[2022] EWHC 1519 (Ch)

Claim No: BL-2020-001761

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch D)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date 17 June 2022

Before
Philip Marshall QC (sitting as a Deputy Judge of the High Court)

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Between :

(1) MICHAEL LLOYD
(2) SEIZAR HOLDINGS LIMITED

Claimants

-and-

MICHELMORES LLP

Defendants

- -

APPROVED
JUDGMENT

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Patrick Lawrence QC and Tim Chelmick (instructed by Payne Hicks Beach LLP) for the Claimants
Paul Mitchell QC and Benjamin Archer (instructed by Kennedys Law LLP) for the Defendants

Hearing date: 26 May 2022

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I direct that pursuant to CPR rule 39.9 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

PHILIP MARSHALL QC

PHILIP MARSHALL QC:

Introduction

1. This is an application by the Claimants for permission to amend their Particulars of Claim.

2. The application has been made at a relatively early procedural stage. Although the claim form was issued on 14 October 2020, the matter has not progressed beyond service of statements of case. No case management conference has yet taken place. By order of Deputy Master Linwood of 12 November 2021 the date for this is to be the subject of directions after the determination of the present application.

3. Perhaps unsurprisingly, given the timing of the application, the arguments over whether the amendments should be permitted have focussed on whether they have a sufficient prospect of success or are adequately particularised rather than on questions of prejudice.

4. Given that the amendments involve, in part, the deletion of passages advancing certain distinct forms of claim, the Defendants have contended that they should be awarded all of their costs of addressing such abandoned claims. They say that such costs should be the subject of detailed assessment on an indemnity basis which should take place forthwith or should be the subject of an order for a substantial payment on account. The Claimants have not contested that they should pay the cost thrown away in respect of the parts of their claim that have been abandoned but contest both the basis and proposed timing of detailed assessment and oppose any order for a payment on account.

Background

5. These proceedings arise out of an earlier claim in which Defendants, who are a firm of solicitors, represented the First Claimant, Mr Michael Lloyd and his brother, Christopher Lloyd.

6. The details of these earlier proceedings, entitled Palmer Birch v Lloyd, ("the TCC Claim") are set out in a detailed judgment of His Honour Judge Russen QC, sitting as a High Court Judge in the Technology and Construction Court ("the Judgment"). This decision was handed down on 24 September 2018 with neutral citation [2018] EWHC 2316 (TCC).

7. In brief summary, Palmer Birch, a construction firm, had contracted in January 2012 with Hillersdon House Limited ('HHL"), a company funded by loan from the Second Claimant, Seizar Holdings Limited, itself a company said to be beneficially owned by Mr Michael Lloyd. The contract was for the provision of building and other work in respect of a substantial property in Devon known as Hillersdon House. In 2015 the contract was the subject of a repudiatory breach by HHL following which that company entered into liquidation with a debt alleged to be due to Palmer Birch of some £1,082,000. In the proceedings, Palmer Birch claimed that Mr Michael Lloyd and his brother were liable for various economic torts linked to the breach of contract by HHL as well as for conversion of certain tools and materials.

8. In the Judgment, His Honour Judge Russen QC found Mr Michael Lloyd liable for wrongfully inducing breach of contract by HHL, for unlawful means conspiracy (the unlawful means consisting of the breach of contract by HHL) and for conversion of certain chattels belonging to Palmer Birch. The quantum of damages was to be assessed at a further hearing. In the event no further hearing occurred and instead the proceedings concluded with acceptance of a Part 36 offer made by Palmer Birch which is said to have resulted in the payment of some £924,319 by Michael Lloyd.

9. In these proceedings the Claimants now advance various claims for alleged breaches of contractual retainer and duty. In the Particulars of Claim, as currently drafted, it is said in the introduction (paragraphs 3 and 4) that the claims are for professional negligence particularly in respect of the alleged mishandling of the TCC Claim. This is said to have consisted of a failure to advise on the true nature and seriousness of the dispute and the corresponding defence that would need to be advanced in those proceedings, advancing a factual case that was clearly wrong and failing to notice the obvious legal errors in the Judgment and to advise in favour of an appeal.

