THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2014/0032

BETWEEN:

COMODO HOLDINGS LIMITED

Appellant

and

[1] RENAISSANCE VENTURES LIMITED
[2] JOSEPH KATZ (as Executor for the Estate of the late Eric D. Emanuel deceased)

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario F. Michel	Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan	Justice of Appeal [Ag.]

Appearances:

Mr. Vernon Flynn, QC with him, Ms. Julie Engwirda for the Appellant[1]
Mr. David Fisher with him, Mr. Robert Christie for the Respondents

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2015: May 21;
2016: May 3.

Civil appeal – Interlocutory appeal – Amendment of pleadings – Amendment of statement of case after date fixed for first case management conference – Adjournment of first case management conference – No directions given – Whether leave required to amend pleadings after first date fixed for case management conference had arrived (albeit adjourned) – Whether learned judge erred in ruling that appellant required leave to amend its reply and defence – Whether learned judge erred in refusing amendment on basis of not broadening claim – Summary judgment – Part 15 of Civil Procedure Rules 2000 –

[1] The appellant's written submissions were prepared by Mr. Moverley Smith,QC and Mr. Grant Caroll.

Whether learned judge erred in finding that appellant had no real prospect of successfully defending counterclaim

On 18th May 1998, Comodo Holdings Limited ("Comodo"), a company incorporated in the British Virgin Islands under the International Business Companies Act ("the IBC Act") was acquired by Mr. Melih Abdulhayoglu. Mr. Abdulhayoglu, whom at the time was the sole director of Comodo, was introduced to one, Mr. Eric Emanuel, who was interested in investing in Comodo. Mr. Abdulhayoglu subsequently entered into a subscription agreement with Mr. Emanuel's investment vehicle, Renaissance Ventures Limited ("Renaissance"), through representations allegedly made by Mr. Emanuel. The subscription agreement provided the number of shares that Renaissance would subscribe for in Comodo, the requisite consideration and the time in which the consideration ought to be paid. The initial shares were to be issued by Comodo on execution of the subscription agreement when the initial instalment was due. Over a period of time, the balance was paid to Comodo. It is in dispute as to whether the balance of the monies that were deposited into Comodo's account came from Mr. Emanuel personally or third parties. Subsequently, Mr. Abdulhayoglu passed a series of resolutions including a resolution for the issue of further shares to Renaissance. It is common ground that this resulted in Renaissance holding 100,000,000 shares of US$0.000125, which was reflected in share certificate number 6.

Mr. Emanuel was then appointed director of Comodo. He later died and it was then Comodo challenged Renaissance's entitlement to the shares represented by share certificate number 6. There is no evidence of an original share register being in existence. However, Comodo created a share register and the shares, which are allegedly held by Renaissance and are reflected in share certificate number 6, are not reflected therein. Comodo filed a claim against Renaissance and the Estate of Mr. Emanuel, alleging that since there was no evidence that the shares for which share certificate number 6 had been issued were ever paid for and that there is no share register which indicates that the shares were registered, neither Renaissance nor Mr. Emanuel has obtained title to the shares. It is noteworthy that by the time the claim was filed the IBC Act was replaced by the BVI Business Companies Act 2004. This latter Act provides that the registration of shares is prima facie evidence of the title to the shares as distinct from the IBC Act, which had stated that the share certificate is prima facie evidence of ownership of the shares. Comodo also filed an application for summary judgment but was unsuccessful. Renaissance in turn filed a defence and counterclaim in which it sought to have the register recitified to reflect it (Renaissance) and the Estate of Mr. Emanuel as the proprietor of the initial shares. Renaissance also made an application for summary judgment on its counterclaim. No application for summary judgment was made by the

Estate of Mr. Emanuel. Mr. Katz, in his capacity as representative of Mr. Emanuel's Estate only sought to have the register rectified.

Prior to this, Comodo had filed its reply and defence to counterclaim and sought to amend it in order to plead several averments of misrepresentations and subsequent dealings by Mr. Emanuel. This was done after the date fixed for the first case management conference had arrived, although adjourned. The learned judge ruled that Comodo required permission to amend its reply and defence to counterclaim. The learned judge, though permitting some of the amendments, refused to allow amendments to be made to several paragraphs of the reply and defence to counterclaim. The learned judge indicated among other things that he did not wish to have the claim "cluttered up" and on that basis refused to grant permission to Comodo to amend its reply and defence to counterclaim. The learned judge ordered that the register be rectified to record Renaissance as the registered proprietor of the shares, which are evidenced in share certificate number 6. Costs were also ordered to be paid by Comodo. Comodo, dissatisfied with the decision of the learned judge, appealed. Comodo contends that that the learned judge erred in refusing to allow the amendments to its reply and defence to counterclaim. Comodo argues that the learned judge had no proper basis for refusing permission. Comodo further submits that the learned judge erred in granting summary judgment to Renaissance on its counterclaim for rectification in face of the serious triable issues which required full ventilation and could have only been resolved during a full trial. Renaissance, in resisting the appeal, argues that the learned judge was correct in refusing to grant leave to Comodo to amend its pleadings and that the learned judge was correct to grant summary judgment.

Held: allowing the appeal, granting leave to Comodo to amend its reply and defence to counterclaim, ordering that Comodo file and serve the amended document on both parties within 14 days of this judgment, setting aside the judgment of the learned judge with costs to Comodo to be assessed if not agreed within 21 days of this judgment and remitting the claim to the Commercial Court of the British Virgin Islands to be dealt with in accordance with the **Civil Procedure Rules 2000**, that:

1. Rule 20.1 of the **Civil Procedure Rules 2000** ("CPR 2000") enables a party to amend its statement of case once, without the court's permission, at any time prior to the date fixed for the first case management conference. Once the date of the first case management conference arises, there can be no amendment of pleadings without first obtaining the permission of the court. It is of no moment that the first case management conference is later adjourned and no directions are given; what triggers the need to obtain the permission of the court is the arrival of the date of the first case management conference. In the case at bar, Comodo desired to amend its pleadings after the date fixed for the first case management conference had arrived, albeit being adjourned. It was therefore necessary to first obtain the leave of the court to do so. The learned judge therefore did not err in

holding that Comodo required leave of the court in order to be able to amend its pleadings.

George Allert et al v Joshua Matheson et al GDAHCVAP2017/0007 (delivered 24th November 2014, unreported) followed.

2. The learned judge, as part of his case management powers, has a discretion to grant or refuse leave to amend a statement of case. An appellate court will rarely interfere with the exercise of a judge's discretion unless it can clearly be shown that the learned judge exercised his discretion on either a wrong principle or in a manner contrary to how the discretion should have been exercised, or if the exercise of discretion has led to a miscarriage of justice. In this case, the learned judge refused the amendments on the basis that he did not want the landscape to be cluttered with allegations of misrepresentations and subsequent dealings of Mr. Emanuel. This is not a proper legal basis upon which the court could refuse to grant permission to amend pleadings. The learned judge failed to address his mind to whether or not the allegations that Comodo wished to proffer in the amendments were hopeless or highly relevant the claim. The learned judge clearly took into account irrelevant matters in arriving at his conclusion to refuse leave to amend and thus committed an error of principle.

   George Allert et al v Joshua Matheson et al GDAHCVAP2017/0007 (delivered 24th November 2014, unreported) followed; **Dufour and Others v Helenair Corporation Ltd and Others** (1996) 52 WIR 188 applied.

3. In determining whether or not leave should be granted, the court is guided by the general principles relevant to applications to amend pleadings and will consider, mainly, if to do so would be in the interest of justice. The court will take a number of factors into account when faced with late amendment applications, including; the exact stage reached in the proceedings, how great a change is made in the issues by the proposed amendments and whether the other side would be prejudiced in a manner for which they cannot be properly compensated.

   George Allert et al v Joshua Matheson et al GDAHCVAP2017/0007 (delivered 24th November 2014, unreported) followed.

4. It therefore falls to this Court to exercise its discretion afresh to determine whether or not to grant leave to amend pleadings. In doing so this Court will consider the overriding objective. Disposing of a case justly would mean that amendments should be allowed to enable real issues to be determined subject to the payment

of costs. However, amendments which are futile or frivolous will not be permitted, once the party who is prejudiced can be properly compensated by costs. There is a public interest in allowing a party to deploy its real case, provided it is relevant. The Court will refuse leave to amend the pleadings if the proposed amendments will serve no useful purpose or are fanciful. In the present case, the proposed amendments are neither irrelevant nor hopeless as they impact directly the question of title to the shares and the claim for rectification of the register of shares. The justice of the matter weighs in favour of granting Comodo leave to amend its reply and defence to counterclaim to enable the real issues to be determined, particularly since no trial date has been fixed.

Cook & Carlton Communications Ltd. v News Group Newspapers Ltd (No.2) [2002] EWHC 1070 applied; **Dufour and Others v Helenair Corporation Ltd and Others** (1996) 52 WIR 188 applied.

5. CPR 15.2 provides that summary judgment is appropriate where the claim or defence and counterclaim has no real prospect of success. While it is recognised that on a summary judgment application, the court is entitled to go behind the evidence which is incredible, the court will also disregard fanciful claims and defences. A claim or defence may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all documents or other material on which it is based. In this case, Comodo's defence is neither frivolous nor fanciful.

Swain v Hillman and another [2001] 1 All ER 91 applied**; St Lucia Motors Ltd & General Insurance Co v Peterson Modeste** SLUHCVAP2009/0008 (delivered 11th January 2010, unreported) followed**; Three Rivers District Council v Bank of England** [2001] 2 All ER 513 at para 95 applied;

6. The summary judgment procedure is unsuitable for claims or issues which would necessitate the court embarking upon a "mini-trial" or to resolve issues which ought to be properly tried. Summary judgment will almost always be inappropriate where there are allegations of reprehensible conduct. Similarly complex claims, cases relying on complex facts and issues involving questions of law and fact where the law is not simple, are likely to be inappropriate for summary judgment.

