



Neutral Citation Number: [2021] EWHC 2060 (Ch)

IN THE HIGH COURT OF JUSTICE

No. CR-2019-007968 & CR-2021-000442

(formerly BL-2019-002192)

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (CHD)

IN THE MATTER OF NTH DIMENSION LTD (09593983)

AND IN THE MATTER OF THE COMPANIES ACT 2006

Remote Hearing by Teams

Date: 21/07/2021

Before :

INSOLVENCY AND COMPANIES COURT JUDGE JONES

Between

- (1) MARTIN WAKELEY
- (2) NICHOLAS ROGERS
- (3) RAJIB BHATTACHARYYA
- (4) SREEKUMARAN THAMPI
- (5) HUW OWEN

Claimants/Petitioners

-and-

- (1) TECH MAHINDRA LIMITED
- (2) NTH DIMENSION LTD

Defendants/Respondents

Mr Matthew Bradley and Mr Usman Roohani (instructed by **Croft Solicitors**) for the
Claimants/Petitioners

Mr Max Mallin Q.C. (instructed by **Reed Smith LLP**) for the **First and Second**
Defendants/Respondents

Hearing date: 16 June 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....CHJ 21/07/21.....

INSOLVENCY AND COMPANIES COURT JUDGE JONES

I.C.C. Judge Jones:

A) Introduction

1. This judgment concerns the Claimants' application to re-re-amend their Points and Particulars of Claim. The following important points need to be made from the beginning:
 - a) First, these proceedings need to be resolved sooner rather than later. They raise not only issues of contractual procedure within the claim for rectification of the share register but also in that claim and in the unfair prejudice petition allege that D1 took steps (whether by itself or by the directors of D2 it had nominated) to interfere with the financial performance of D2 and procure its "Material Underperformance". The alleged purpose of such interference being to enable D1 to exercise call options for the purchase of the Cs' shares at a nominal value as a result of D2 having not met specified targets. Neither side should have that type of allegation left hanging in the air.
 - b) Second but within that context, the key actions, omissions, meetings and discussions occurred during 2016 and 2017. The Petition was presented in 2019 and the claim for rectification was issued in 2020. Yet this CMC is still dealing with the statements of case. D1 points as principal causes for the delay to the facts that the original Particulars of Claim had to be replaced entirely in the face of a strike out application, that a previous CMC was "lost" because of an application by the Cs for a split trial which took up the time allowed and was dismissed with criticism and that this CMC has had to deal solely with the application to re-re-amend the Points and Particulars of Claim. However, I need not address cause. It is the fact of the expiry of time that matters not only for the reasons set out in (a) above but also because of the effect lapse of time has upon memory.
 - c) Third, the claims, whether re-amended or not, are complex in terms of fact and law and it is currently unclear how this trial will proceed and that is the position notwithstanding the observations made in the judgment delivered at the hearing before me on 19 January 2021. Of particular opacity is the extent (i.e. the detail required) to which it will be necessary to address in terms of liability and/or quantum the anticipated future prospects of D2 in the context of building its business and successfully obtaining valuable contracts which the Cs claim would have occurred but for the alleged interference with its financial performance. There is the potential for up to a dozen or so transactions to have to be addressed in detail whether before or at a tender stage.
 - d) This absence of clarity is important because absent careful costs management this matter will take up time and resources of the parties and the court which will be disproportionate to the sum in issue even if it is right to assert that the Cs shares should be valued in the region of £20m if the necessary relief is obtained under s.996 CA 2006. It is also important because it is part of an

underlying concern that the steps from breach to causation and to quantification are, as yet, insufficiently defined.

