

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

IN THE MATTER OF LENDY LTD (in administration)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N:



(1) LENDY LTD (in administration)

(2) MARK JOHN WILSON

(3) PHILIP RODNEY SYKES

(4) DAMIAN WEBB

(the second to fourth Claimants in their capacity as joint administrators of Lendy Ltd)

Claimants

-and-

(1) LIAM BROOKE

(2) TIM GORDON

(3) LP ALHAMBRA LIMITED

(4) RFP HOLDINGS LIMITED

(5) BRANKESMERE LIMITED

Defendants

DEFENCE OF THE FIFTH DEFENDANT

1. Paragraph references herein are to the Amended Particulars of Claim dated 8.11.2021 unless otherwise stated.
2. Save as specifically pleaded to below, the Fifth Defendant ("Brankesmere") denies each and every allegation contained in the particulars of claim as if the same were herein set out and separately traversed.

I. The Parties

3. Paragraphs 1-7A are admitted.

II. Background

4. Paragraphs 8 to 12 concern the Claimant Company and the Claimants are required to prove them.

III. The Offshore Payments



5. Brankesmere understands that the sums paid to the Offshore Companies comprising the Offshore Payments were for the benefit of a Mr Anthony Smith. Mr Smith is said to have provided services to the Claimant to develop its fledgling business by way of ~~then~~ *inter alia* introducing investors. Accordingly, paragraph 13 is admitted but in these premises.
6. The Claimants are required to prove paragraphs 14 to 16.
7. Brankesmere can neither admit nor deny paragraph 17, having no direct knowledge of the Claimant's accounts but the pleading accords with paragraph 5 above.
8. As to paragraph 18, the Claimant is required to prove that no (or negligible) services were provided to it and the payments were made otherwise than to discharge genuine liabilities. Brankesmere understands the Offshore Payments were made for services provided by Mr Smith but can neither admit nor deny the extent of any services rendered.
9. With the omission of "[n]otwithstanding the foregoing" Brankesmere takes no issue with, but can neither admit nor deny, the remaining content of paragraph 19 which concerns the Claimant's past accounting. By paragraph 35 of their Amended Defence the First and Third Defendants admit paragraph 19, with the same removal of "notwithstanding the foregoing" and the remainder of paragraph 19 is then not understood to be contentious.
10. The Claimant is required to prove paragraph 20, namely that the Offshore Payments and consequential recording of the same was unlawful and not a genuine allowable expense in the Claimant's accounts. Paragraphs 5 and 8 are repeated.

IV. The benefits received by the Directors

11. Brankesmere can neither admit nor deny paragraphs 21 to 22 which do not relate to it and are a matter for the First and Second Defendants.

V. The Company's Entry into administration

12. Paragraph 23 is admitted.
13. Brankesmere can neither admit nor deny paragraph 24.

VI. The Duties Owed by the Directors

14. Paragraphs 25 and 26 are admitted as propositions of law.

VII. The Directors' Breaches of Duty

15. As to paragraphs 27 to 31 Brankesmere repeats paragraphs 5 and 8 above. In the premises if the Claimant made the Offshore Payments in return for services rendered by Mr Smith, pursuant to a contract or otherwise, the Claimant's directors may well have acted properly and in accordance



with their statutory and fiduciary duties. The Claimants are put to proof of the underlying facts, and paragraphs 5 and 8 are repeated but the relief sought by paragraphs 27 to 31 is not against Brankesmere .

VIII. The Company's Proprietary Claims

16. Paragraph 15 is repeated as regards paragraphs 32.
17. Brankesmere does not plead to paragraphs 32 to 36, the contents of which are addressed to other defendants. Brankesmere addresses the Claimant's proprietary entitlements so far as concerns it by paragraphs 28 to 31 below.

IX. The Administrators' claim under s.423 of the Insolvency Act 1986

18. The first sentence of paragraph 17 is repeated as regards paragraphs 37 to 40. The Claimants are expressly required to prove paragraph 37.2 namely the averment that the Claimant company received no consideration in return for the Offshore Payments or a consideration that was significantly less than the value, in money or money's worth of the consideration given by the Claimant.

X. Claims in respect of the Brankesmere Dividend

19. Paragraphs 40A-40C are admitted.
20. Brankesmere admits paragraph 40D as being uncontroversial between the Claimant and the First and Third Defendants, by reference to the Amended Defence of the First and Third Defendants, but has no direct knowledge of this averment.
21. Paragraph 40E and 40E.1 are denied in the premises of paragraph 5 above which is repeated. In the premises that Lendy made the Offshore Payments for the receipt of services the Claimant is required to prove that any material omissions from the accounts were made as claimed and the extent of such omissions.
22. As to paragraph 40E.2 the Claimant is required to prove that, in accordance with generally accepted accounting practices the Claimant failed to make proper provision for remediation. Paragraph 55C.2. of the Defence of the First and Third Defendant's is noted for the dispute on the provision that ought to have been made.
23. Paragraph 40F is therefore denied for the reasons aforesaid.
24. Save for the repeated inclusion of the word "further" Paragraph 40G is admitted.
25. Paragraph 40H is denied for the reasons aforesaid.
26. Paragraph 40I is denied for the reasons aforesaid.