Swain v Hillman and another [2001] 1 All ER 91 applied; **Three Rivers District Council v Bank of England** [2001] 2 All ER 513 applied, **Hallman Holding Ltd v Webster and another** [2016] UKPC 3 applied; **Citco Global Custody NV v Y2K Finance Inc** BVIHCVAP2008/0022 (delivered 19th October 2009, unreported)

followed; **Alfa Telecom Turkey Ltd v Cukurova Finance International Ltd et al** BVIHCVAP 2009/0001 (delivered 16th September 2009, unreported) followed.

7. In the case before the Court, the judge was not merely required to rectify the register but critically would have needed to determine who had title to the shares. He would only be able to properly do so after there is a full ventilation of the issues that have been joined by Comodo and Renaissance. Additionally, the case involved allegations of reprehensible conduct. The issues raised are ideally suited to be determined by the court after it has had the benefit of full arguments. Accordingly, this case was unsuitable for summary disposal and the learned judge therefore erred in awarding Renaissance summary judgment on its counterclaim.

Nilon Ltd & Another v Royal Westminster Investments S.A. & others [2015] UKPC 2 applied **Hallman Holding Ltd v Webster and another** [2016] UKPC 3 applied.

JUDGMENT

Introduction

[1] **BLENMAN JA**: This is an appeal by Comodo Holdings Limited ("Comodo") against the judgment of the learned judge in which he refused to grant Comodo leave to amend its reply and defence to counterclaim to the extent that Comodo desired. Also, the judge granted summary judgment to Renaissance Ventures Limited ("Renaissance") on its counterclaim for Comodo's register to be rectified to show Renaissance as the proprietor of the shares which are reflected in share certificate number 6. Mr. Joseph Katz ("Mr. Katz") (in the capacity of Executor of the Estate of the late Eric D. Emanuel) has counterclaimed against Comodo but did not apply for summary judgment. The judge also ordered Comodo to pay costs to Renaissance. Comodo is dissatisfied with the decision of the learned judge and has appealed; its appeal is resisted by Renaissance.

Background

[2] Comodo is a company, which was incorporated in the British Virgin Islands under the **International Business Companies Act 1984** (as amended)[2] ("the IBC Act"). On 18th May 1998, it was acquired by Mr. Melih Abdulhayoglu ("Mr. Abdulhayoglu"). The original funding for Comodo was provided by Mr. Eamonn McManus ("Mr. McManus"). The original shareholders were Mr. Abdulhayoglu and Mr. McManus' company, Owl's Nest Ltd. Mr. Abdulhayoglu, at that time, was the sole director of Comodo. Mr. Abdulhayoglu was later introduced to Mr. Eric Emanuel ("Mr. Emanuel") who was interested in investing in Comodo. Towards this end, Comodo entered into a subscription agreement with Mr. Emanuel's investment vehicle, Renaissance, through representations allegedly made by Mr. Emanuel. The subscription agreement provided that Renaissance would subscribe for 50 shares in Comodo at US$15,000.00 each amounting to a total of US$750,000.00 payable in instalments over a period of nine months. The initial shares were to be issued by Comodo on execution of the subscription agreement when the initial instalment of US$250,000.00 was due; over a period of time, the balance of US$750,000.00 was paid to Comodo. It is in dispute as to whether the balance of the monies that were deposited into Comodo's account came from Mr. Emanuel personally or third parties. Comodo alleged that Mr. Emanuel misrepresented to third parties that they were investing in Comodo and had used third parties' monies to pay into Renaissance's account. It is alleged by Comodo that shares were subsequently issued to third parties utilising the subscription money.

[3] Subsequently, Mr. Abdulhayoglu passed a series of resolutions including a resolution for the issue of 12,450 further shares of US$1 each to Renaissance. The resolutions included a further resolution to divide the issued and unissued but authorised share capital of US$1 shares into shares of US$0.000125 each. It is

[2] Cap.291, Laws of the Virgin Islands.

common ground that this resulted in Renaissance holding 100,000,000 shares of US$0.000125 which was reflected in share certificate number 6.

[4] There is no evidence of an original share register being in existence. Comodo however has created a share register and the shares which are allegedly held by Renaissance and are reflected in share certificate number 6 are not reflected therein.

[5] Mr. Emanuel was eventually appointed the director of Comodo. He died and after his death, Comodo challenged Renaissance's entitlement to the shares represented by share certificate number 6. Comodo alleges that the shares were never registered and therefore Renaissance never obtained title to them. It is noteworthy that the IBC Act, which is now replaced by the **BVI Business Companies Act 2004** ("the BCA"),[3] provided in section 18, that, an international business company (which Comodo then was) could not issue a share in itself until the consideration in respect of the share had been fully paid. It however provided for the payment of the share which could be by way of partial payment subject to forfeiture if the balance of the consideration is not paid. The terms of section 18 of the IBC Act were replicated in article 4.2 of the Articles of Association of Comodo.

[6] Comodo also claimed that the second set of shares of 12,450 shares allocated to Renaissance is void because there was no payment for it. Renaissance argued that the shares were validly issued since they have a share certificate for the shares and sought to have Comodo's share register rectified to reflect their title to the shares. Towards this end, they filed the counterclaim.

The Claim and Counterclaim

[3] Act No. 16 of 2004, Laws of the Virgin Islands.

[7] Comodo filed a claim and points of claim and sought a number of declarations against Renaissance and the Estate of Mr. Emanuel. The effect of the claim was to seek to resolve the issue of whether Renaissance is a member of Comodo. Comodo's contention is that because there is no evidence that the shares for which share certificate number 6 has been issued to Renaissance and Mr. Katz, as Executor of Mr. Emanuel were ever paid for and since the company has been unable to discover a share register which indicates that the shares were registered, neither Renaissance nor Mr. Emanuel has obtained title to the shares. Renaissance filed a defence and counterclaim in which it sought to obtain an order that the shares be registered and that the register be rectified to reflect Renaissance and the Estate of Mr. Emanuel as the proprietors of the initial shares. Mr. Katz, in his capacity as representative of Mr. Emanuel's Estate, also sought to have the register rectified. Comodo filed an application for summary judgment but was unsuccessful. Renaissance made an application for summary judgment on its counterclaim for Comodo's register of members to be rectified to show Renaissance as the proprietor of the shares as evidenced in share certificate number 6. No application was made for summary judgment in respect of the Estate of Mr. Emanuel. The learned judge granted summary judgment to Renaissance and ordered that the register be rectified to record Renaissance as the registered proprietor of the shares which are evidenced in share certificate number 6. Costs were also ordered to be paid by Comodo.

[8] Prior to all this, Comodo had filed its reply and defence to counterclaim and sought to amend it. The learned judge ruled that Comodo required permission to amend its reply and its defence to counterclaim in order to plead several averments of misrepresentations and subsequent dealings by Mr. Emanuel. It is noteworthy that a date had been fixed for the first case management conference. The summary judgment application having been brought on for hearing, the case management conference was adjourned with no directions having been given. In

fact, the record reveals that at the conclusion of Comodo's application for summary judgment, the judge had directed that the parties fix a date for the case management conference and had acknowledged that the case management conference was adjourned.

[9] The learned judge, though permitting some of the amendments to Comodo, refused to allow amendments of the reply and defence to counterclaim to be made to several paragraphs in order to enable Comodo to plead misrepresentation and subsequent dealings of Mr. Emanuel. The judge clearly indicated among other things that he did not wish to have the claim "cluttered up" and on that basis refused to grant permission to Comodo to amend its reply and defence to its counterclaim.

[10] It is noteworthy that by the time the claim was filed the IBC Act was replaced by BCA. This Act provides that the registration of shares is prima facie evidence of the title of the shares as distinct from the IBC Act, which had stated that the share certificate is prima facie evidence of ownership of the shares.

The Appeal

[11] Comodo is dissatisfied with the decision of the learned judge and has appealed against the following orders that were made by the judge:-

(a) The order that Comodo required permission of the Court to amend its reply and defence to counterclaim.

(b) The judge's order refusing Comodo's permission to amend its reply and defence to counterclaim in order to include paragraphs that

relate to misrepresentation and subsequent dealings namely paragraphs 11 to 14, 33, 36, 39, 47,54 63 and 73.

(c) The order of the judge (i) granting Renaissance summary judgment on its counterclaim, (ii) ordering Comodo to rectify its share register to record Renaissance as the holder of 100,000,000 shares in Comodo and (iii) ordering Comodo to pay Renaissance the costs of its summary judgment application.

Appellant Submissions

Appeal Against the CPR 20.1(1) Order

[12] Learned Queen's Counsel Mr. Vernon Flynn stated that this appeal involves a simple question of statutory construction, which is of significant importance for the Eastern Caribbean Supreme Court as a whole. He reminded the court that rule 20.1(1) of the Civil Procedure Rules 2000 ("CPR 2000") is in the following terms:

> "A statement of case may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference."

[13] In his written submissions learned Queen's Counsel Mr. Flynn, said that no date had (or has) been fixed by the court for the first case management conference or indeed any case management conference. The learned judge overlooked the fact that at the conclusion of Comodo's application for summary judgment he directed the parties to fix a date for the case management conference. In any event, Comodo had not previously amended its reply or its defence to counterclaim and so it was entitled to amend those statements of case without permission. Comodo accordingly, plainly fell within the terms of CPR 20.1(1). Mr. Flynn, QC stated that "in (wrongly) reaching the opposite conclusion, the judge took account of the fact that on Comodo's application for summary judgment on 29th April 2014, and having dismissed that application, he had, as he was required to do under CPR

15.6(2), treated the hearing as a case management conference and adjourned the case management conference to a date to be fixed (and in the event no date has been fixed)." As Renaissance's counsel indicated at the 29th April hearing, "[i]t's supposed to be a case management conference, but we have run out of time". And as the judge acknowledged: "It is, but I am not going to, I know I am obliged to do this, I am going to adjourn the case management conference to a further occasion". The learned judge did not take any steps in relation to a case management conference (such as making any case management directions); his only action was to adjourn the case management conference to a further (unspecified) date. Furthermore, Renaissance sought, in its application for summary judgment, that the hearing be treated as the case management conference.