10. All of the claims are denied in a detailed Defence served by the Defendant firm of solicitors.

The Application

11. The present application to amend is supported by a witness statement of Mr Goldstein, a partner in Payne Hicks Beach, who represent the Claimants. He explains that the amendments were prepared following the instruction of leading counsel on behalf of the

Claimants and the review of various files which the Defendants made available for inspection in the period between July and early September 2021.

12. Initial draft amendments were circulated in September 2021 with a view to obtaining consent. When the proposed amendments were not fully consented to the present application was served on 25 November 2021, attaching a revised draft of the proposed amendments.

13. The opposition to the amendments focusses on the following areas:

13.1 Allegations of breach of duty owed to Mr Michael Lloyd: it is said that an allegation has been introduced for the first time by the draft amendment that the Defendants owed Mr Michael Lloyd a duty of care in tort on the basis of a voluntary assumption of responsibility during two time periods that are distinct from that involving the conduct of the TCC Claim on his behalf. The first is understood to be in respect of late 2010, concerning what is defined as the "Transactional Structure"; and the second concerns the period from late 2014 to June 2015 and relates to advice allegedly given in respect of Mr Lloyd's own interests. The particular paragraphs objected to in this category are paragraphs 15A, 35A, 127 and 128 of the draft. The Defendants contend that the pleading lacks sufficient detail to support the alleged existence of a voluntary assumption of responsibility in favour of Mr Lloyd.

13.2 Allegations regarding termination of the contract between HHL and Palmer Birch and the liquidation of HHL: it is said that allegations have been introduced for the first time that the Defendants decided to terminate the contract of HHL without authority from either of the Lloyd brothers and that they sent a letter dated 22 April 2015 putting that termination into effect essentially of their own accord; and, further, that the decision to place HHL into liquidation was itself a decision taken by the Defendants on HHL's behalf. The allegation that all of the above was done by the Defendants without adequately consulting the Lloyds is also placed in this category. The relevant paragraphs of the draft amendment for these purposes are paragraphs 37A, 38, 39 (save for the first sentence) and 72B.

The Defendants contend that the amendments introduce allegations which are fanciful and have no realistic prospect of success.

13.3 Advice on appeal: it is said that a further new allegation has been introduced in the draft amendment that the Defendants failed to advise that the Judgment was premised on a "fundamental legal misconception" and that it was bound to be reversed, namely the Judge's finding that Mr Michael Lloyd "should" have continued funding HHL to enable the contract with Palmer Birch to be performed. The paragraphs in the draft relevant to this contention are paragraphs 3, 120 (last sentence only), 120A (last sentence) 120C (last sentence only), 129(15) and 140. The Defendants say these also have no realistic prospect of success.

13.4 Miscellaneous: there are miscellaneous allegations which are said to raise new matters that are demonstrably factually wrong and unsupported or contradicted by the contemporaneous evidence. The relevant passages in the draft amendment to which objection is taken are at paragraphs 63, 67, 72A, 77, 120A (last sentence only), 125, 129(5), 132 (only the words "nor ML"), 138 and 141.

14 During the course of argument some concessions were made in respect of certain of the proposed amendments and consequently the areas of dispute narrowed. In addition, following the hearing a further draft amendment has been produced by the Claimants accompanied by an explanatory note. I address each area on which the issues have become more confined as well as how I propose to deal with the new draft in the course of my analysis below.

