when expressing the above concerns to Mr Wojakovski in October 2018 about the incomplete factual picture and the possibility that the Bank of Singapore funds were tainted, Mishcon had already received more than £2.2 million from that account;

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- j. the complete absence of any documentary evidence from Mr Wojakowski (whether in response to the 16 October 2018 note or otherwise) to establish any legitimate provenance of the funds in the Bank of Singapore account;
- k. Mishcon's refusal to engage with repeated requests from the Claimants' solicitors Rosling King for undertakings not to accept payments from Extractions, the reasonable inference from Mishcon's silence being that they knew that they could not properly give any such undertaking;
- l. Mishcon's decision to obtain external advice from Clyde & Co in or around October 2018 as to their potential liability in knowing receipt in relation to the Mishcon Payments (and although Mishcon have asserted privilege over Clyde & Co's advice, no competent solicitor if told the relevant facts would have advised Mishcon that there was no risk of such liability arising);
- m. the manifest inadequacy of bare assertions by Mr Wojakowski (recorded in a manuscript attendance note of 10 January 2019) that Bank of Singapore funds "*shouldn't be*" tainted; that "*I don't think*" the funds were mixed and that "*Singapore account is not Tonstate money*";
- n. the confirmation given to Mishcon by Mr Wojakowski's tax advisor Brian White on 11 January 2019 that Extractions had been paid into the Bank of Singapore account (which was consistent with Mr Wojakowski's COP9 disclosure from more than a year earlier on 12 December 2017);
- o. explanations given to Mishcon by Brian White on 31 January 2019 that it was "*impossible to give a categoric answer yes or no or to provide any assurances*" as to the source of the Bank of Singapore funds (and indeed Mr White had not himself seen the Swiss bank statements from Credit Suisse or UBS which would have helped to clarify the position);
- p. the absence of any adequate explanation or excuse for Mr Wojakowski's failure to provide a complete set of bank statements evidencing the source and flow of funds into the Bank of Singapore account;



- q. Rosling King's explanation to Mishcon on 15 February 2019, based on instructions from members of the family into which Mr Wojakovski had married, that in relation to Mishcon's fees:

Our clients know that Mr Wojakovski would never be able to afford such fees out of legitimate historic earnings from Tonstate. Our clients know of no other source of funds within your client's control beyond the monies stolen from the Tonstate companies, and so they can only conclude that he must be using their funds, money stolen from them and the subject of this litigation, to pay your firm's fees.


- r. even after instructing Mr Wojakovski's then counsel, Neil Kitchener QC, to inform the Court on 26 March 2019 "*I have it on instructions that Mishcons is refusing to accept monies that come from the extractions*", Mishcon's refusal to explain in response to a direct request from Rosling King what steps had in fact been taken to verify the origin of the monies they were receiving in order to permit that assurance to be given;
- s. Mr Kitchener QC's repetition on 27 March 2019 of an equivalent assurance (presumably on instructions from Mishcons, notwithstanding the failure to respond to Rosling King overnight and the absence of any documentary evidence of a legitimate source of funds); "*Edward [Wojakovski] is not in a position to use the monies he's taken away to pursue his side of the proceedings because Mishcons won't accept those monies*";
- t. the fact that Mishcon appreciated that it was necessary to investigate the provenance of the funds from which they were being paid, and in fact made some belated and half-hearted inquiries of their client, but nevertheless proceeded to receive payment from the Bank of Singapore account without in fact having established the provenance of those funds.
11. In the circumstances set out at paragraph 10 above, Mishcon (through at least Kevin Gold and Janet Tobin, whose knowledge in their capacities as partner and legal director respectively is for these purposes attributable to the firm):



- a. had actual knowledge that the Mishcon Payments were or were probably, the proceeds of Mr Wojakovski's breaches of fiduciary duty; and/or
 - b. wilfully shut their eyes to the obvious; and/or
 - c. wilfully and recklessly failed to make such inquiries as an honest and reasonable firm of solicitors would have made; and/or
 - d. knew of circumstances which would have indicated the facts to an honest and reasonable firm of solicitors; and/or
 - e. knew of circumstances which would have put an honest and reasonable firm of solicitors on inquiry.
12. The inquiries which an honest and reasonable firm of solicitors would have made would have included, at a minimum, the insistence upon credible documentary evidence to establish the source of the funds in the Bank of Singapore account. This would have revealed (whether by the provision of documents or by the inferences reasonably to be drawn from a failure to provide them) that those funds were or were probably the proceeds of Mr Wojakovski's breaches of fiduciary duty.
13. Moreover, Mishcon were aware of and consciously assumed the risk that the Mishcon Payments might have derived from Extractions and thus be repayable to the Claimants. Mishcon's awareness and assumption of that risk appears from:
- a. Kevin Gold's 27 November 2017 WhatsApp, which implicitly acknowledged a scenario (albeit one he regarded as unlikely) in which there was not enough money to go around and not everyone was "made good": Mr Gold will have understood that in those circumstances "tainted" money would need to be repaid;
 - b. Mishcon's 16 October 2018 Note to Mr Wojakovski, in which Mishcon informed Mr Wojakovski, correctly:

