Neutral Citation Number: [2019] EWHC 2165 (QB)

Case No: QB-2018-000996

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/08/2019

Before :

LEIGH-ANN MULCAHY QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

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Between :

(1) MR MARKUS PEDRIKS **(2) ANSOMAR HOLDINGS LIMITED**	**Claimants**
- and –	
MR SERGE GRIMAUX	**Defendant**

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David Lord QC (instructed by **Ronald Fletcher Baker LLP**) for the **Claimants**
Donald Lilly (instructed by **Holman Fenwick Willan LLP**) for the **Defendant**

Hearing date: 17 July 2019

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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.

…….

MS. LEIGH-ANN MULCAHY QC

Ms Leigh-Ann Mulcahy QC (sitting as a Deputy High Court Judge):

1. This is my ruling in relation to two inter-related applications:

   (1) An application by the Claimants issued on 5 February 2019 for permission to amend the Particulars of Claim, in respect of which some of the amendments are opposed by the Defendant on the basis that they are alleged to have no real prospect of success; and

   (2) An application by the Defendant issued on 15 March 2019 to strike out, or alternatively for summary judgment in respect of, some parts of the Particulars of Claim (as they stand) on the basis that the averments are alleged to disclose no reasonable grounds for bringing the claim in those regards, alternatively have no real prospect of success and there is no other reason for the matters to proceed to trial.

2. In relation to the Claimants' application, the Defendant agrees to certain proposed amendments, namely the amendments to paragraphs 2 to 5, 12, 13 (excluding those amendments contained in the first line), 13A, 13C, 13D, 13G, 25, 27.2, 27.3 and 29 of the draft Amended Particulars of Claim. Pursuant to CPR 17.1(2)(a), the Claimant is entitled to amend in those respects pursuant to CPR 17.1(2)(a) by consent and without needing the permission of the Court. Accordingly, this ruling will focus on the disputed amendments.

3. Two witness statements were filed and served in support of the respective applications:

   a. Mr Rudi Ramdarshan on behalf of the Claimant dated 5 February 2019; and
   b. Mr Richard Brown on behalf of the Defendant dated 15 March 2019.

   Statements from Mr Pedriks dated 5 July 2019 and Mr Grimaux dated 10 July 2019 have additionally been filed and served on behalf of the Claimants and the Defendants. Two hearing bundles (which included the applications, evidence and other documents) and two lever arch files of authorities were filed in relation to the applications and I heard a full day of oral argument.

Factual background to the applications

4. The claim is based on the Mediation Settlement Agreement ("**MSA**") entered into by the First Claimant, Mr Markus Pedriks, and the Defendant, Mr Serge Grimaux, after a successful mediation on 5 January 2015 ("**the Mediation**"), as well as an alleged oral contract between them in September 2016 ("**the alleged 2016 Agreement**").

5. The Mediation concerned allegations of misappropriation and fraud made by Mr Pedriks against Mr Grimaux relating to Mr Grimaux's management of a company incorporated in Cyprus called Ticketpro Ltd ("**TL**"). At the time of the MSA, Mr Pedriks was a director and shareholder in TL as to 25%, and Mr Grimaux was a director and shareholder in TL as to 75%.

6. Mr Pedriks subsequently transferred his shares in TL to the Second Claimant, Ansomar Holdings Ltd ("**Ansomar**"), on 27 November 2016.

7. The MSA and, on the Claimants' case, the alleged 2016 Agreement, set out the mechanism by which Mr Pedriks and Mr Grimaux are to share in the proceeds of sale of TL's business, which took place on 9 February 2017 to Live Nation Holdco 2, SARL ("**the Sale**").

8. It appears to be common ground that the MSA fully and finally settled the disputes relating to the Company, TL, and that these do not form part of the present claim.

9. The MSA provided in relevant part as follows:

"***Terms***

1 [Mr Grimaux] *shall endeavour to provide* [Mr Pedriks] *with (i) a summary of Ticketpro Ltd's 2014 financial activities by the first week of February 2015 and (ii) Ticketpro's 2014 draft financial statements as soon as they will become available.*

2 *Ticketpro Ltd. to pay a dividend to its shareholders by the end of March 2015 in respect of the previous year's trading, in such sum as the Company shall determine to be the maximum available for distribution.*

3 *The aggregate loan capital owed to* [Mr Pedriks] *is USD $1.8 million plus $250,000 of accrued interest, totalling $2,050,000, of which $500,000 is owed by* [Mr Grimaux] *and $1,550,000 is owed by Ticketpro Ltd.*

4 *Interest shall accrue on a daily basis at the rate of 10% per annum, on the balance remaining of the loan capital of $2,050,000 from the date of this agreement until repayment in full.*

5 *Ticketpro Ltd shall make repayments of Euro 20,000 per month of loan capital if the Company can sustain it, commencing seven days from the date of this agreement.*

6 *Ticketpro Ltd to be prepared for sale, during the first quarter of 2015, with a targeted agreement for completion of sale to take place by 30 June 2015. The balance of remaining loan capital, owned by* [Mr Grimaux] *and Ticketpro Ltd, to be repaid out of the proceeds of any sale.*

7 ….