15 Apart from the areas identified above, the balance of the proposed amendments were uncontentious save in respect of some aspects of the costs consequences of them being permitted. Of particular significance in this regard is the deletion of passages in the draft amendments which had previously advanced specific types of claim. These fall into the following categories:

15.1 Legal advice: In their current statement of case the Claimants contend that the Defendants failed to understand the case advanced by Palmer Birch in the TCC Claim and wrongly advised Mr Michael Lloyd as to their merits. In the draft amendment, paragraph 105A, that allegation has been abandoned, save in respect of the claim in the tort of conversion. The Claimants now contend that, with the exception of the topic of conversion, the advice was in fact correct, and that the Palmer Birch claim was misconceived. Relevant passages in the current pleading which have been deleted are at paragraphs 60, 104, 105, 106, 108, 133, 142 and 143.

15.2 Reflective loss: in the current statement of case the Claimants contend that there was a complete defence to the TCC Claim which the Defendants failed to deploy. They alleged that the Palmer Birch claims were barred by the rule against reflective loss and relied on the decision of the Court of Appeal in Garcia v Marex Financial Limited [2018] EWCA Civ 1468 (a decision subsequently reversed on appeal by the Supreme Court: [2020] UKSC 31). In the draft amendments, the Claimants have withdrawn these allegations by making deletions to paragraphs 98 to 103, 129(13) and 139.

15.3 Investment losses: in the current pleaded case Mr Michael Lloyd alleges that he lost opportunities, as a result of the dispute with Palmer Birch and the TTC Claim, to develop shopping centres in Kenya at a profit of some US$1 million per centre. Those claims are abandoned in the draft amendments by the deletion of paragraph 144(4).

Relevant Principles

16 There have been a number of recent authorities which have considered the correct approach to an application to amend (examples include CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2015] EWHC 1345 (TCC) and Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm)) but they have generally been cases in which issues of delay have arisen with a consequent focus upon relative prejudice and the effect on the administration of justice. As I have already mentioned, this application is made at a relatively early procedural stage and the focus of the argument has therefore been on whether the proposed amendments are maintainable on the merits rather than upon other

discretionary factors. I bear in mind and apply, however, the observations of Lambert J in Pearce v East and North Hertfordshire NHS Trust [2020] EWHC 1504 (QB), at [10], that the starting point is CPR 17.3 which confers on the Court a broad discretionary power to grant permission to amend and that in exercising the discretion under CPR 17.3, the overriding objective is of central importance.

17 In Kawasaki Kisen Kaisha Ltd v James Kemball Limited [2021] EWCA Civ 33, Popplewell LJ (giving a judgment with which all other members of the Court of Appeal agreed) set out the following principles to be applied when the court is considering what he referred to as "the merits test" in various contexts, including an application to amend:

"16. It was common ground that on an application to serve a claim on a defendant out of the jurisdiction, a claimant needs to establish a serious issue to be tried, which means a case which has a real as opposed to fanciful prospect of success, the same test as applies to applications for summary judgment: Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2102] 1 WLR 1804 per Lord Collins JSC.

17. The Court will apply the same test when considering an application to amend a statement of case, and will also refuse permission to amend to raise a case which does not have a real prospect of success.

18. In both these contexts:

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

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

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

18. The judgment of the Court of Appeal in Elite Property to which Popplewell LJ makes reference, however, also emphasises at [40] that: "*it is important to bear in mind that the overriding objective applies and the question of whether permission to amend should be given must be considered in the light of the need to conduct litigation fairly and justly and*

at proportionate cost" and at [42] the Court addressed the issue of particularity as a matter for the court to consider to determine whether the proposed amendment *"contains the properly particularised elements of the cause of action relied upon"*.

19. The issue of particularity has also been recently considered by Mr Peter MacDonald Eggers QC (sitting as Deputy Judge of the High Court) in Various Airfinance Leasing Companies v Saudi Arabian Airlines Corporation [2021] EWHC 2330 (Comm), at [15] where he made these observations:

> *"(3) As regards particularisation of a plea which is sought to be introduced by way of an amendment, it is the absence of any particulars which is a cause for concern. The other extreme is a fully particularised plea. However, many pleas are not fully particularised, but provide some particulars to varying degrees. Where a proposed amendment is particularised, but perhaps not to the extent a purist would wish, the Court must decide whether the particularisation is adequate to allow the amendment. Where the particularisation is just adequate, but the particulars of the plea could be further developed, the solution which the Court could opt for is to allow the amendment, but on condition that further particulars will be provided by the applicant, or to permit the respondent to request further information as to the plea and to require the applicant to provide the further information as requested insofar as the information can be provided…*
>
> *(6) A relevant factor to be taken into account is the fact that the case sought to be advanced by the applicant by the proposed amendment is one which the parties had already been addressing whether by other pleas or in evidence, although this consideration will be less material where the new case has received only peripheral attention to date. See Toucan Energy Holdings Ltd v Wirsol Energy Ltd [2021] EWHC 895 (Comm) , Annex, para. 9-10".*

Analysis on Amendment

(1) The Contentious Amendments

20. I now address each of the contentious categories of amendment in turn.

21. The first category concerns the allegation of a duty of care owed to Mr Michael Lloyd in respect of advice regarding "the Transactional Structure" in 2010 and also in respect of a

period in 2014 and 2015 prior to the TCC Claim. The key passages introducing this amendment are at paragraphs 15A and 35A of the draft, although there is said to be some consequential impact on paragraphs 127 and 128.

22. Mr Mitchell for the Defendants contends that the amendment is incapable of sustaining a plea of a voluntary assumption of responsibility which is needed for any duty of the type alleged to have been created. He submitted that the proposed amendments give no proper particulars of the basis upon which it is alleged that the Defendants assumed a responsibility to advise Mr Michael Lloyd personally. In particular he points to the fact that there is no plea that Mr Lloyd relied upon advice allegedly given to him by the Defendants to keep him harmless from the particular losses now said to have been sustained and it is not averred that any such reliance was reasonable. The other factual matters pleaded in the draft amendment are said not to be supportive of the Defendants having voluntary assumed responsibility and so the prospects of success in relation to the proposed amendments are said to be fanciful. These arguments were developed in further detail, both orally and in Mr Mitchell's skeleton argument at paragraphs 20 to 24.

23. In my judgment the amendment should be permitted for the following reasons:

    23.1 Assuming the existence of a voluntary assumption of responsibility is the sole basis on which a duty of care could arise in this case, it is accepted by the Defendants that the issue of whether there has been such a voluntary assumption or not is highly fact specific (see in this regard paragraph 22 of Mr Mitchell's skeleton argument – a concession that is supported by observations in the authorities such as Her Majesty's Commissioners of Customs and Excise v Barclays Bank Plc [2006] UKHL 28 at [8] (per Lord Bingham)).

    23.2 Whilst foreseeability that there would be reliance and the reasonableness of reliance are undoubtedly key matters in determining whether there was a voluntary assumption of responsibility in a case of negligent representation (see, for example, Poole Borough Council v GN [2019] UKSC 25 at [68] (per Lord Reed)), these are issues to be assessed objectively by reference to the particular circumstances.

23.3 It is sometimes the case that solicitors owe a duty of care to both a company which is formally their client and to persons closely associated with it. Examples include instances where directors may be taking on a personal liability for obligations of the company. Such cases contrast with those where a duty is much less likely to arise, such as in the context of dealings between solicitors and the opposite party to a transaction or litigation (as to which see NRAM Ltd v Steel [2018] UKSC 13). Examples of cases of these types are provided in Jackson & Powell on Professional Liability (9th Ed.), at paragraph 11-044).

23.4From the Judgment it is appears that there is real prospect of evidence being available that would support a case, with a reasonable prospect of success, that there was a voluntary assumption of responsibility by the Defendants towards Mr Michael Lloyd as is now proposed to be advanced. His Honour Judge Russen QC stated at [317]:

"In relation to dealing with Michaelmores in connection with the Contract [with Palmer Birch], the trial bundle was replete with communications between them and Michael. Michael was treated as a client alongside HHL and with few if any independent communications between Christopher and the solicitors, he gave instructions in relation to the Contract on that basis. At the very outset, when advising upon the structure between HHL and SHL, by a letter to Michael dated 26 August 2010, Michelmores had said that both HHL and the Cypriot company would be their clients and "so far as possible you wish our instructions to be rooted [sic] through Hillersdon House Limited and, so far as possible, our fee accounts will be addressed to Hillersdon House"" (emphasis added).