[14] Mr. Flynn, QC submitted that, the underlying purpose of CPR 20.1(1) is to allow a party to amend its statement of case once prior to the case management conference actually taking place. He stated that prior to that point of course, no orders relying on the original pleadings would have been made. Where, following an unsuccessful summary judgment application, no case management in fact takes place at all, and the case management conference (which as a result of CPR 15.6(2) is notionally before the court) is simply adjourned to another occasion, no "first case management conference" within the meaning of CPR 20.1(1) has either been fixed or has taken place. In the circumstances under CPR 20.1(1) the appeal should be allowed with costs. Of great importance is the fact that, in his oral arguments Mr. Flynn, QC posited that the claim was listed for first case management conference but insofar as it was adjourned, the question remains as to whether permission was required.

The Amendment Appeal

[15] Learned Queen's Counsel, Mr. Flynn said that the amendment appeal concerns the rejection of amendments which Comodo sought to make to its reply and defence to counterclaim. Mr. Flynn, QC said that having concluded that permission was required to amend the reply and defence to counterclaim, the judge considered the draft pleadings, including the allegations that the subscription agreement had been induced by misrepresentations (the "Misrepresentation Allegations") and that Renaissance had purported to deal with some of the shares it was now claiming it was entitled to (the "Dealing Allegation"). The judge rejected both the Misrepresentation Allegations and the Dealing Allegations. His reasoning was extremely brief.[4] The only substantive reason for the judge's rejection of the Misrepresentation Allegations was the stage the proceedings had reached, but, whilst both sides had made strike out and summary judgment applications, the proceedings themselves had not progressed even as far as a first case management conference. Accordingly, the period prior to the first case management conference, which CPR 2000 contemplated was one in which Comodo could have made one set of amendments without permission, had yet to come to an end.

[16] Learned Queen's Counsel, Mr. Flynn said that the learned judge erred when he refused to allow Comodo to amend its reply and defence to counterclaim in order to plead the misrepresentations and dealings that were made by Mr. Emanuel to Comodo and the latter's reliance on the misrepresentations and his dealings. Mr. Flynn, QC complained that in any event the learned judge had no proper basis for not permitting Comodo to amend its reply and defence to counterclaim. Mr. Flynn, QC said that the reason that the learned judge provided for refusing to allow the amendments was that he did not wish to "clutter" the claim with allegations of misrepresentation. Mr. Flynn, QC stated that in relation to the Dealing Allegation the reasoning of the learned judge is even more unclear. As can be seen from the transcript, the allegation was rejected by the learned judge on the ground that the

[4] Transcript of Cambers Proceedings dated Thursday, 4th December 2014, pp. 31 to 32.

pleading was "bad". No explanation is given as to why that might be the case. The point taken by Renaissance during the hearing was that the allegation referred to Comodo's beliefs, which it said were irrelevant, but that is a gross mischaracterisation of paragraph 73. Whilst Comodo explained that pending disclosure and further investigation, its conclusions were provisional, it did identify at least one and possibly two further dealings with shares which were the subject of the summary judgment application. Further, the judge in any event considered (and rejected) the point in paragraph 19 of the judgment.

[17] Mr. Flynn, QC stated that whether or not the judge granted leave to Comodo to amend its reply and defence to counterclaim, Comodo intended to and would provide the court with evidence of Mr. Emanuel's misrepresentations at trial. He opined that the evidence would be admissible at trial and would be of great probative value. Mr. Flynn, QC said that the learned judge, having granted Comodo permission to amend its reply and defence to counterclaim in order to plead that Renaissance's shares were not registered and bearing in mind that the thrust of Comodo's claim was that Mr. Emanuel committed a fiduciary breach, it was implausible for the learned judge to have excluded the allegations of misrepresentations. Mr. Flynn, QC argued that what Mr. Emanuel did (his conduct in the past and after the transactions) must be relevant to the issues of his credibility. Mr. Flynn, QC said that the learned judge erred in shutting out Comodo from pleading facts that were material to its case. He maintained that the learned judge did not exercise his discretion within the parameters of the Civil Procedure Rules and wrongly refused to give permission to effect the amendments on the very impermissible basis "which was quite extraordinary". Mr. Flynn, QC reminded the Court that the reason the learned judge gave for refusing to grant Comodo permission to amend its pleadings in order to advance misrepresentation was that he did not want "misrepresentation claims to clutter up the landscape; it is a case management decision; I'm not going to do it."

[18] Mr. Flynn, QC informed the Court that whether or not Comodo is allowed to advance misrepresentations and dealings as to a claim may have very little impact on the case insofar as Comodo has already provided affidavit evidence of the misrepresentations and dealings which will form part of the evidence in the substantive trial. In any event, Comodo will be advancing what amounted to equitable fraud at the trial, based on the misrepresentations. Mr. Flynn, QC therefore implored this Court to grant Comodo the requisite permission to amend its reply and defence to counterclaim in order to include the alleged misrepresentations that were made by Mr. Emanuel on behalf of himself and Renaissance which induced Comodo to enter into the subscription agreement. Mr. Flynn, QC reiterated that the learned judge erred in refusing to allow the amendment. He also asked this Court to grant Comodo leave to plead Mr. Emanuel's dealings since these averments were integral to Comodo's substantive counterclaim.

[19] In reinforcing this submission, Mr. Flynn, QC said that the judge said "I mean you can address this point, but my belief is we can get along perfectly well in this case without throwing in misrepresentation on top of everything else." Mr. Flynn, QC complained that this reason which the judge provided was not a proper basis to refuse to grant permission to amend. He said that the judge said "I don't want to broaden it. It is very late in the day and that's my decision. It is a case management decision." Mr. Flynn, QC was adamant that the decision was not only a case management decision but rather it was a final decision. Mr. Flynn, QC argued that the judge could only have refused permission to amend or strike out the sections of the pleadings if he was satisfied that Comodo had no realistic prospects of success of prosecuting the claims. The legitimate concern should have been whether or not Comodo's case on misrepresentation and dealings is hopeless and should be struck out or whether it should proceed to trial. In support

of his argument Mr. Flynn, QC referred the Court to **The Royal Brompton Hospital National Health Service Trust v Hammond**[5] case. He said that there were three available options to any judge; to grant summary judgment, to strike out the claim or to permit the claim to proceed to trial. Mr. Flynn, QC was adamant that the learned judge did not exercise his discretion properly in refusing to give Comodo permission to amend its reply and defence to counterclaim and therefore erred.

Summary judgment

[20] Mr. Flynn, QC very forcefully argued that the learned judge erred in granting summary judgment to Renaissance on its counterclaim for rectification. This was the main focus of Mr. Flynn, QC's oral submissions. Mr. Flynn, QC maintained that the claim ought to have proceeded to trial and the learned judge could not properly grant summary judgment to Renaissance. Mr. Flynn, QC said that the legal principles the court was required to apply are well-known. In essence, in order for a claimant (or, as in this case, a counter-claimant) to apply for summary judgment under CPR 15.2, it is necessary to show that the defendant has no real prospect of successfully defending the claim. In **The Bank of Bermuda Ltd v Pentium (BVI) Ltd** et al[6] Saunders CJ, giving the judgment of the Court of Appeal, approved at para 11 the "meticulous" summary of "the proper approach" to CPR 15.2 set out by Rawlins J in the court below. He had referred to rule 24.2 of the English CPR and to the approach taken in regard to that rule by Lord Woolf MR in **Swain v Hillman**[7] which, he said, "aptly illustrated" the approach to be taken by the Eastern Caribbean Supreme Court to rule 15.2. This has been approved and followed more recently in two BVI Court of Appeal cases; **Citco Global Custody**

[5] [2001] EWCA Civ 778.
[6] BVIHCVAP2003/0014 (delivered 20th September 2004, unreported).
[7] [2001] 1 All ER 91.

NV v Y2K Finance Inc[8] and **Alfa Telecom Turkey Ltd v Cukurova Finance International Ltd et al**.[9]

[21] He reminded the Court that the test for summary judgment is whether the case under attack is "something better than ... merely arguable" and carries "some degree of conviction". He referred the Court to **ED&F Man Liquid Products Ltd v Patel and another**.[10] CPR 15(2) does not require the court to conduct a mini-trial. It must assess whether there are significant issues of fact or complex issues of law which merit investigation and testing at a full trial.[11]

[22] Mr. Flynn, QC said that the learned judge failed to apply the above principles in a number of important respects. In particular, he made a number of erroneous findings of law and a series of impermissible findings of fact, none of which could properly be based upon the evidence before the court. These errors are addressed below. Mr. Flynn, QC submitted that if the learned judge had approached the summary judgment application correctly the only conclusion he could properly have come to was that it be dismissed with costs. Instead, the court embarked upon a form of "mini trial", which it should not have done. To underscore his argument, Mr. Flynn, QC said that it is important to appreciate at the outset that, as indicated above, Renaissance's case relied solely on the share certificate. Mr Flynn said it is to be noted that, whereas under the IBC Act a share certificate was prima facie evidence of the title of the holder to the share specified, [12] that provision was repealed with the introduction of the BCA, which has no equivalent provision. Instead, the BCA provides that the entry of a person's name in the share register is prima facie evidence of legal title of that person to the

[8] BVIHCVAP2008/0022 (delivered 19th October 2009, unreported).
[9] BVIHCVAP 2009/0001 (delivered 16th September 2009, unreported).
[10] [2003] EWCA 472 per Potter LJ at paras.7 to10.
[11] See: ED&F Man Liquid Products at para 10 and Lord Hobhouse of Woodborough in Three Rivers District Council and others v Bank of England (No.3) [2001] 2 All ER 513 at para 158. where he stated that: "The criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is absence of reality.
[12] Section 27 (3) of the IBC Act.

shares in question. Simply producing a certificate, gives rise to no presumption. As indicated above, Renaissance's name was not entered in the register as the holder of the initial shares, the additional shares or the split shares.