2. Those points lead to the conclusion that the decision whether to permit re-re-amendment is inextricably entwined with the question as to how these proceedings can be effectively case managed to ensure that the parties have a trial in accordance with the overriding objective as soon as practical and not at disproportionate cost. For example, those points mean it is relevant to consider whether the application to re-re-amend should be refused or adjourned to ensure that determination of the matters currently in issue will not be further delayed. I emphasise, that is just one possibility but it explains why my preference at or about 5pm at the end of the day hearing the application to re-re-amend was to reserve my decision until I had also heard submissions upon case management directions for trial.
3. Unfortunately, dates to avoid have prevented the adjourned hearing from being fixed before the end of June or during early July. As a result and in the context of the delay already described, I have decided to provide a judgment now in the hope that it may progress matters. It therefore in part addresses issues of case management that have not yet been the subject of submissions. However, it does so on the basis that such matters are not binding decisions but are for guidance. They will be subject to discussion/submissions and determination when this judgment is handed down to the extent that they are not agreed and time allows.

B) The Case

4. From a case management perspective seeking to identify what will need to be addressed at trial, as I currently see the case without re-re-amendment:
 - a) The commercial relationship between D1 and D2 needs to be established. This should not be difficult in terms of logistics in that it will turn on some background evidence but principally upon contractual documentation. The court will be considering in particular the extent to which D2 was to be treated as a connected company to D1 or whether there was to be an arm's length commercial relationship. That documentation will also be relevant to the relationship between the Cs, D1 and D2 insofar as it needs to be established for the purposes of a re-re-amended case.
 - b) The duties of D2's directors, including those nominated by D1, and the application of the "no conflict" principle will also need to be addressed. This too should be relatively straightforward.
 - c) The rectification claim needs to be considered first within the context of whether contractual procedure was complied with enabling the put option to be exercised. If not, a decision on rectification can be made and the findings may also be relevant to the Petition.
 - d) If the procedural requirements were met, the second matter for consideration is whether D1 was able to exercise the put options, as it did, if the above-mentioned "Material Underperformance" was caused by its alleged

interference. The first task will be to establish what D2's actual performance was. This appears to raise questions including: (i) how did D2 perform financially up to a Business Review Meeting on 23/11/16 and by the end of that month? (ii) What was said at the review meeting? and (iii) how did D2 perform financially afterwards? Overall this should not be a significantly difficult matter for trial insofar as it will rely upon accounts and conversations at the Review Meeting and possibly (a matter yet to be considered) forensic evidence opining upon financial performance.

- e) The second task will be to establish the cause of any "Material Underperformance" (there not appearing to be any doubt that this occurred) concentrating upon whether (and, if so to what extent) it resulted from the interference alleged against D1 which can be relied upon to establish unfair prejudice. This will involve evidence of (amongst other things): (i) meetings alleged to involve the disclosure of D1's plan to divert D2's business in particular to a U.S.A. company D1 purchased and/or otherwise to thwart its business; (ii) competing bids preventing D2 winning tenders; (iii) D1 undermining D2's ability to win new contracts; (iv) D1's role in funding D2. That evidence will need to be addressed within the context of asking (to the extent necessary) whether D1's actions or omissions complied with its contractual obligations and, if not, whether those actions or omissions are relevant. It may also require distinctions to be drawn between the actions/omissions of D1 and of the directors of D2 who had been nominated by D1.
- f) If the evidence establishes causative interference, there will still need to be submissions as to whether this entitles the Cs to claim rectification and unfair prejudice. Assuming it does, the question of remedy and (presumably for these purposes) share valuation will arise. Valuation will be based upon a date which is fair in all the circumstances but in any event is likely to turn to a large extent upon the future performance of D2 as anticipated by a willing purchaser. Currently the parties envisage that this valuation will be based upon the results which would have occurred if the Cs had exercised put option rights attached to their shares held at the end of D2's fifth financial year. If that is correct or if a multiplier/multiplicand approach is used, the valuation will need to assess the likelihood or chance of D2's future prospects as at the valuation date.
- g) The additional, personal claims of the Cs appear to turn on the matters above except for valuation, which will also need to take these into consideration. Whilst those claims are not to be forgotten for the purposes of the CMC, they need not feature for the purposes of the application to re-re-amend.