8 [Mr Grimaux's] *private residence at 25 Rybna, Prague 1, 11000, Czech Republic, to be purchased by* [Mr Grimaux] *from Ticketpro Czech Republic for the original purchase price paid for it by Ticketpro Czech Republic and such proceeds of sale to form part of the assets of the Company*.

9 …

10 [Mr Grimaux] *to find a formula to recognise* [Mr Pedriks'] *assistance in the creation of Intellitix. It is anticipated that this could come in the form of share options within four months of the signing of this Agreement.*

11 *This Agreement is in full and final settlement of any causes of action, which the Parties have against each other arising from, or relating to, all matters raised in the Mediation.*

> *12 This Agreement supersedes and takes precedence over all previous agreements between the parties, whether in writing or orally, in respect of matters the subject of the Mediation.*
> ….”

10. Following the MSA, the loan repayments provided for were not paid to Mr Pedriks and no dividends were paid.

11. During the negotiations for the Sale, Mr Grimaux sought to refer in the Incumbency Certificate to a promissory note dated 1 January 2006 issued by TL to a numbered Canadian company which was now held by Mr Grimaux (“**the Promissory Note**”) suggesting that he was owed the sum of US $4,438,000, which could then be offset against sums that Mr Grimaux owed personally to TL. This had the effect of diminishing the proceeds of sale available for distribution under the MSA.

12. The Claimants’ case is that:

    a. the Promissory Note (and other promissory notes including one in the sum of US $1,000,000 to Mr Pedriks) were never intended to be repaid and were subsequently swapped with equity;
    b. Mr Grimaux never loaned any money pursuant to the Promissory Note; and
    c. Mr Grimaux never sought to suggest that he was owed money pursuant to the Promissory Note either at or before the Mediation.

13. Mr Pedriks’ case is that he was concerned not to sign the Incumbency Certificate required in connection with the Sale until the matter was resolved. This resulted in email exchanges between Mr Pedriks and Mr Grimaux and a telephone conversation between them on 13 September 2016. The Claimants allege that it was agreed between Mr Pedriks and Mr Grimaux that:

    a. Mr Pedriks would receive the sum of €3,738,000 from the proceeds of the Sale;
    b. Any excess cash and/or working capital would be divided equally between Mr Pedriks and Mr Grimaux;
    c. Mr Pedriks would be responsible for paying the bills of TL’s accountants and lawyers in relation to the Sale; and
    d. Mr Grimaux would provide Mr Pedriks with an equity interest in Intellitix equal to 10% of Mr Grimaux’s shareholding in Intellitix
    (“**the alleged 2016 Agreement**”).

14. It is the Claimants’ case that the alleged 2016 Agreement was subsequently recorded in an exchange of emails between Mr Pedriks and Mr Grimaux on 13 and 14 September 2016 and was referred to in subsequent emails.

15. Following the Sale, Mr Pedriks received the sum of €2,208,040. However, he claims that he has not been paid the full sums to which he was entitled pursuant to the alleged 2016 Agreement in breach of that Agreement, or, if that Agreement is not enforceable, pursuant to the MSA, and further that Mr Grimaux has not accounted for the original purchase price of the “Real Estate” (identified in clause 8 of the MSA) or paid interest on the sums due.

16. He further alleges that, in breach of clauses 1 and 2 of the MSA, Mr Grimaux has never provided proper details of TL's financial activities or caused it to declare a dividend to the shareholders. He also alleges that over the years a number of improper payments had been made by TL for the benefit of Mr Grimaux in respect of which Mr Grimaux has failed properly to account (as pleaded at paragraph 24 of the Particulars of Claim). He asserts that the result of this is that no dividend was declared pursuant to the MSA and the net assets available for the shareholders have been depleted. Mr Pedriks also alleges that Mr Grimaux has not recognised his interest in Intellitix. The Claimants seek damages, payment of sums alleged to be due under the MSA and/or alleged 2016 Agreement and any necessary accounts and inquiries.

17. In its essentials, by his Defence, Mr Grimaux denies that there has been any breach of the MSA. He relies on the fact that Mr Pedriks signed the Promissory Note as a director of TL, both upon making it and by endorsement to confirm its transfer to Mr Grimaux, and that he approved, as a director, TL's accounts showing it as a debt owed by TL to Mr Grimaux. Mr Grimaux also denies that the alleged 2016 Agreement is a binding contract on the basis that the parties exchanged numerous draft contracts but ultimately never agreed to the terms of it.