[23] Queen's Counsel, Mr. Flynn said that the share certificate purported to relate to an issue of 100,000,000 split shares, purportedly issued on 28th October 2000 following the purported division of 12,500 shares in Comodo into 100,000,000 shares of US$0.000125. The 12,500 shares were said to be the product of two separate purported issues of shares, namely:

(a) purported issue of 50 initial shares pursuant to the Subscription Agreement; and

(b) a purported issue of the additional shares pursuant to the 2000 Resolutions.

[24] He reminded the Court that Comodo contests both purported issues of shares, namely, the initial shares and the additional shares and that they unlawful, void and of no effect.

[25] Further, Mr. Flynn, QC pointed out that Comodo has made some serious allegations against Mr. Emanuel and by extension Renaissance including the fact that he had misled third parties as to the nature of their investments in Comodo. Mr. Flynn, QC said the effect of the judgment below was to grant summary judgment to the fraudster on the basis of the possession of share certificates even though the certificates at best only give rise to the presumption of ownership. Mr. Flynn, QC said that there are legal arguments as to whether it is the share certificate (under the old law) or being on the register (under the new law) that gives rise to the presumption. Mr. Flynn, QC sought to impress on this Court that the case is not one that is suitable for summary judgment. There are such major dispute of facts and very serious allegations of equitable fraud against Mr.

Emanuel coupled with the fact that Comodo asserts that two different sets of persons have share certificates for the same shares. He says that there are fundamental legal issues that might arise and the case is one that is very suitable for a full trial.

[26] Learned Queen's Counsel, Mr. Flynn emphasised the fact that he only has to show that Comodo's case is not fanciful or hopeless in order to convince this Court that the learned judge erred. Mr. Flynn, QC said to the contrary, Comodo has pleaded a very strong case that Mr. Emanuel misused other person's funds to pay for the subscription agreement and those funds were impressed with a Quistclose trust. He pointed the Court to what he said was the very untenable situation. The learned judge was wrong to enter summary judgment in the face of the serious triable issues that formed the bases of the claim, bearing in mind that there are complex issues which could only be resolved during a full trial. Learned Queen's Counsel, Mr. Flynn stated that even if the court were to accept Renaissance's case based on its pleadings, there is no basis for concluding that Comodo's claim is hopeless. The learned judge could only have granted summary judgment on Renaissance's counterclaim if he felt that Comodo had no real prospect of success in defending the claim. This was not such a claim. There is clearly a dispute as to who owns the shares which requires a full investigation of the title to the shares. Mr. Flynn, QC reiterated that there are many fundamental legal issues that arise in this matter and numerous factual disputes that substantially impact Renaissance's counterclaim, therefore the learned judge should not have granted Renaissance summary judgment.

[27] In further support of his position that summary judgment ought not to have been granted to Renaissance, Mr. Flynn, QC said the trial judge mischaracterised the issue in relation to from where or to whom the monies which were used to pay for the shares as one between Renaissance and third parties belonged. Mr. Flynn,

QC was adamant that the dispute between the parties concerned title to the shares. Mr. Flynn, QC referred to **Nilon Ltd & Another v Royal Westminster Investments S.A. & others**[13] in support of the proposition that if there is an issue about title it is a matter that must be tried, and if a factual case on title is disputed, it needs to be dealt with at trial by the judge.

[28] To underscore his point, Mr. Flynn, QC reminded the Court that under the IBC Act it was provided that the share certificate is prima facie evidence of title. However, under the BCA it is provided that being on the register is prima facie evidence of title. He told the Court that the learned judge granted permission to Comodo to pursue its case that Renaissance's shares were not registered. In those circumstances, Mr. Flynn, QC argued that the change in the law cannot be ignored. He maintained that the learned judge erred in granting summary judgment in face of the several triable issues including which was the applicable law. He said that the holder of the share certificate, on the coming into force of the new law must ensure that he is placed on the register (which is now prima facie evidence of title). In any event, the prima facie evidence is rebuttable.

[29] Mr. Flynn, QC submitted that based on the decision in **Nilon** the learned judge adopted the incorrect approach when he held that under section 43 of the BCA he had no discretion but to order that the register be rectified to reflect that Renaissance is the proprietor of 100,000,000 shares as evidenced by share certificate number 6. Mr. Flynn, QC said that the learned judge proceeded on the basis that the "old law" IBC Act applied. He said whether or not the old Act or the new Act applied, Comodo has evidence to rebut the presumption that Renaissance has title to the shares and the learned judge ought to have allowed the case to proceed to trial. Mr. Flynn, QC was adamant that the "old law" applied but hastened to add that this is not a matter that this Court needs to trouble itself

[13] [2015] UKPC 2.

with on the appeal. The controversy as to whether Comodo can rebut any presumption in favour of Renaissance's title is a matter that should be addressed during the full trial.

[31] Next, Mr. Flynn, QC argued that the issue that the learned judge had to grapple with was whether or not the shares were paid for by Mr. Emanuel and not whether there was consideration. The former question addresses title whereas the latter is a pleading point. What Comodo raised was a question of who has proper title to the shares and this is a triable issue that required full ventilation. Mr. Flynn, QC reminded the Court that Comodo's contention is that Renaissance (Mr. Emanuel) had made no payment since the monies came from third parties. Mr. Flynn, QC then said that the monies that Renaissance paid towards the subscription agreement were impressed with a Quistclose trust. These are real triable issues that need to be fully ventilated at trial and cannot be properly determined on a summary judgment application.

[32] Mr. Flynn, QC submitted that the learned judge made several errors of law in coming to the conclusion that the case was suitable for the grant of summary judgment

Error of Law – sections 18 and 19A of the IBC Act

[33] Firstly, Mr. Flynn said that section 18 of the IBC Act prohibited Comodo from issuing a share until the consideration for that share had been fully paid, save where a share was issued for a promissory note or other written obligation for the payment of a debt subject to forfeiture in the manner prescribed by section 19A of the IBC Act. Mr. Flynn, QC submitted that the primary and erroneous finding of the learned judge in relation to section 18 was that the consideration in respect of a share was fully paid for the purposes of section 18 of the IBC Act, notwithstanding that part of the subscription price for the share remained

outstanding, because a promise to pay constituted payment. Mr. Flynn, QC opined that there was no basis for such a conclusion, which is contrary to the natural and obvious meaning of the expression "fully paid"; not least because it would have the consequence that all issues of shares were fully paid as, in respect of every issue, there is an express or implied obligation to pay the balance of the purchase price outstanding. If that were the case, it would be entirely otiose for there to be a prohibition against a share being issued until the consideration in respect of the share is fully paid; that circumstance could never arise. Mr. Flynn, QC complained that the learned judge's construction was not one advanced by Renaissance, and Comodo had no prior notice of it. Even if it were arguably correct, it is plain that the contrary (i.e. that "fully paid" meant what it said) was highly arguable. This is a matter that should be dealt with at trial.

[34] Further, Mr. Flynn, QC opined that the learned judge should have concluded that, whilst section 18 of the IBC Act was subject to the proviso that a share could be issued for a promissory note or other written obligation for a debt, it could only be so issued if subject to forfeiture in the manner prescribed by section 19A. Section 19A states that the memorandum or articles or an agreement for the subscription of shares may contain the relevant provisions for forfeiture (those provisions being set out in sections 19A(2) to (4)). No such provisions were contained in the subscription agreement and the articles simply permitted the issue of shares for a promissory note or other written obligation for a debt to be issued subject to forfeiture. Article 4.2 states '… a share issued for a promissory note or other written obligation for payment of a debt may be issued subject to forfeiture in the manner prescribed in these articles.' Article 9.1 provides: 'When shares issued for a promissory note or other written obligation for payment of a debt have been issued subject to forfeiture, the following provisions apply.' Mr. Flynn, QC said that the learned judge should have concluded that, there being no provision relating to forfeiture in the subscription agreement, the issue of the shares to Renaissance

was prohibited. Article 4.2 was (and is) in the same terms mutatis mutandis as section 18 of the IBC Act.

[35] The subscription agreement, pursuant to which the initial shares were purportedly issued, provided that the issue should be of part-paid shares, to take place immediately on completion.[14] At the time of completion only $250,000.00 of the $750,000.00 purchase price for the initial shares was required to be paid.[15]. Mr. Flynn, QC maintained that Renaissance's case, at its highest, is that only $250,000.00 had been paid at the point when the initial shares were purportedly issued. Accordingly, the learned judge should have concluded that, given the prohibition in section 18 of the IBC Act and article 4.2, the shares were not capable of being issued part paid on completion. Therefore, the purported issue of the initial shares was unlawful, void and of no effect. Mr. Flynn, QC advocated that even if the learned judge was not prepared to come to that conclusion, he should have found at the very least that it was highly arguable that such a conclusion was correct. The matter should therefore have proceeded to a full trial. Mr. Flynn, QC turned his attention next to another alleged error of law.

Issue as to the Payment of Consideration for the Initial Shares

[36] Learned Queen's Counsel Mr. Flynn reiterated that under the terms of the subscription agreement the initial shares were only fully paid when Comodo received $750,000.00. He said as indicated above, there is a real dispute as to whether Renaissance in fact paid anything for the initial shares. The issue arises because, whilst an aggregate amount of $750,000.00 was paid into Comodo's bank account by Renaissance, it is highly arguable that that money was in fact subscription money paid by third party investors identified by Renaissance,

[14] See clauses 2.2 and 3.2(b) of Subscription Agreement relating to a subscription of new shares in Comodo Ltd, Hearing bundle p. 480 to 481.
[15] See clause 2.3 of Subscription Agreement relating to a subscription of new shares in Comodo Ltd, Hearing bundle p. 480

through its agent, Mr. Emanuel, for shares in Comodo, and accordingly not available to be appropriated by Renaissance in payment of its liabilities under the subscription agreement. The effect of the learned judge's ruling is that there has now been a double issue of shares: first to these third party investors and now to Renaissance. Mr. Flynn, QC maintained that the learned judge should in the circumstances have concluded that there was a real triable issue as to whether Renaissance had made any effective payment for the initial shares. Mr. Flynn, QC said that as Renaissance was simply seeking to be registered as the holder of the whole of the split shares, and had no alternative claim or application to be registered for only some of those shares, the summary JUDGMENT application should at that point have been dismissed. There were in any event further insurmountable problems with regard to the purported issue of the additional shares.