C) Permission to Re-Re-Amend – Paragraphs 93A-93Q

- 5. The re-re-amendments addressed at the hearing on 16 June are at paragraphs 42A and 43, 56(ii)(b), 65 (which is a minor factual correction, agreed and need not be referred to) and 93A-Q of the proposed draft. The most significant of the re-re-amendments proposed allege as an alternative claim that D1 acted in breach of the contractual obligations it owed the Cs causing them loss and damage to be measured by the lost

value of the shares transferred to D1 pursuant to the call option. It is sensible to start with this proposed re-re-amendment. It was accepted by the Cs during the hearing that if it is to be permitted, the claim form will also require amendment to add this new cause of action, that any additional issuing fee based on value will have to be paid and that the application before me requires amendment accordingly.

6. The explanation for this alternative claim not having been previously raised is that it was not considered possible to plead the cause of action because of the law on reflective loss until the decision in *Nectrus Ltd v UCP Plc* [2021] EWCA Civ 57. I do not understand that when the claim is for loss of the value of the shares that have been transferred to D1. It has nothing to do with a prohibition against recovery of loss because it should be claimed by the company. The loss in value of the shares claimed being a reflection of the company's net assets to be found in the capital and reserves of its balance sheet. However, I do not consider that the cause of the delay matters.
7. The lengthy amendment by paragraphs 93A-93Q and their numerous sub-paragraphs has been addressed in detail during submissions. It appears this is the fourth version of the draft, there having been a series of amendments to attempt to address problems identified by D2's lawyers. I observe from the third witness statement of Mr Summerfield, in particular at paragraph 9, that they still find it impossible to understand the case they have to meet in particular concerning causation and quantum of loss (as detailed within paragraphs 23-37). D1's position is set out with by Mr Mallin Q.C. in his skeleton argument with his normal clarity.
8. My overall observation is that this proposed re-re-amendment appears unnecessarily complicated. I believe I clarified from Mr Bradley during the hearing that the alternative cause of action relies on the same contractual terms and facts and matters as those already pleaded in the Points and Particulars of Claim and in the Reply. That being so, one wonders why the re-re-amendment is not pleaded, at paragraph 93A alone, substantially along the following lines:

The contractual obligations pleaded at paragraphs [xxx] of the Points and Particulars of Claim were owed to the Cs in addition to D2. In the alternative to the claims of rectification and unfair prejudice, the Cs rely upon the facts and matters pleaded at paragraphs [xxx] of the Points and Particulars of Claim and [yyy] of the Reply and Defence to Counterclaim to claim loss and damage resulting from the breaches of those contractual obligations. Namely, the value of their shares which were or would otherwise have been the subject of the call options exercised by D1 as particularised in a Schedule of Loss. The breaches are pleaded at paragraphs [xxx] of the Points and Particulars of Claim ("the Short-Form Pleading").

The merits of that thought can be reviewed, if appropriate, having addressed paragraphs 93B-93Q.

9. My understanding of paragraphs 93B(i) to (viii) is that the facts and matters pleaded in support of the Petition under paragraphs 71, 72, 74(i) and (ii) and 75-76 are relied upon to establish breaches of contract which can be relied upon by the Cs for this alternative claim. I am not entirely convinced that paragraph 93B(i) is required or that it is clear what terms are breached or what the "implementation" specifically relied upon is and/or that paragraph 93B(ii) should proceed until after disclosure when the

allegation will not need to depend upon inference. However, the fundamental point is that it appears unnecessary to do more than plead reliance upon the facts and matters already pleaded in paragraphs 71, 72, 74(i) and (ii) and 75-76. The additional verbiage is unnecessary and D2 can simply rely upon its existing pleading to the facts and matters in those paragraphs without having to concern itself with the additional verbiage.