23.5In paragraph 15A of the draft Amended Particulars of Claim it is pleaded that the Defendants took instructions from and gave advice to Mr Michael Lloyd in respect of what is defined as a "Transactional Structure" involving the execution of a loan agreement, put and call options and debenture as between HHL and its funding company. It is also alleged that they did this

knowing that Mr Michael Lloyd would be ultimately funding the development of Hillersdon House and would potentially be exposed to personal liability. Then in paragraph 34, the Claimants plead what they alleged to be important written advice of the Defendants of 13 April 2015 in which the possible impact of the liquidation of HHL and in particular "*what mischief might be caused by Palmer Birch to the detriment of…Mike Lloyd*" is specifically raised as a matter "*We need to consider…*". This is relied on in paragraph 35A of the draft amended statement of case as demonstrating that the Defendants acted for, took instructions from and gave advice to Mr Michael Lloyd in the period between 2014 and the liquidation of HHL in June 2015. In my judgment, these passages are a sufficient pleading to support a claim that a duty of care existed albeit that the particulars of how the duty arose could undoubtedly be fuller. There are sufficient facts pleaded from which it could properly be argued that it was foreseeable that the Defendants' advice would be relied on by Mr Lloyd personally and that it would be reasonable for him to so rely. If the case had to be classified along the lines suggested by Mr MacDonald Eggers QC in Various Airfinance Leasing it would be one in which the particulars were just about sufficient but which ought be supplemented following a request for further information, if the Defendants wished to make one, directed at the specific matters relied on to support the existence of the alleged duty of care.

23.6 As mentioned previously, since the hearing the Claimants have circulated a further revised draft of the proposed Amended Particulars of Claim. This provides further particulars on this topic by way of expanded paragraphs 15A and 35A and new paragraphs 15B and 35B and 35C. I will hear further argument on whether the Defendants should be content with the further particulars thereby supplied or should retain the right to make a request for further information as to the grounds relied on to establish a duty of care.

24. The next category of contentious amendment concerns the allegation that the Defendants sent a letter dated 22 April 2015 terminating the contract between HHL and Palmer Birch

and proceeded with the liquidation of HHL of their own volition and without consultation with Mr Michael Lloyd. The key passages objected to are in paragraphs 37A, 38 and 39 (save for the first sentence) of the draft amendments although a related objection appears to be raised to paragraph 72B.

25. The basis for the objection is a contention it is fanciful to allege that the Defendants sent the letter and caused the liquidation to commence without consulting with Mr Michael Lloyd. A number of documents, including the transcript of Mr Lloyd's own evidence in the trial of the TCC Claim, are relied upon in Mr Mitchell's skeleton argument, at paragraph 28 to 30, to demonstrate this.

26. In my judgment, having considered the detailed points advanced in opposition, including the transcript of Mr Michael Lloyd's evidence in the TCC Claim, the proposed amendments do raise a case with a reasonable prospect of success that there was no or inadequate consultation and advice given by the Defendants regarding the consequences of sending the 22 April 2015 letter and putting HHL into liquidation and that this amendment should therefore be permitted to be advanced. In so far as Mr Michael Lloyd has given what is alleged to be inconsistent evidence in the TCC Claim, that is a matter which ought properly to be explored in cross-examination at trial. I note that in this earlier evidence, when asked whether the draft 22 April letter and a further, without prejudice letter of the same date, were "run by" him he stated that "I expect they were". A number of possible explanations might be given for this, including that this was his genuine expectation or belief at that time which is now believed to be erroneous on further consideration of the documents derived from the Defendants' files. Whether any such explanation is credible is a matter properly to be determined by the trial judge.