If the Claimants are granted an account of the monies you...received from the Tonstate Group they will have a proprietary claim over those monies and will be able to trace into them. This means that any bank account

which received monies originating from Tonstate is tainted, including those the Tonstate monies passed through.

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- c. Rosling King having explicitly put Mishcon on notice, by letter of 23 October 2018 of Mishcon's potential liability in knowing receipt if Mishcon were found to have accepted payment from Extractions;
 - d. Mishcon's decision to continue to receive payments from the Bank of Singapore account even after having sought and obtained advice from Clyde & Co;
 - e. the inference reasonably be drawn from the astonishingly high fees which Mishcon incurred (a total of around £4.5 million before any of the claims had even progressed beyond the pleadings stage) that they perceived the prospect of fee income at this level as justifying the risks involved in accepting the Mishcon Payments.
14. The Claimants rely also upon the Court having been misled at the hearing of 26 and 27 March 2019 as to how Mishcon were being paid. Mr Kitchener QC's assurances set out at paragraphs 10.r. and s. above were expressed in categorical language, as distinct from merely reporting the uncorroborated assertions of Mr Wojakovski. Mishcon had no proper basis to cause or permit assurances in such terms to be given. It is reasonably to be inferred that to have leading counsel make such statements in open Court was an attempt by Mishcon to draw a line under the issue and to discourage further inquiry into an area where Mishcon knew that their conduct was open to challenge.
15. In all the circumstances, Mishcon's original receipt of the Mishcon Payments, and/or their refusal to repay those sums now that Mr Wojakovski has admitted that they derived from Extractions, is commercially unacceptable conduct and it would be unconscionable for Mishcon to retain the benefit of the Mishcon Payments. The Claimants therefore seek an order requiring Mishcon to compensate them for the total value of the Mishcon Payments.

Additional Equitable Compensation

16. Mishcon used the Mishcon Payments to pursue an expensive and aggressive litigation strategy on Mr Wojakovski's behalf. This included the defence of the Main Claim, the

issuing of an unfair prejudice petition in Claim Number 2018-0002541 (“the Petition”) and a number of interim applications against the Claimants in the Main Claim and in the Petition. This in turn required the Claimants to incur very substantial legal costs.

17. In circumstances where the Mishcon Payments should never have been used in this way by Mishcon to fund Mr Wojakovski’s costs, the Claimants are entitled to and claim equitable compensation in respect of their costs of the Main Claim and the Petition, in an amount to be assessed.

Interest

18. The Claimants claim:
- a. compound interest on the Mishcon Payments under the Court’s equitable jurisdiction at 8% or at such rate as the Court thinks fit;
 - b. alternatively, simple interest under s.35A of the Senior Courts Act 1981 on such amounts and at such rate as the Court thinks fit;

in each case from the date of receipt by Mishcon to the date of judgment or for such other period as the Court may determine.

AND the Claimants claim:

- (1) A declaration that the Mishcon Payments and/or their traceable proceeds belong in equity to the Claimants.
- (2) An Order for the transfer of the Mishcon Payments and/or their traceable proceeds to the Claimants, alternatively for the payment of a sum equivalent to the Mishcon Payments.
- (3) Equitable compensation, in the alternative to (2), in a sum equivalent to the value of the Mishcon Payments and, in any event, in relation to the Claimants’ costs of the Main Claim and the Petition, to be assessed.
- (4) Interest, as stated.
- (5) Further or other relief.

(6) Costs.



ANDREW FULTON QC
SAM GOODMAN

The Claimants believe that the facts stated in this particulars of claim are true. I am authorised to make this statement on the Claimant's behalf. I understand that proceedings for contempt of Court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed

Name

SHLOMO RECHTSCHAFFEN

Date

4/11/21