10. Under the title “Consequences of Breach”, paragraph 93B(ix)(a) asserts that the matters pleaded in 93B(ii), (iii), (vi) and (vii) caused the harm set out in paragraph 69 including D2’s Dun & Bradstreet credit rating plummeting thereby preventing it engaging in public procurement. However, the pleaded cause of the plummet in paragraph 69 was the late filing of D2’s annual accounts and reports. It appears that other elements of harm (enhanced payment terms required by a supplier, the loss of a staff member and the loss of a business opportunity and a tender) are also alleged to result from that plummet caused by the late filing. It must be the case, therefore, that the claim of consequence of breach must start with the late filing and plead that this was caused by the breaches of contract alleged and why. This proposed amendment does not. It cannot be permitted in this form, at least.
11. I do not understand why paragraph 93B(ix)(b) is required. The question is what the consequences of the specific breaches of contract were not whether it resulted in a break-down of relations which break-down caused financial deterioration. This may be an appropriate pleading for a Petition but not for a damages claim.
12. Paragraph 93C is entitled “Further Material Facts: Effective Withdrawal from Pursuit of Further Opportunities”. What is being alleged is that the financial performance resulting from the alleged breaches and the fact that continuing breaches were anticipated meant D2 could no longer commit to new contracts even though the Cs sought to keep the relevant business opportunities alive. However, sub-paragraphs (i) to (iv) when explaining this allegation read more like a witness statement, are too general and short on particulars and seem to dwell on subjective issues such as hope and cause to believe. This style of pleading is unsuitable and will cause unnecessary difficulty for the pleading in answer as a result.
13. However, the substance of this part of the pleaded case depends upon sub-paragraph (v) and its particulars. To address those particulars, sub-paragraphs (i)-(v) can be reframed to read as though they together plead: “By reason of the continuing breaches of D1’s obligations as particularised in the paragraphs 93D-93G below the following business opportunities were lost to D2 as also particularised in those paragraphs:”. I will consider sub-paragraphs (i)-(v) accordingly.
14. The first breach at paragraph 93D concerns the Oxford Project and the negotiations for a venture described in the most general of terms at paragraph 30(ii). Paragraph 93D(i) continues the generality and pleading of evidence within four sub-paragraphs to make the assertion that this was an important project. Sub-paragraph (ii) then asserts that the project was to be funded by D2 as the anchor investor without any reference to or particulars of any agreement or other binding obligation to that effect. Its four sub-paragraphs refer to other potential investors but also without particulars in the usual form of the offers referred to. They do not mention D1. The numbering goes away with the next sub-paragraph (iv) referring to D2 taking no part in the project apparently after Christmas 2016 but without any clarity as to what they were obliged

to do. Clearly the form of pleading addressed in this paragraph of the judgment is unsatisfactory.

15. It is then pleaded in sub-paragraph (iii) that as of January 2017 it became clear to the Cs that D1's intentions as to the future of D2 were that "[it] was to be choked of funds and closed down". The conclusion drawn by the Cs being that the Oxford Project could not be pursued. However, there are no particulars of knowledge pleaded (although no doubt the Business Diversion Plan is intended to be referred to). Confusingly, despite this conclusion sub-paragraph (v) appears to refer to negotiations with Oxford University and two others to achieve heads of terms continuing until June 2017. However, the fundamental point is that this sub-paragraph pleads no more than what has already been pleaded in sub-paragraph 93C except that it expressly refers to what has already been pleaded to the Oxford project. The criticisms of sub-paragraph (iii) mean that permission is inappropriate.
16. At this stage of the pleading, therefore, it is pleaded in unspecific terms that there had been negotiations and there were potential investors but that the negotiations could not be progressed and the investors never committed. Yet the re-re-amendment then asserts in sub-paragraph (vi) that the project "*should have been operational as of July/August 2017 at the latest and would in Year 3 have generated revenues of approximately £12 million and EBITDA of approximately £3 million (even before taking into account the fact that Oxford Hospitals received £20 million to spend on digital transformation, from which the Company would likely have benefitted)*". There may be a factual basis for this assertion but it is not pleaded. On the face of it this is pure assertion without any facts and matters to sustain it. The pleading ends there and permission cannot be granted for it.
17. Next is the Ryhurst Opportunity, described in paragraph 30(vi) as an opportunity concerning a Memorandum of Understanding of 14 February 2017 under which D1 would become Ryhurst's strategic IT partner which would be likely to lead by June 2020 to NHS Trusts' contracts to supply services with anticipated revenues (each and for whom?) of between £10-30 million each year. This is described in paragraph 93E as leading to contracts which D2 might have from five hospital joint ventures in which Ryhurst was already engaged which would generate revenues of £2 million for D2 in its third financial year. That re-amended case is pleaded in sub-paragraph (ii) on the basis that Ryhurst was keen to progress to a binding agreement which by June 2020 would have been likely to have provided D2 with the above-mentioned £10-30 million each year. Its details are confusing but the overall case apparent.
18. The reason that did not occur is not set out in sub-paragraph (iii). It pleads the choking of funds and closure alleged at paragraphs 42 and 43 caused the Cs in late January 2017 to harbour concerns that they "*may ultimately be unable to conclude a meaningful business relationship with Ryhurst*". Paragraph 42 pleads the source of knowledge of facts and matters pleaded at paragraphs 37(i) to 37(iv). Those sub-paragraphs (which now need to be turned to) contain the assertion that the acquisition of the U.S.A. company, HCI, was intended to achieve the subsuming of D2's pipeline of business, the merger of its business with HCI, the closure of its business in favour of HCI's operations, its target revenues becoming HCI and the closure of D2. This is the "Business Diversion Plan". It is to be assumed for the purposes of the re-re-amendment application that the bases for the assertion are already pleaded in the Re-