Failure to Comply with the Requirements of section 20(1) IBC Act

[37] Mr. Flynn, QC reminded the Court that the additional shares were purported to have been issued pursuant to the 2000 Resolutions. Mr. Flynn QC posited that aside from the technical point that there could have been no issue because Renaissance's name was not entered on the register; there was a wholesale disregard of the provisions of section 20(1) of the IBC Act and the articles of association. Section 20(1) of the IBC Act provided that, subject to any limitations in the memorandum or articles, shares in a company incorporated under the IBC Act (as Comodo was) might be issued for such amount as might be determined from time to time by the directors, except that in the case of shares with a par value, the amount should not be less than the par value. Article 4.4 is in similar terms to section 20(1) of the IBC Act. Renaissance's case is that the purported par value of the additional shares was US$12,450. Article 4.3 provides that shares in Comodo shall be issued for money, services rendered, personal

property, an estate in real property, a promissory note or other binding obligation to contribute money or property or any combination of the foregoing as shall be determined by a resolution of the directors. The 2000 Resolutions did not contain any resolution by the directors as to (nor made any reference to) the consideration to be paid for the additional shares.

[38] Mr. Flynn, QC was adamant that there was no evidence before the court at first instance that the directors of Comodo had passed any resolution as to the amount of the consideration for the additional shares pursuant to article 4.3; that the question of what should be paid for Renaissance's additional shares had been considered by the directors, or that they had been aware of the need to fix the consideration to be paid at an amount equal to or more than the par value of US$12,450; that the directors had passed any resolution declaring a dividend of shares pursuant to article 18.1 of the articles; that Renaissance's additional shares were being issued for consideration already paid to Comodo (whether in the form of services rendered or otherwise); that Renaissance's additional shares had otherwise been issued by way of a bonus issue (even if such a course were permitted (which it was not) by the IBC Act and the Articles); that par value (as required by section 20(1) of the IBC Act and article 4.4) or indeed any sum had been paid for Renaissance's additional shares.

[39] Mr. Flynn, QC said that Renaissance led no evidence on what consideration had been provided. All Renaissance said on this point was that monies were paid around the relevant time sufficient to cover the $12,450.[16] Learned Queen's Counsel said that the learned judge sought to resolve these difficulties by making entirely impermissible findings of fact that were not supported by any evidence, as to the circumstances surrounding the 2000 Resolutions:

[16] See Fourth Affidavit of Joseph Katz at para. 23 and Transcript of Chambers Proceedings dated Thursday, 4th December 2014 at p. 116.

(a) Firstly, he concluded that the sole director of Comodo (until 28th October 2000), Mr. Abdulhayoglu, was to be taken to have understood that at least the par value of the split shares must be paid and as such it was necessarily to be inferred that the price was intended to be their par value.[17] Mr. Flynn, QC stated that there was no evidence as to Mr. Abdulhayoglu's understanding or any material from which any such inference might be drawn.

(b) Secondly, the learned judge concluded that Comodo was a registered foreign company for the purposes of UK companies legislation which required it to file audited annual financial statements when there was no evidence to that effect.[18] The learned judge relied on this to conclude that the director understood that at least par value should be paid. Mr. Flynn said that it was not an issue that had been raised at the hearing of the summary judgment application and was in any event contradicted by a 12 page document referred to as "Draft Accounts" to which the learned judge made reference (which expressly stated that Comodo was not required to adhere to the provisions of the English Companies Act, 1985.

(c) Thirdly, the learned judge then gave undue weight to the Draft Accounts which were 12 pages of a draft information memorandum. Mr. Flynn indicated that not only did they state on their face that they were "draft" but they inaccurately misstated the number of fully paid up shares and the amount in the share premium account as at 30 June 1999. Further, there was no consideration of the extent to which (if at all) the auditors had been involved in their preparation, as opposed to simply having provided a template which Comodo had adapted (in draft).

[17] See para. 14 of lower court judgment.
[18] See para. 15 of lower court judgment.

(d) Fourthly, he concluded that Comodo was receiving expert professional advice at the time the 2000 Resolutions were passed.[19] Mr. Flynn, QC said that there was no evidence that Comodo had received any advice; expert, professional or otherwise, whether in relation to the 2000 Resolutions or otherwise.

(e) Fifthly, he concluded that the 2000 Resolutions were obviously professionally drafted.[20] Mr. Flynn said that not only was there no evidence to support this conclusion, but the learned judge wholly failed to take account of facts suggesting that they were not professionally drafted (viz: the sole director was consenting to, not passing, resolutions and no reference was made to consideration).

(f) Sixthly, he concluded that the overwhelming probability was that the additional shares were to be paid for out of the share premium account, and that that was the most likely reason why the 2000 Resolutions made no specific mention of any acquisition price.[21] Mr. Flynn argued that this was pure speculation as there was no evidence to enable the judge to reach any such conclusion.

[40] Mr. Flynn, QC said that the learned judge felt that those "findings" enabled him to conclude that the additional shares had accordingly been allotted by way of a bonus issue ("Bonus Issue") notwithstanding that there was no pleading making that allegation, there was no evidence whatsoever that was the case, and it was not a suggestion raised in evidence nor addressed at the hearing by any party. As appears from the transcript of the summary hearing, the learned judge simply speculated:

[19] See para.16 of lower court judgment.
[20] See para 16 of lower court judgment.
[21] See para.15 of lower court judgment.

> "Well, it's pretty well implicit in what you're looking at, because as I say that looks like a bonus issue. In other words for all the good stuff they had done and the value they put into the company by getting it up and running, they've got to give themselves these shares."[22]

[41] Mr. Flynn, QC next stated that, in any event, in concluding, by reference to the Draft Accounts, that the additional shares were allotted by way of a Bonus Issue the learned judge failed to have any regard to the fact that the provisions of section 20(1) of the IBC Act and article 4.4 preclude the issue of bonus shares and the articles in any event make no provision for any such issue. Whilst a share could in theory have been issued by way of dividend (as permitted by section 23(1) of the IBC Act) it was not possible for any of the additional shares to be issued by dividend, because:

(i) Comodo was shown in those Draft Accounts to have net liabilities;

(ii) there was no evidence that the director would have been able (let alone did) make a determination of solvency as required by section 36(3) of the IBC Act for a dividend to be declared; and

(iii) moreover, the Draft Accounts (which, by referring to the appointment of new directors on 28 October 2000 were intended to post-date the 2000 Resolutions) expressly stated that no dividend had been declared.[23]

[42] Mr. Flynn, QC submitted that the learned judge should have concluded that at the very least there was a real issue as to whether Mr. Emanuel had paid for the additional shares and there was a real issue as to whether any purported issue of the additional shares contravened section 18 of the IBC Act and article 4.2 of the articles of association and was thus void and of no effect. Accordingly, this gave Renaissance no right to be registered as the holder of such.

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[22] Transcript of Chambers Proceedings dated Thursday, 4th December 2014 at p.142. See also pp.116,139,144,147.

[23] Directors report p. 326 of hearing bundle.

Discretion under section 43 of the BVI Business Companies Act

[43] Mr. Flynn posited that even assuming the learned judge was otherwise correct, he erred in concluding that the court had no discretion as to whether to make an order for rectification of the register under section 43 of the BCA. The learned judge should have concluded that (i) the court was given a discretion under section 43 as to whether to order rectification; and (ii) in exercising that discretion he should have regard to the facts that:

(a) Renaissance was in effect seeking, many years after the expiry of the relevant six year limitation period, specific performance of the obligations of Comodo under the subscription agreement;

(b) the basis of the summary judgment application had been that Renaissance had performed its obligations under the subscription agreement, but that had not been established and/or;

(c) there was an issue as to whether Renaissance had purported to pay for the split shares with money misappropriated from Comodo.

[44] Mr. Flynn, QC submitted that the judge should have found that, at the very least, there was a real issue as to the existence of these factors and that, if (as Comodo contended) they did exist, what weight if any should be given to them. He should accordingly have concluded that the court was in any event not in a position to decide on the summary judgment application and how that discretion given to the court under section 43 should be exercised. In either event, he should then have concluded that there was a real issue as to whether the subscription agreement had been induced by false representations made by Mr. Emanuel on behalf of Renaissance and that if such representations were established that would provide a further reason against the court exercising its discretion under section 43 in favour of rectification.

[45] For the reasons set out above, Mr. Flynn, QC submitted that Comodo plainly has a real prospect of defending Renaissance's counterclaim. In the circumstances, the appeal against summary judgment should be allowed with an order that Renaissance pays Comodo's costs of the summary judgment application and or this appeal.

Respondent's Submissions

Amendment Appeal

[46] Learned counsel Mr. Vernon Fisher said that this is a case management decision. Accordingly, the learned judge at first instance has a wide discretion with which the Court of Appeal will rarely interfere. He argued that this appeal has no prospect of success. Even if it did, it would not affect the summary judgment. Mr. Fisher said that whether or not the judge should have granted Comodo leave to amend its defence and reply to counterclaim is a matter for the exercise of the learned judge's discretion.

[47] Mr. Fisher said that as to the justification for refusing leave, the learned judge's reasons given in argument for rejecting the specific amendments were perfectly justifiable. He stated that in addition to the clear case management reasons given, the proposed amendments were simply bad. The "initial representations" pleaded at paragraph 11 of the amended reply and defence to points of defence and counterclaim[24] are lacking in sufficient material content to amount to representations that any reasonable person could rely on. Further, those allegations do not, as might be expected, form the basis for a claim to rescind or avoid any relevant transaction. Rather, they seem only to go to the bad point that rectification of the register pursuant to section 43 of the BCA is a discretionary remedy which, even where good title to the shares is made out, might be refused

[24] Hearing bundle, p. 571.

on discretionary grounds, such as the court disapproving of the general conduct of Renaissance.