27. I should add that in respect of this category of amendment, the Claimants have also provided an additional draft since the hearing. This consists of a new paragraph 133A which is designed to explain how the Claimants would have proceeded if, as they allege ought to have occurred, proper advice had been given on the effect of the 22 April letter. I will hear further submissions on whether this further paragraph is objected to and, if so, whether it should nonetheless be permitted to be introduced.

28. The third category of amendment to which objection is taken concerns advice regarding appeal. It is contended by the Defendants that there is no reasonable prospect of establishing that an appeal from the Judgment would have succeeded and that therefore the amendments advanced in paragraphs 3, 120, 120C and 140 of the draft Amended Particulars of Claim ought not to be permitted.

29. I note first that it is evident from at least paragraph 40 of the current, unamended, Particulars of Claim that this matter is already in issue. The Claimants already contend that His Honour Judge Russen QC reached an erroneous conclusion in law by finding that Mr Michael Lloyd should have continued to fund HHL and that by not doing so this supported a finding of liability for inducing a breach of contract and conspiracy to injure by unlawful means.

30. I also note that the passage of the Judgment in which these findings are contained has been the subject of review by the Court of Appeal in Kawasaki Kisen Kaisha Ltd. Specifically, the Court of Appeal found some difficulty in identifying any obligation on Mr Michael Lloyd to fund HHL on the basis of which His Honour Judge Russen QC could then conclude that he "should" have done so (see the judgment of Popplewell LJ at [50] to [51]). I respectfully share that difficulty.

31. Finally, I do not understand the Claimants' case to be that they must show that an appeal would certainly have succeeded. In the existing statement of case, paragraph 141, they already plead damages for the loss of the chance of succeeding on an appeal and this is preserved in the amendment proposed to this paragraph, which has not been objected to.

32. Having regard to all of the above I consider that the proposed amendments in this category should be allowed. They raise a case that has a reasonable prospect of success and is sufficiently pleaded.

33. This leaves the miscellaneous category of amendments to which objection is taken. The various contentions regarding these items narrowed during the course of argument and the points can therefore be addressed quite shortly.

34. In paragraphs 63 and 67 of the draft Amended Particulars of Claim reference is made to the Defendants advancing a case that Mr Michael Lloyd was not a de facto director of HHL in the TCC Claim. Objection is taken that no such case was advanced as it was irrelevant to

the TCC Claim. In my judgment these amendments should not be permitted unless particulars can be given of a case being advanced that Mr Michael Lloyd was not a de facto director of HHL either in the pleaded defence in the TCC Claim or in the witness statements of Michael Lloyd served in those proceedings. Any such particulars should be provided within 7 days following the handing down of this judgment.

35. In paragraph 72A of the draft proposed amendments refers to "initial drafts" of witness statements in the TCC Claim having included a suggestion that a meeting with an insolvency adviser regarding the liquidation of HHL took place on 21 April 2015. Objection is taken that in fact the suggestion was made in a fourth draft of Mr Michael Lloyd's statement. In my judgment the solution is to refuse permission to introduce the words "the initial" in the first sentence of paragraph 72A of the proposed amendment. I note that this is a solution that the Claimants now themselves accept in the note that has been produced since the hearing.

36. Paragraph 120A of the draft Amended Particulars of Claim includes an allegation in the final sentence regarding Palmer Birch's own view of His Honour Judge Russen QC's findings in the Judgment. Objection is made that this is simply untenable on the evidence. I agree and consequently permission to introduce the last sentence of this paragraph is refused. I note that the Claimants have now conceded the point in any event in their note supplied after the hearing.

37. Paragraph 125 of the draft amendments simply introduces the words "to the effect" to an allegation that the Judgment included a public finding that Mr Michael Lloyd had committed a fraud on Palmer Birch. Objection is made that the Judgment contained no finding of fraud. However, this is really an objection to the existing statement of case rather than the amendment. The amendment shall be permitted.