Amended Points and Particulars of Claim. However, the fact that it is only relied upon to sustain the case of harbouring concerns means it is rather academic.

19. Sub-paragraphs (iv) and (v) of paragraph 93E plead that despite D1's breaches, Cs sought to keep this business opportunity alive and a further Memorandum of Understanding was signed on 14 August 2017. It does not explain what happened to or the relevance of the harboured concerns. Sub-paragraphs (vi) and (vii) then plead requests by Ryhurst for accounts and other information. Sub-paragraph (viii) pleads the cause of the loss of the business opportunity as the Cs' decision that it could not proceed due to "*a breakdown in negotiations with D1 and the inability to resolve their dispute with D1 and its directors*".
20. As I understand the pleading within sub-paragraphs (iv) to (viii), therefore, the case is that this business opportunity had the chance of progressing to contractual stage. That would have established the chance of contracts being agreed with NHS Trusts resulting in revenue for D2. That chance was lost because of the Cs' decision attributed to the breakdown in negotiations and inability to resolve disputes not to the causes for harbouring concerns. The question this leaves unanswered is how a breakdown in negotiations and inability to resolve disputes constitutes a breach of contract. In addition, even if that question is answered, the method of calculating the likely revenue of £10-30 million each year is not pleaded.
21. It can also be observed that sub-paragraphs (iv) to (viii) plead evidence rather than only the facts and matters relied upon. That makes this pleading subject to many other potential questions and issues. It is unnecessary to spell these out. The underlying conclusion is that this tortuous form of pleading is unsatisfactory.
22. The next business opportunity pleaded at paragraph 93F concerns the Amicus ITS Acquisition. Sub-paragraph (i) explains that the possibility of D2 acquiring Amicus was mentioned at the beginning of 2017. Sub-paragraphs (ii)-(iii) refer to discussions and to a board presentation in June 2017. It is pleaded that D2's directors nominated by D1 did not respond to this but no basis for them being required to do so is pleaded. Sub-paragraph (iv) pleads the Cs' intention that the purchase would occur by the end of August 2017 with revenues of £9 million anticipated by Year 3. No particulars are provided. Sub-paragraph (v) pleads that in early 2017 negotiations were placed on hold because of the absence of response from the nominated directors. No particulars are provided to explain or justify this as an enforceable requirement or a breach of contract. Sub-paragraph (vi) pleads a specific failure of one nominee director to respond to an email and accompanying documents of 23 August 2017 but with the same absence of particulars. Sub-paragraph (vii) then pleads the minutes of D1's 20 October 2017 board meeting recording that C1 reported he had received no feedback for the acquisition business case. Again, lacking the same particulars. This is not a proper pleading of obligation, breach and causation. It is a general summary of evidence which also lacks the necessary particulars.
23. Paragraph 93G refers to "The Care UK Opportunity". Sub-paragraphs (i) to (iv) describe steps taken during February and April 2017 by D2 and Care UK to establish private homecare joint business opportunities through "joint workshops, solutioning, proposition development and pitch creation" which, sub-paragraph (i) pleads, would, the Cs anticipated, achieve revenues in Year 3 of approximately £2m from Care UK. Again the pleading suffers from its evidential content approach, its failure to identify