[48] Mr. Fisher opined that the learned judge was plainly correct in holding that the intention of CPR 20.1(1) is broad enough to encompass the situation where a case management conference has been fixed automatically (albeit then adjourned) by reason of CPR 15.6(2). Mr. Fisher further argued that the learned judge was also correct in refusing to grant leave to Comodo to amend its pleadings in order to include that the share certificates were issued based on Mr. Emanuel's misrepresentations. He submitted that the plea of misrepresentation would only have been relevant and serve a useful purpose if Comodo was seeking to argue that the share certificate or the decision to give it or the transaction should be set aside. Mr. Fisher said there was no plea of avoidance of the transaction and that at the best any misrepresentation renders a contract not void but voidable. Mr. Fisher urged the Court that the learned judge was correct in refusing to grant leave to Comodo to amend the pleadings in order to plead misrepresentations since this would have cluttered up the pleadings. In any event, that evidence would be inadmissible and is irrelevant. Mr. Fisher told this Court that he urged the learned judge not to permit the amendments which would have the effect of complicating matters in the claim, which had been in the system for a very long time. He urged this Court to dismiss Comodo's appeal on this ground.

[49] Finally, Mr. Fisher submitted that if the result of the amendment appeal differs from the summary judgment appeal, any costs order should take account of the fact that this aspect of this appeal was de minimis as compared to the costs incurred in respect of the summary judgment appeal.

Summary Judgment

[50] Mr. Fisher accepted that it is trite law that in a summary judgment application, the respondent's case must "carry a degree of conviction". He submitted however the court is not bound to simply accept anything that the respondent says. This is particularly so where the respondent has declined the opportunity to put in any evidence in support of its argued case. In support of this proposition, Mr. Fisher referred to **ED&F Man Liquid Products Ltd v Patel**;[25] **Franklin Management SRL v Central Eastern European Real Estate Shareholders BV**.[26] Accordingly, it is not sufficient to simply make bald claims that there is a factual dispute and expect that the court will conclude that it must be determined at trial. Mr. Fisher stated that the court should consider whether any claimed factual issue really does require trial in order to be determined.

[51] Mr. Fisher posited that the provisions of the IBC Act are plain on this point as to how a share could be issued. Section 19 provides, in relation to the kinds of consideration acceptable, that:

> "each share in a company… **shall** be issued for [among other possibilities]…a promissory note or other binding obligation to contribute money…"

A subscription agreement containing a promise to pay is therefore acceptable consideration for the issue of a share.

[52] He stated that section 18 provides that:

> "No share in a company… may be issued until the consideration in respect of the share is fully paid, and when issued the share is for all purposes fully paid and non-assessable save that a share issued for a promissory note or other written obligation for payment of a debt **may** be issued subject to forfeiture in the manner prescribed in section 19A."

[53] Mr. Fisher said that Comodo seeks to argue that the words above are a carve-out from the requirement that consideration be fully paid. That is incorrect; that would require a comma after the word "non-assessable". In fact, the words are a

[25] [2003] EWCA Civ 472 at paras 3, 5, 8, 10.
[26] [2014] EWHC 4127 at paras 19, 24-25.

carve-out from the statement that, 'when issued the share is for all purposes non-assessable.' It is a permissive carve-out hence the use of "may" rather than "shall". Comodo itself describes the materially identical language of the articles as permissive. As the learned judge found, once a type of consideration which is acceptable under section 19 has been provided the share is fully paid and may be issued.

[54] Mr. Fisher submitted that this is consistent with section 19A(1), which says:

> "The Memorandum or Articles, **or** agreement for the subscription of shares, of a company incorporated under this Act **may** contain provisions for the forfeiture of shares…

[55] Mr. Fisher stated that again the use of a forfeiture provision is permissive. He argued that even if that were wrong, and the requirement to have a forfeiture provision were mandatory in the case of a written obligation to pay, the forfeiture provision can be in the articles – it is an "or" not an "and". In this case, the provisions are in the articles, at article 4.2 and article 9. These provisions in the articles closely mirror the wording of the IBC Act. Comodo seeks to argue that the language of the Act is mandatory but the language of the articles is permissive although it accepts that the Act and the articles are in the same terms. It cannot have it both ways. If the provisions are indeed mandatory, as Comodo argues, then they apply to the issue of these shares and the shares were therefore issued subject to forfeiture as provided for in the articles.

[56] Mr. Fisher submitted that the IBC Act and the articles must be read in a way which facilitates business efficacy, not in a way which facilitates companies evading their obligations by running arid technical points many years after they have accepted payment in return for those obligations. These shares were clearly issued in compliance with the requirements of the IBC Act. Section 50 of the BCA, which is cited in support of the proposition that this would mean the shares were not

issued, was not in force. Comodo says that "it is [Comodo's] case that this provision simply reflects the law as it had previously stood". This proposition only needs to be considered to be dismissed. Section 27(3) of the IBC, which was in force at the time, states that:

> "A certificate issued in accordance with subsection (2) specifying a share held by a member of the company is prima facie evidence of the title of the member to the share specified therein".

[57] Mr. Fisher said that the repeal of this provision as a result of the BCA does not affect this point because the repeal was not retrospective and therefore could not have changed the status of Renaissance derived from section 27(3) of the IBC Act.

[58] Mr. Fisher said that factually, Comodo's case does not carry any degree of conviction. He said that Mr Nisi says on oath that he was investing in Renaissance and Comodo has produced a document which proves it. Mr. Golden has produced no documentary evidence to show that he thought he was investing in Comodo. He does not even say that he made any complaint during the four years in which he held only Renaissance shares. Renaissance's evidence that their shares in 2003 were issued from Mr Emanuel's entitlement to shares is supported by Mr Emanuel's contemporaneous note. The fact that Mr Emanuel's entitlement to those shares is in dispute does not affect that point.

[59] Mr. Fisher complained that Comodo says, misleadingly, that the money came from third parties 'and those third parties were duly issued with share certificates in their names for shares in Comodo'. Renaissance agreed in 1999 to purchase for $750,000 (and did purchase) what became 100,000,000 shares. Mr Nisi and the Goldens were issued a total between them of 4,000,000 shares in 2003, from a different source. The attempt to create an equivalence between the two transactions is wholly unpersuasive and carries no conviction. In any event, the

factual issue is not relevant in any case because it does not give rise to a defence for Comodo, for three reasons. First, it is clear on the evidence that Renaissance paid the money in satisfaction of its own obligation under the subscription agreement, and it was appropriated by Comodo as Renaissance's payment in satisfaction of that obligation. Although complaint is made of the learned judge relying on those Draft Accounts, the fact is that those Draft Accounts were put in evidence by Mr. Katz in his affidavit sworn on 17th April 2014. Comodo has had ample time and opportunity to state in evidence that those draft accounts are inaccurate in material respects, but neither Mr. Whittam (who swore an affidavit in reply on 23rd April 2014) nor Mr Abdulhayoglu (who swore an affidavit in opposition to the summary judgment application on 25th November 2014) took any objection to the accuracy of those Draft Accounts.

[60] Second, Comodo asserts that the monies received by Renaissance from Mr. and Mrs. Golden were paid by Mr. and Mrs. Golden for a specified purpose, i.e. the payment by Renaissance to Comodo of the consideration for the issue of Comodo shares to Mr. and Mrs. Golden; and that the funds were therefore held on a Quistclose Trust. In those circumstances, the payment might at best (on Comodo's case) be a misappropriation of trust property by Renaissance and therefore a breach of trust. The factual basis of the alleged Quistclose trust is disputed, but even if Comodo were correct, this argument would not avail it. Any such Quistclose trusts would (upon the failure of the purpose) have become resulting trusts in favour of Mr. and Mrs. Golden. Such a claim would lie with the Goldens only.[27]

[61] Third, even if Comodo's argument had some merit at law (which it does not), it is an agreed fact that the original payment of $250,000.00 was made from funds received by Renaissance from Mr Nisi. It is impossible to credibly maintain the

[27] See Barclays Bank Ltd. v Quistclose Investments Ltd. [on appeal from Quistclose Investments v Rolls Razor Ltd.] [1970] AC 567 at 580.

factual assertion that there was any Quistclose trust in relation to the money transferred by Mr Nisi. As found by the learned judge at paragraphs 12 to 13 of his judgment, once the shares were issued on the basis of the initial $250,000 and the subscription agreement, they were fully paid as a result of the promise to pay the remaining instalments[28] subject to forfeiture, which has never been attempted. Even if the remaining $500,000.00 were never paid, that would not invalidate the share issue in the absence of forfeiture.

[62] Mr. Fisher said that Comodo states that no regard was had for the requirements of the IBC Act. It is surprising, to say the least, opined Mr. Fisher that Comodo makes this statement when Mr Abdulhayoglu and Mr Whittam have chosen to simply maintain complete silence concerning the circumstances of the second share issue which they orchestrated. Comodo's own evidence remains that this was something similar to a stock split, with no further explanation as to the nature of the share issue. Comodo's evidence as to consideration for shares is made on the basis that the only monetary consideration required for the 100,000,000 shares was the $750,000.00; that evidence has not changed since 5th March 2014.

[63] Comodo further states that no resolution was passed in accordance with article 4.3 or one complying with article 4.4. Again, Comodo has chosen not to put any evidence from the director and company secretary at the time saying what other resolutions may or may not have been made. In the circumstances, it does not lie in Comodo's mouth to make such an assertion.

[64] Mr. Fisher submitted that in the face of this omission, the learned judge was given no reason to think that circumstances would be any different at trial: Comodo has had several opportunities to adduce any affidavit or documentary evidence that it

[28] Section 19 of the IBC.

has, if it has any. To say that this submission by Comodo is lacking a degree of conviction would be to understate the case.

[65] There was absolutely no reason to subject the parties to the cost and delay of trial when the court was in as good a position to make the decision at this stage. As such, the learned judge came to the only reasonable decision available to him, which was that he must assume the appropriate formalities had been complied with, however that was done.