38. Paragraph 129(5) of the proposed amendment includes an averment that because the liquidation of HHL was lawful it could not be the object of a conspiracy. Objection is made that this is a non sequitur since the conspiracy claim was not based on an unlawful liquidation. I agree. The amendment of this paragraph is refused. I observe that the note and draft further amendment provided on behalf of the Claimants following the hearing now concedes this in any event.

39. Paragraph 132 of the draft amendments includes an averment as to the effect of one passage of the Judgement in which reference is made to Mr Michael Lloyd being a de facto director. Objection is taken that it does not accurately reflect the Judgment since the passage referred to (paragraph 346(ix)) only concerns whether Mr Christopher Lloyd could be liable separately from HHL. I agree. The wording of the amendment must be reformulated, if it is to be permitted. The words "neither CL nor ML could shelter" must be deleted and replaced by the words "CL could not".

40. Paragraph 141 of the draft amendments suggests no liability would have been found to exist had it not been for the Defendants' alleged conduct. Objection is taken that, even accepting the allegations, liability would still have been found in respect of conversion. In my judgment that objection is justified and the amendment requires qualification if it is to be permitted. I note from the draft produced since the hearing that such a qualification appears to have now been proposed. I will hear further argument as to whether it suffices to meet the objection.

Analysis on Costs

41. This leaves the remaining matter of costs.

42. As already mentioned, the parties are agreed that the costs of and caused by the amendments should be paid by the Claimants in accordance with standard practice. It was also common ground that the Claimants should pay the costs thrown away in respect of the claims that have been abandoned (which I have described in paragraph 15.1 to 15.3 above). There is, however, an issue over whether these should be the subject of an immediate detailed assessment and whether this should take place on the indemnity basis.

43. In my judgment, there are no circumstances warranting a departure from the normal procedure of a single detailed assessment at the conclusion of the proceedings as envisaged by CPR rule 47.1. The fact that certain claims are abandoned does not alter the position. Compare the position on discontinuance of part of a claim. Under CPR rule 38.6(2)(b), where part of claim is discontinued the default position is that any costs thrown away will be assessed at the end of the proceedings. If there was to be a detailed assessment at this stage it would be likely to increase the costs and time incurred in assessment of costs overall

and might give rise to difficulties with regard to the disclosure of material that was the subject of legal professional privilege for the purposes of assessment.

44. Nor do I consider this to be a case which warrants assessment on the indemnity basis. The Claimants have reviewed their claims with the benefit of further documentation and the input of leading counsel. They have now abandoned certain contentions at a relatively early stage rather than persist with them. In my judgment this case is not outside the norm (which is agreed to be the applicable test adopting the formulation derived from Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson [2002] EWCA Civ 879).

45. Finally, the Defendants seek a payment on account of costs.

46. CPR 44.2(8) provides that: "*Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so*". Difficulties arise, however, in this instance in coming to any reliable figure in respect of a payment on account. This is because of significant disagreement between the parties over how to distinguish between costs incurred on the claims that have been abandoned and the more general conduct of the proceedings. Although the Defendants have provided evidence in the form of a witness statement of Mr Neil Shah of their solicitors, Kennedys, in which he has apportioned costs, the Claimants would be entitled to challenge this on any assessment by reference to what otherwise would be privileged documentation.

47. Although I have had some doubts on the matter, on balance I have concluded that it is appropriate that in this instance there should be a payment on account although it will be appropriate to make a significant discount given the level of uncertainty over the amount of costs truly recoverable. The Defenants have sought a sum of £70,000. The Claimants have suggested only some £10,000 is truly distinct and claimable. In my judgment an appropriate figure is £25,000 taking into account, in particular, the time taken up in liaising with counsel who attended the TCC Claim trial in respect of the reflective loss argument.

Conclusion

48. For the reasons set out above the application is allowed in part. I shall hear submissions on the further matters I have referred to above and on any consequential matters, including the timing of the costs and case management conference.