the facts and matters relied upon by that anticipation or the methods of calculation. Sub-paragraph (v) pleads that by May 2017 the dispute between the Cs and D1/its nominee directors caused the Cs to take a reactive rather than proactive approach to this opportunity and by September 2017 the opportunity had come to an end. This is not a proper pleading of obligation, breach and causation. It is a general summary of evidence which also lacks the necessary particulars.

24. There follows a heading entitled “Further Consequences of [D1’s] Breaches”. Paragraph 93H which follows starts with a “for the avoidance of doubt” provision referring back to paragraph 93B(ix). This should either have been pleaded in that paragraph or it is otiose. It next refers back: in sub-paragraph (i) to paragraphs 93B(ii) to 93B(vii); then in sub-paragraph (ii) to 93B(ii) and (iii); in sub-paragraph (iii) to “paragraphs 93B(ii) and 93B(vii) above and the consequences of the same (as set out at paragraphs 93H(i)(a), 93H(i)(b), 93H(ii)(a) and 93H(ii)(b) above”); next in sub-paragraph (iv) to paragraph “9B(iv) above (as relevant to the CUH Bid”); in sub-paragraph (v) to “paragraphs 9B(iv) and 9B(v) above (9B(v) being relied on only in relation to the UHB/HoEFT and SRFT bids)”. Each sub-paragraph including (overall) numerous sub-sub-paragraphs has additional cross-references to other paragraphs and/or sub-paragraphs for the purposes of reliance.
25. This is no way to plead a statement of case. As a result I will address its contents no further other than to observe in addition: that whilst in part it appears to attempt to provide particulars presumably to cure the deficiencies of the paragraphs referred to, the content is often repetitious, often pleads evidence and/or consists of speculation and/or argument.
26. Paragraph 93I is inserted because for some reason at this stage it is still necessary to plead: that but for the breaches of contract pleaded at paragraphs 93B(i) and 93B(viii) the Cs “would still be in possession of their shares”.
27. Paragraphs 93J and the “for the avoidance of doubt” paragraph 93K then plead that but for the cumulative breaches D2 would have reached its EBITDA and Revenue Targets for Year 5 and further shares would have vested in the Cs accordingly pursuant to the original agreements with D1 and the Cs would have remained employed until the end of Year 5. In addition that the Cs would have exercised their put options. In other words that the loss and damage should be valued on the basis that the Cs would have received the put option price for all the shares to which they would have become entitled by the end of Year 5. That is (in effect) repeated in a different way in paragraph 93L. It appears to unrealistically ignore the fact that this is clearly a loss of chance claim.
28. Paragraph 93M sets out examples of how the claim may be valued at £20m, which is the Cs’ current assessment. The example is calculated using business opportunities identified from D2’s May 2017 Business Plan on the bases of £30m EBITDA, £7m net debt, and a company value with a multiplier of 7.5 of £218m. However, there are no particulars of facts and matters which establish that those figures should be used.
29. The alternative case in paragraph 93M asserts there should be an 80% loss of chance claim in respect of each such measure of loss and damage. Paragraph 93P values this at £16m.

30. Mr Mallin Q.C. on behalf of D1 made clear that his skeleton argument and submissions did not raise issue with the merits. They did not dispute that a claim for damages for breach of contract might be pleaded in the alternative. Instead, their opposition was based upon the fact that this “labyrinthine” statement of case both in its current form and if re-amended simply did not provide the structure required for D1 to be able to prepare for trial. Too often, the position is opaque whether in terms of identifying what is required from disclosure, witnesses of fact and/or expert opinion. The addition of this alternative case in that context and bearing in mind its own complexities and inadequacies would make it all the more probable that the trial will be long delayed and that it will be disproportionate applying a value:cost/time/effort and resources analysis.
31. Mr Mallin Q.C. made many specific points in support of that submission. Whilst it was necessary for him to do so in submission, it is unnecessary for me to repeat them. That is not only because their substance can be identified from his skeleton argument but also because he is plainly correct. There are far too many outstanding questions concerning what facts and matters (not evidence of them) will be relied upon to establish breach and/or causation and/or loss and damage. There is still no road map to trial.