[66] Mr. Fisher submitted that Comodo's statement that the learned judge made various findings of fact, including ultimately that this was a Bonus Issue, is incorrect. The learned judge speculated in the hearing that the consideration might have been anything, including non-monetary consideration or the possibility that the issue might have been later ratified under the principles in **re Duomatic Ltd**.[29] The learned judge did comment in his judgment that a Bonus Issue was likely (and indeed that is a possibility, under the IBC equivalent procedure) but that is not the ratio decidendi of the learned judge's decision. The learned judge's decision (in paragraphs 16 to 17 of his judgment) was that however it was done, Comodo must be presumed, in the absence of any evidence to the contrary, to have done whatever needed to be done; the share certificate certified that the shares were fully paid and it was for Comodo to rebut that presumption.

[67] In his further oral arguments on the correctness of the judgment, Mr. Fisher argued that the subscription agreement coupled with the issue of the share certificate must have some legal effect. Mr. Fisher says whether or not Renaissance paid for the shares is immaterial. He adverted the Court's attention to sections 18 and 19 of the IBC Act and he said that even if the entire price of the shares was not paid, once they were issued subject to the ability to forfeit for

[29] [1969] 1 All ER 161

non-payment of the balance they were fully paid. He said that the articles of association provided for the forfeiture so they complied with section18 of the IBC Act. Going even further, Mr. Fisher argued that even if Renaissance has, in fact, not paid any money under the subscription agreement it would not affect its title to the shares. He relied on **National Westminster Bank plc and another v Inland Revenue Commissioners**,[30] which he opined is authority for the proposition that, an undertaking to pay cash to that company at a future date is sufficient consideration.

[68] Accordingly, Mr. Fisher submitted that the learned judge was right to grant summary judgment to Renaissance. Mr. Fisher took this Court to a large body of documentation evidence including bank statements in support of his contention that it was Renaissance that paid the subscription agreement. He also referred us to the affidavit that was deposed by one of the third parties who had allegedly provided the monies. He also adverted the Court to certain paragraphs of Mr. Whitman's evidence (who is Comodo's witness), in support of his contention that the parties authorised Renaissance to invest their monies in the way it did.

[69] Mr. Fisher further argued that the principles established in **re Ambrose Lake Tin and Copper Mining Company**[31] are very applicable. In that case, Chief Justice Cockburn said that allotment means that some subsequent act has been done whereby title of the shares becomes complete, either by the holder of the shares receiving some certificate, or being placed on the register of shareholders. He therefore argued that the issue of share certificate completes title and referred to **National Westminster Bank plc and another v Inland Revenue Commissioners**. Mr. Fisher admitted that being on the register is prima facie evidence of title, and clearly a share certificate is evidence of title.

[30] [1995] 1 AC 119.
[31] (1880) 14 Ch.D. 390.

[70] Finally, learned counsel Mr. Fisher argued that, the case below was not one for specific performance of the contract. The contract has been performed. What had not happened is the company has not performed its statutory obligation to keep the register accurate and it has omitted Renaissance's name. It is not a claim for specific performance but it is a claim for rectification under section 43. He was adamant that possession of the share certificate confirms title to the shares. He said that once Renaissance pleaded the share certificate and once the certificate is admitted (as it is) then Renaissance was entitled to summary judgment unless Comodo can make out a case that the share certificate is, for some reason, invalid; it has failed to do so. He was adamant that the learned judge was correct to grant summary judgment on its defence and counterclaim and invited this Court to dismiss the appeal with costs even though he conceded in oral arguments that the learned judge made certain findings that were not open to him.

Discussion and Conclusion

Amendment Appeal

[71] It is common ground that the claim below had been listed for the first case management conference. In effect the pleadings had been closed. The question that needs to be addressed is whether Comodo required leave or permission from the court to amend its pleading after the first date that had been fixed for the case management conference had arrived. As alluded to earlier, learned Queen's Counsel Mr. Flynn in his oral arguments, belatedly acknowledged that the date had been fixed for the case management conference but took a slightly different stance though not abandoning his written position. He did not pursue the point that the case management conference was not fixed but argued that in view of the fact that the learned judge had not given any directions at the case management conference but rather adjourned it, that it raises the question whether permission was required. Learned counsel Mr. Fisher, did not press this point too much.

[72] Whether or not Comodo required the court's leave to amend its reply and defence to counterclaim in my view is a very short point. CPR 20.1 enables a party to amend its statement of case once before the date that is fixed for the first case management conference. Once the date of the first case management conference arises, there can be no amendment of pleadings without first obtaining the permission of the court. In **George Allert et al v Joshua Matheson et al**[32] this Court held that it is of no moment that the case management conference was adjourned and in fact no directions were given; what triggers the need or otherwise to obtain the permission of the court is the arrival of the date of the first case management conference which in this had occurred and since Comodo desired to amend its pleadings after that date, it was necessary to first obtain leave of the court to do so. The learned judge was therefore correct in holding that Comodo required leave of the court in order to be able to amend its pleadings. Accordingly, the first ground of appeal fails.

Amendment of Pleadings

[73] It is the law that the court may give permission to amend a statement of case at a case management conference or at any time on an application to the court.[33] There is no doubt that this is a case management decision and that the learned judge has a discretion whether or not to allow an amendment. The law on the exercise of the trial judge's discretion is settled. In **Dufour and Others v Helenair Corporation Ltd and Others**[34] Sir Vincent Floissac CJ stated that, an appeal against discretion will not be allowed unless the appellate court is satisfied:

> "(1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which

[32] GDAHCVAP2014/0007 (delivered 24th November 2014, unreported).
[33] CPR 20.1(2).
[34] (1996) 52 WIR 188.

reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.[35]

Indeed it is true that an appellate court will not interfere with the judge's exercise of discretion unless it can clearly be shown that the learned judge exercised his discretion on either a wrong principle or in a manner contrary to how the discretion should have been exercised, or if the exercise of discretion has led to a miscarriage of justice. In **George Allert v Joshua Matheson**, this Court distilled the principles that are relevant to applications to amend pleadings. It was stated that the main factor that the Court will take into account in determining whether or not to grant leave is the interest of justice. When faced with late amendment applications, the Court will therefore take a number of factors into account including; the exact stage reached in the proceedings, how great a change is made in the issues by the proposed amendments and whether the other side would be prejudiced in a manner for which they cannot be properly compensated. Mr. Flynn, QC's complaint that the learned judge refused to allow the amendments on an irrelevant basis when the learned judge said 'my belief is we can get along perfectly well in this case without throwing in misrepresentation on top of everything else' is well founded.

[74] Learned Queen's Counsel Mr. Flynn, quite properly accepted that if a pleading is bad, a judge, as part of the case management function, can strike it out. He however stated that 'the judge can only do so if the pleading had no realistic prospect of success or is hopeless.' However, it must be done on a legal basis and not the basis that the learned judge utilised namely 'not wanting to broaden the claim. It is very late in the day and that is my decision.'

[75] This Court would therefore have to consider whether any of the exceptions to the appellate court's interference apply. It is clear to me that the learned judge did not

[35] At pp. 189 and 190.

address his mind to whether or not the allegations that Comodo wished to proffer in the amendments were hopeless. I agree with Mr. Flynn, QC that the learned judge should not have shut out the claims/allegation on the basis that he did not want the landscape to be cluttered. This is a clear indication that the learned judge took into account irrelevant matters in exercising his discretion. The learned judge acted on a wrong principle in arriving at his decision. The learned judge did not have any proper basis for concluding that the landscape would be cluttered by the amendments. I am satisfied in the above view, since Comodo has provided evidence of the factual contentions that were excluded by the learned judge in his refusal to grant leave to amend the reply and defence to counterclaim. To say the least, this has led to an anomalous, if not untenable situation.

[76] It is clear to me that the matters that Comodo wished to plead in its proposed amendments are very relevant to its substantive claim, namely, whether or not Renaissance and Mr. Katz (in his representative capacity) have obtained title to the shares in question (which are reflected in share certificate number 6). The allegations that are made in paragraphs 11 to 14, 33, 36, 39, 47, 54, 63 and 73 of the reply and defence to counterclaim, for which permission to amend was refused impact directly the central question of the case below namely, title to the shares.[36] I have no doubt that the fact that Comodo does not seek to avoid the transactions on the basis of the alleged misrepresentations and subsequent dealings cannot undermine its ability to plead those allegations. Indeed, the proposed amendments are fundamental to Comodo's claim. Mr. Fisher was very candid in his oral arguments when he indicated that he had urged the learned judge not to grant the amendment since this was another attempt by Comodo to complicate matters. He also indicated that he told the learned judge that the proposed amendments were not necessary in order to enable Comodo to advance its case

[36] Nilon Ltd & Another v Royal Westminster Investments S.A. & others [2015] UKPC 2.

and therefore permission should not be granted to Comodo to amend its pleadings. The learned judge seemed to have acted based on those implorations.

[77] With the greatest respect to the learned judge, that is not the proper basis upon which the court could refuse to grant permission to amend pleadings. Even though the judge has a discretion to refuse to grant permission to amend pleadings in order to plead irrelevant matters, I agree with Mr. Flynn, QC that the proposed amendments are not irrelevant matters nor hopeless. They are highly relevant to the claim for rectification of the register of shares. Indeed they are matters that a trial judge may well take into account in his determination of the issue of the title to the shares. I am therefore driven to the ineluctable conclusion that the learned judge clearly took into account irrelevant matters and in arriving at his conclusion to refuse leave to amend committed an error of principle.

[78] It therefore falls to this Court to exercise its discretion afresh. In doing so, I take cognisance of and apply the principles that this Court enunciated in **George Allert v Joshua Matheson**. It is the law that a court which is asked to grant permission to amend will base its decision on the overriding objective. Generally, disposing of a case justly will mean that amendments should be allowed to enable the real issues to be determined. There is a public interest in allowing a party to deploy its real case, provided it is relevant and has a real prospect of success.[37] The court is competent to refuse to grant leave to amend the pleadings if the proposed amendments will serve no useful purpose or are fanciful.