26.1. In the premises of paragraph 5 of this Defence Brankesmere understands that the Claimant paid the Offshore Payments for services rendered to it and, accordingly, to discharge its associated liabilities.

26.2. The Claimant was, on that premise, entitled to incorporate the Offshore Payments, or an element thereof, as a deduction from the Company's profits. The extent of corporation tax payable flows from the extent to which the Offshore Payments were properly made, as to which Brankesmere has no knowledge.

26.3. The extent of associated corporation tax declarable and payable is a matter for the Claimant and First and Second Defendants upon which Brankesmere puts the Claimant to proof.

XI. Mr Brooke's Breach of Fiduciary Duty in Causing the Brankesmere Dividend to be Paid

27. As to paragraph 40J to 40L paragraphs 21, 22 and 26 are repeated. The pleading that Mr Brooke *knew and/or must be taken to have known* of facts which made the dividend unlawful is not understood. The Claimants have not particularised what it is said Mr Brooke's *actually* knew and what knowledge it is said should be imputed to him or the basis for any such imputation.

XII. Proprietary Claim in respect of the Brankesmere Dividend

28. Paragraphs 40M and 40N are denied for the reasons aforesaid and paragraphs 21, 22 and 26 are repeated.

29. Paragraph 40O is admitted, save insofar as it is denied that Brankesmere holds Brankesmere House on trust for the Claimant which is denied in the premises of this Defence above.

29.1. It is further noted that the Claimant's relief and the extent of the First and Second Defendant's breach of duty if any, which is denied for the reasons above, is limited to the extent to which the Claimant could not properly declare the Brankesmere dividend. To the extent that part, but not all, of the Brankesmere dividend was properly declared the Claimant's remedies as against Brankesmere House are limited to that extent.

30. Further, and without prejudice to the foregoing denial, Brankesmere received the Brankesmere Dividend from Enebral Holdings Limited by way of a loan of said funds. On the basis of paragraph 40P below regarding the attribution of knowledge, Brankesmere received said loan funds as a bona fide purchaser for value without notice of any prior equitable interest of the Claimant attaching to the funds.

31. Accordingly, it is denied that the Claimant can trace into Brankesmere House and assert any proprietary remedy in relation to this asset.



XIII. Personal Claim against Brankesmere

32. Paragraph 40P is denied. At all relevant times the First Defendant was the director of Brankesmere and of the Claimant. Brankesmere avers that as a director of the Claimant Mr Brooke owed no duty to disclose his knowledge to Brankesmere. Further, Brankesmere owed no duty to investigate Mr Brooke's knowledge. As such, Mr Brooke's knowledge was not attributed or attributable to Brankesmere.
- 32.1. Brankesmere denies that the fact of dual directorship suffices for the attribution to Brankesmere of the knowledge pleaded.
- 32.2. It is further noted that by paragraph 40J the Claimant pleads that Mr Brooke "*knew and/or must be taken to have known of the facts*" that made the Brankesmere Dividend unlawful. It is denied, if it is alleged, that the content of what Mr Brooke *ought to have known*, as opposed to what he in fact knew, was attributable to Brankesmere. In those premises Mr Brooke did not have *actual* knowledge of the relevant facts, such that no actual knowledge was attributable to Brankesmere. The final sentence of paragraph 27 is repeated.
- 32.3. If the Claimant wishes to rely upon Mr Brooke having *actual* knowledge of a fact the Claimant is invited to particularise the facts and matters relied upon: PD 16, paragraph 8.1(5).
33. On this basis it was not unconscionable for Brankesmere to receive or retain the Brankesmere Dividend. Paragraphs 40Q and 40R are accordingly denied.
34. Further, paragraph 30 above is repeated. Brankesmere received absolute legal and beneficial title to the funds loaned to it, being a bona fide purchaser for value without notice and nothing in its receipt or retention was unconscionable.
35. Paragraph 40R is further denied for the reasons aforesaid and paragraphs 21, 22, 26 and 30 are repeated; there being nothing unjust in the receipt of the Brankesmere dividend or any funds representing it or traceable to it.
36. Paragraphs 41 and 42 are denied in the premises above as the Claimant's entitlement to any relief against Brankesmere is denied.

JAMES SAUNDERS

STATEMENT OF TRUTH

I believe that the facts stated in this defence are true. 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.



Mrs Carmen Pamela Guillamon Gonzalez

Director of the Fifth Defendant for and on behalf of the Fifth Defendant

Dated:

9/12/21