D) Permission to Re-Re-Amend – Paragraphs 93A-93Q

The Decision and Case Management

32. In my judgment based upon the matters above:
- (1) There are numerous deficiencies within the proposed paragraphs 93A-93Q as set out above. Permission to re-re-amend in that form of draft cannot be granted in those circumstances.
 - (2) In addition, any decision to grant permission must take into consideration the problems that already exist within the Re-Amended Points and Particulars of Claim, in particular concerning the second task and the valuation referred to at paragraphs 4(e) and (f) above. It would be doubly wrong to grant permission when the numerous deficiencies within the proposed paragraphs 93A-93Q would simply add to the problems that already exist.
 - (3) However, it must also be appreciated that it is not disputed that in principle an alternative claim of breach of contract can be pleaded from the facts and matters already pleaded in the Re-Amended Points and Particulars of Claim and the Reply.
 - (4) In those circumstances there is no reason in principle why the alternative claim could not be started (no limitation period issue having been identified) without the need for permission by a new Claim Form relying upon those facts and matters unless it would be an abuse of process to do so rather than to re-re-amend.

Therefore but subject to paragraph 3 of this judgment:

- (5) A solution is to grant permission to amend substantially in the terms of the Short-Form Pleading. That statement of case would rely only upon facts and matters already in issue in the Re-Amended Points and Particulars of Claim and in the Reply and, therefore, already answered. It should not result in any significant re-amendment to the Amended Defence and Counterclaim except to the extent that paragraphs in the Reply are relied upon because they are subject only to the implied general traverse.
- (6) That solution will not of itself resolve the problems referred to in paragraph (2) that exist within the Re-Amended Points and Particulars of Claim. However, they are already before the Court and are to be addressed by case management to produce the route map required for trial. They can be addressed in the context of there being re-re-amendment substantially in the terms of the Short-Form Pleading. As to that:
- a) The Short-Form Pleading solution should not complicate this process further insofar as the re-re-amendment relies upon facts and matters already pleaded in the Re-Amended Points and Particulars of Claim which have already been answered in the Amended Defence.
 - b) There will be further complications insofar as the Short-Form Pleading solution re-re-amendment will incorporate facts and matters pleaded in the Reply because they have not been the subject of rejoinder. However, realistically the problems they will give rise to concerning the required route map will also have to be addressed in any event.
 - c) The Short-Form Pleading solution will leave the need to plead how the loss and damage is or is to be calculated in the context of a claim for breach of contract. However, the problems of causation and valuation which already arise in respect of the Re-Amended Points and Particulars of Claim can also be addressed in the context of this alternative claim.
- (7) If the optimism in (6) proves to be ill founded during case management, it may be appropriate however, for example, to stay any Re-Amendment of the Defence. The need and appropriateness of this or any other solution can be considered further during case management.
33. For the purposes of that case management and in particular concerning the second task and the valuation referred to at paragraphs 4(e) and (f) above, it seems to me that it is necessary in respect of the Petition and the alternative claim (if permitted as above) to tie down the facts and matters intended to be proved to establish: (i) the cause of action/defence; (ii) causation of loss and damage; and (iii) quantification. The list of issues does not do this.
34. The resulting document must not include evidence, subjective elements such as hope and belief (unless a required element of the cause of action etc) or argument or speculation. It must be drafted on a macro basis to identify (in effect) the equation (not the argument) for a successful claim/defence and (most importantly) what will be required to be proved at trial. The Re-Amended Points and Particulars of Claim do not achieve this with the clarity required.