[79] A review of the transcript shows that the learned judge's main reason for not allowing the amendment was that he did not wish to clutter the claim with allegations of misrepresentations and subsequent dealings of Mr. Emanuel. Another matter that seemed to operate largely on the learned judge's mind is that

[37] Cook & Carlton Communications Ltd. v News Group Newspapers Ltd (No.2) [2002] EWHC 1070.

the claim could be prosecuted without the introduction of the additional allegations. I agree with learned Queen's Counsel Mr. Flynn that, the learned judge could properly have refused to grant Comodo permission to amend its reply to defence and counterclaim if he had concluded that the proposed amendments were hopeless.

[80] I would go on to say in **George Allert v Joshua Matheson**, this Court reviewed the principles that are applicable in obtaining leave to amend pleadings. This Court has stated that amendments which would enable the real issues between the parties to be decided should be permitted subject to the payment of costs. However, the corollary is also true, namely, that the amendment which is futile or frivolous will not be permitted, once the party who is prejudiced can be properly compensated by costs. In this case, the case management conference had been adjourned and no pre-trial review hearing date had been fixed. Of greater significance, no trial date had been fixed; there was ample opportunity for the parties to obtain evidence and witnesses in relation to the proposed amendments in order to resolve the real issue as to who has title to the shares. In **Mc Philemy v Times Newspapers Ltd**[38] May LJ stated that late amendments which caused a fixed trial date to be vacated should only rarely be allowed. Given the totality of circumstances, the justice of this case required the Court to grant Comodo permission/leave to amend its pleadings in order to plead the allegations in the proposed amendment to the reply and defence to counterclaim.

[81] I am not of the view that the proposed amendments relate to any background matters or are in any way irrelevant. To the contrary, they are an integral part of Comodo's claim in which the issue of title to the shares looms large. Comodo must be allowed to deploy its full case particularly in view of the very helpful pronouncements in **Nilon** as to how the court should approach a trial on the issue

[38] [1999] 3 All ER 775 at p. 792.

of title to shares**.** The grant of leave by this Court would enable the real issues to be determined, particularly since no trial date has been fixed for obvious reasons. I am fortitude in the above view since no delay would be occasioned if the Court were to grant Comodo leave to amend its pleadings, in accordance with the proposed amended reply to the defence and counterclaim and there is no doubt that Renaissance can be properly compensated for any prejudice it is likely to suffer. The justice of the matter weighs in favour of granting Comodo leave to amend its reply and defence to counterclaim. I would so order, subject to Comodo paying Renaissance's costs to be assessed if not agreed within 21 days of this order.

[82] In view of the fact that this Court holds that the leave should be granted to Comodo to amend its reply and defence to counterclaim, the Court further orders that Comodo should file and serve the amended document on both parties within 14 days of this judgment. Comodo's appeal therefore, on this ground succeeds.

Summary judgment

[83] Summary judgment is appropriate where the claim or defence and counterclaim has no real prospect of success.[39] The law on summary judgment is well settled. Lord Woolf MR in **Swain v Hillman and another**[40] enunciated some very useful principles with which I agree. His Lordship stated:

> "The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success… It is important that a judge in appropriate cases should make use of the powers contained in Pt 24".

[84] In **St Lucia Motors Ltd & General Insurance Co. v Peterson Modeste**[41] George- Creque JA, said:

[39] CPR 15.2.
[40] [2001] 1 All ER 91.
[41] SLUHCVAP2009/0008 (delivered 11th January 2010, unreported).

> "...the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or defence has a real prospect of success."

[85] It is the law that a defendant can obtain summary judgment on its counterclaim. In order to obtain summary judgment, Renaissance was required to prove that Comodo had no real prospect of defending Renaissance's claim to be registered. It is noteworthy that Renaissance had sought and obtained summary judgment on its counterclaim for Comodo's register to be rectified to show that Renaissance was the proprietor of 100,000,000 US $0.000125 shares fully paid in the sum of US$12,500.00 as evidenced by the share certificate number 6. The counterclaim and the relief sought brought into sharp focus the question of who has title to the shares.[42]

[86] By way of emphasis, the gravamen of Mr. Flynn, QC's complaint against the summary judgment is that, based on the serious dispute in relation to the title to the shares coupled with the complex legal and factual issues that had to be determined, the judge should not have granted Renaissance summary judgment. 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 to resolve issues which ought to be properly tried. Indeed Lord Woolf in **Swain v Hillman** stated that the summary trial procedure should be kept to its proper role. 'It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial.' I am in total agreement with this statement.

[87] The Board in **Hallman Holding Ltd v Webster and another**[43] stated:

> "…that it will often be appropriate to determine a dispute about a short point of law or the construction of a simple contract by summary judgment, where the legal issue between the parties is straightforward and the court

[42] Nilon Ltd & Another v Royal Westminster Investments S.A. & others [2015] UKPC 2.
[43] [2016] UKPC 3

> is satisfied that there is no need for an investigation into the facts which would require a trial: Where, in the absence of any factual dispute, more complex legal issues arise, including difficult issues of contractual construction, they may be determined on an application for a preliminary issue."[44]

[88] The case below required the learned judge to embark on a mini trial and he made a number of impermissible assumptions in coming to the conclusion that summary judgment was appropriate. The learned judge clearly erred in so doing; the mere fact that he had to make a number of impermissible findings with which Mr. Flynn, QC complained, reinforces the fact that the summary judgment procedure was unsuitable. In **Three Rivers District Council v Governor and Company of The Bank of England**[45] Lord Hobhouse of Woodborough stated that 'the criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality.'

[89] In **Lucita Angeleve Walton (nee Lucita Angeleve De La Haye) et al v Leonard George De La Haye**,[46] this Court stated that:

> "Summary judgment should only be granted by a court in cases where it is clear that a claim on its face obviously cannot be sustained or is in some other way an abuse of the process of the court. What must be shown is that the claim or defence has no real prospect of success."

[90] Also, **ED & F Man Liquid Products Ltd v Patel and another**[47] recognises that the test in a summary judgment application is no reasonable prospect of success and the burden of proof falls upon the applicant, that is, the person who is attacking the claim or defence. Because a summary judgment application is not a trial or even a mini trial, it is not necessary to consider which party had the stronger case.

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[44] At para 17
[45] [2001] 2 All ER 513 at para 158.
[46] BVIHCVAP2014/0004 (delivered 14th August 2015, unreported).
[47] [2003] EWCA Civ 472.

[91] It 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 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**. I agree with Mr. Flynn, QC's complaint that the Comodo's pleaded case could not be said to be fanciful or have no real prospect of success.

[92] Comodo's defence on the payment of the shares and the breaches of the IBC Act are not frivolous. Neither is its contention on the interpretation of the forfeiture provisions fanciful. It is the law that before deciding whether or not to grant summary judgment, the judge should take into account the filed witness statements and also consider whether the case is capable of being supplemented by evidence at trial.[48] Mr. Flynn, QC adverted to the fact that nowhere in the judgment did the judge address this possibility. Mr. Flynn, QC complained that Renaissance's counterclaim was unsuitable for a summary judgment has lots of merit. The learned judge would have been required to conclude that Comodo's claim is fanciful and nothing further that it could have said between case management and even at the trial could have made a difference. I agree with him. While it is recognised that on a summary judgment application, the court is entitled to go behind the evidence which is incredible, the court will also disregard fanciful claims and defences. A claim or defence may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all documents or other material on which it is based.[49]

[93] Further and based on a close reading of the judgment, I accept Mr. Flynn, QC's complaint that the learned judge embarked on a mini trial and speculated quite a bit on important evidential matters (which need no repetition) in arriving at the

[48] The Royal Brompton Hospital National Health Service Trust v Hammond [2001]EWCA Civ 778.
[49] Three Rivers District Council v Bank of England [2001] 2 All ER 513 at para 95.

conclusion that Renaissance was entitled to summary judgment. These are matters that could only be properly determined after the court has investigated them properly.

[94] It is well recognised that summary judgment will almost always be inappropriate where there are allegations of reprehensible conduct. In this case, there are serious allegations of improper conduct on the part of Mr. Emanuel, which may well be relevant in the court's determination of the title to shares. For this reason also, the learned judge erred in awarding Renaissance summary judgment on its counterclaim.

[95] Similarly complex claims, cases relying on complex facts and issues involving questions of law and fact where the law is not simple, are likely to be inappropriate for summary judgment. It is also recognised that summary disposal is also inappropriate if the case is in a developing field of law.[50]

[96] In the case before the court, the judge was not merely required to rectify the register but critically would have needed to determine who had title to the shares. He would only be able to properly do so after there is a full ventilation of the issues that have been joined by Comodo and Renaissance.

[97] Even on the appeal before this Court both sides during oral arguments presented the Court with lots of submissions in relation to factual dispute and opposing interpretation of legal provisions and also which was the applicable law. I have no doubt that if ever there was a case that was unsuitable for summary disposal this was such a case. This is keeping with the **Nilon** judgment. In fairness to the learned judge, **Nilon** was delivered after the judge had rendered his judgment on

[50] Brooks v Commissioner of Police of the Metroplis and others (2005) 1 WLR 1495.

15th December 2014 even though he alluded to the fact that title to the shares was in issue, the case evidently could not have been brought to his attention.

[98] In addition, there is a serious dispute as to whether the money that Renaissance received from third parties was impressed with a Quistclose trust and if so what effect if any it would have on the title to the shares. In my view, the learned judge impermissibly determined this issue as part of the summary judgment application. This issue is ideally suited to be determined by the court after it has had the benefit of full arguments.

Conclusion

[99] In view of the premises, I am ineluctably driven to conclude that the learned judge erred in granting summary judgment to Renaissance. Accordingly, I will allow the appeal and set aside the judgment of the learned judge with costs to Comodo to be assessed if not agreed within 21 days of this judgment.

[100] The claim is remitted to the Commercial Court of the British Virgin Islands to be dealt with in accordance with the **Civil Procedure Rules 2000**.

[101] I gratefully acknowledge the helpful assistance of all learned counsel.

Louise Esther Blenman
Justice of Appeal

I concur.

Mario F. Michel
Justice of Appeal

I concur.

Joyce Kentish-Egan
Justice of Appeal