35. It should be for the parties' solicitors to reach agreement after discussion as to the best format for such a document. It must not be overly long and complicated but should produce a route map from which decisions can be made concerning: (i) the number of witnesses; (ii) their topics; (iii) the opinions required from experts; (iv) the method(s) of quantification; (v) the appropriateness of any form of split trial; and (vi) the length of the trial. It should be sufficient to enable the proceedings to be set down for trial.
36. This is a matter that can be discussed when judgment is handed down but any proposed agreement or proposals should be lodged with my clerk in good time before the hearing.

E) Permission to Re-Re-Amend – Paragraphs 42A and 43 and 56(ii)(b)

E1) Paragraphs 42A and 43

37. This proposed re-re-amendment if permitted will plead evidence of a conversation alleged to have disclosed legal advice received by D1 which, if correct in fact, will provide evidence which may add some prejudicial value to the Cs' claim that there was a Business Diversion Plan. However, it is not a fact and matter which will establish the existence of a cause of action.
38. The amendments are consented to and, I suppose, there is no harm in the matters alleged being pleaded provided there is no legal professional privilege point. The risk is that this will lead to arguments that the legal advice in fact provided to D1 should be disclosed either during the disclosure process or during cross-examination on the ground that there has been waiver and/or it is placed in issue by D2's consequential defence. This risk has not been considered by the parties but it plainly presents the potential hazard of satellite litigation or at least, further time and resources having to be allotted to proceedings which are already unduly delayed and subject to the very real risk of disproportionate cost contrary to the overriding objective. That is to be avoided.
39. Based upon consent and the fact that this matter is now "in the open", I will grant permission provided there will be no resulting disclosure of or connected to the relevant legal advice (whether by documents or orally during examination except to the extent that this might occur by answering the question whether that conversation took place as alleged) without further permission of the Court.

E2) Paragraph 56(ii)(b)

40. This amendment alleges that D1 instructed the deletion of emails which if disclosed would have evidenced that D1 knew that by bidding for the UHB/HoEFT tender with HCI it would breach the Investment and Subscription Agreements (in particular the Non-Diversion Obligation).
41. The problem with this as a pleaded allegation is that the fundamental issues are: (i) did they bid; and (ii) was this a breach of the agreements? If either of those questions

are answered with a negative, the deletion of emails is academic. So too if answered with two positives. The question of subjective intention does not arise. The allegation is only relevant for the purposes of trial insofar as it is and needs to be relied upon as evidence relevant to credibility. A witness can always be challenged as to credibility through material showing bad character provided it meets the test of legal relevance. It is not, however, a fact and matter to be relied upon to establish a cause of action.

42. Mr Mallin Q.C. also complains that this pleading reads as though there has been no exchange of witness statements dealing with the issue and despite that this pleading is based upon inference and is little more than inappropriate mudslinging.
43. In my judgment this allegation can be left as a matter of credit in circumstances of existing witness statements. The re-re-amendment is not required whether with or without further particulars. It will be refused. Further consideration can be given to the admission of the evidence of credit during the CMC or by the trial Judge if it appears that its admission will significantly increase costs or the length of the trial or otherwise be contrary to the overriding objective.

F) Conclusion

44. Permission will be granted as asked only for paragraphs 42A and 43 of the draft Re-Re-Amended Points and Particulars of Claim. That permission is conditional as set out in paragraph 39 above.
45. Subject to paragraph 3 above (i.e. discussion/submissions and determination when this judgment is handed down to the extent that it is not agreed and time allows) permission will be granted (subject to seeing the draft), if sought, for the alternative claim to be pleaded as a re-re-amendment substantially in the terms of the Short-Form Pleading (defined in paragraph 8 above) with the necessary amendment to the Claim Form and payment of all necessary additional fees. It will require a Schedule of Loss.
46. So far as case management is concerned, it should be possible to agree standard directions, to identify the expert evidence and form of instructions required and to estimate trial length based upon the summary at paragraph 4 above. That is subject in particular to the problems identified in sub-paragraphs (e) and (f) concerning causation and valuation. At paragraphs 33-36 above is a potential solution for the parties to consider.
47. It appears that the time for hand-down will be limited to about 1 hour. That being so and assuming more time is needed for case management, the parties should consider how this can be found without further undue delay and what can be done to prepare this case for trial in the meantime.

Order Accordingly