18. The procedural status of the claim is as follows:

    a. The Claim Form and Particulars of Claim were served on Mr Grimaux on 25 June 2018 in the Czech Republic, at which time Mr Pedriks was acting as a litigant in person and Ansomar was acting by Mr Pedriks in his capacity as its director;
    b. The Defendant's solicitors sent a Request for Further Information to the Claimants on 27 July 2018;
    c. The Claimants provided the Responses on 9 August 2018;
    d. The Defence was filed and served on 28 August 2018;
    e. The Claimants' Reply was filed and served on 17 September 2018;
    f. The parties filed and served their Directions Questionnaires on 15 October 2018; and
    g. Following correspondence between the parties regarding the matters which became the subject matter of the applications, the Claimants' and Defendant's applications were issued on 5 February 2019 and 15 March 2019 respectively.

    It then appears to have taken a number of months for the listing of the applications for hearing. However, this claim is currently still at an early stage and no Case Management Conference ("**CMC**") has yet been listed.

The law applicable to determination of the applications

19. The test for granting permission to amend a statement of case pursuant to CPR 17.1 is whether the amendment in question has some prospect of success (White Book at 17.3.5 and 17.3.6). If an amendment is not maintainable in established law, permission will not be granted (17.3.6). The court is required to have regard all the matters set out in CPR 1.1(2) as part of the overriding objective. It must strike a balance between any injustice caused to the applicant if the amendment is refused and any injustice caused to the respondent if it is granted. The application must be

determined on the basis that the facts and matters pleaded in the Amended Particulars of Claim will be established at trial.

20. The test for striking out a claim under CPR 3.4(2)(a) is whether the statement of case, or the parts of the statement of case objected to, disclose no reasonable grounds for bringing the claim. If the applicant shows that the claim, or part of the claim, is bound to fail and its continuance would be without any possible benefit to the respondent and would waste court resources, it should be struck out (White Book at 3.4.2).

21. The principles applicable to an application for summary judgment pursuant to CPR 24 are set out in CPR 24.2 and the White Book at 24.2.3 and 24.2.5 and, in relation to a claimant respondent, are in summary, as follows:

    a. Summary judgment may be granted only where a respondent has no real prospect of success in relation to the claim or part of it and there is no other compelling reason why the case or issue should be disposed of at trial (CPR 24.2);
    b. The overall burden of proof rests on the applicant to show that the CPR 24.2 criteria are met;
    c. To defeat a summary judgment application, it is sufficient that the respondent has some prospect of success. The prospect of success must be real, not fanciful or imaginary. It is not necessary, however, to show that the claim will probably succeed at trial. A case may still have a real prospect of success even if it is improbable - the criterion is the absence of reality, not probability;
    d. The hearing of the summary judgment application is not, and does not involve the court in conducting, a mini-trial;
    e. The court should be cautious about trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts being advanced by the other side. The function of choosing between conflicting versions of facts is that of the trial judge, not the judge hearing a summary judgment application, unless there is inherent improbability in what is being said or it is contradicted by extraneous evidence;
    f. The court should also consider the evidence which could reasonably be expected to be available at trial.

The issues for determination

22. The subject matter of the two applications before the Court (in relation to the striking out of existing paragraphs in the Statement of Claim and/or whether permission should be granted for the disputed proposed amendments) can be divided into 6 issues as follows:

    (1) The Second Claimant's status;
    (2) The claim for a contractual account;
    (3) The allegations that Mr Grimaux owed Mr Pedriks fiduciary, as well as contractual, duties;
    (4) Whether paragraphs 7-10 of the Particulars of Claim raise irrelevant matters;
    (5) The Promissory Note; and
    (6) The alleged 2016 Representation.

23. I will address each issue in turn.

Issue 1: The Second Claimant's status

24. This issue relates to the proposed amendments in the draft Amended Particulars of Claim at paragraph 1, which makes it clear that the Second Claimant claims no remedy and sets out why it is joined, and paragraphs 13 (first line), 23, 28, 28.8, 31 and the Prayer (the heading, (ii) and (iii)), which are all amendments altering "Claimants" to the "First Claimant".

25. The Claimants' submissions, in summary, are that:

    a. Whilst no relief is (now) being claimed by the Second Claimant, it was properly joined to the proceedings because the dispute is essentially between the shareholders of TL as to their respective entitlements to dividends, the proceeds of the Sale and the net assets of TL and joinder was appropriate to avoid any point being taken by the Defendant that Mr Pedriks could not maintain his cause of action based on his former shareholding as a result of the transfer of his shares to Ansomar, as was explained at paragraph 27 of the Further Information provided by the Claimants on 9 August 2018;
    b. Further, the Second Claimant is maintained as a party to the proceedings for the purpose of being bound by the resulting judgment and so that it cannot bring a derivative or other claim in relation to the same subject matter as these proceedings with the risk of duplicity of proceedings and inconsistent judgments (which it is asserted, is a benefit to the Defendant);
    c. The Second Claimant's involvement will not add to the costs of the proceedings and there is no prejudice to the Defendant if it remains a party; and
    d. The issue of the Second Claimant's status has been raised and pursued by the Defendant in order to seek to secure an order for its costs in the event of discontinuance by the Second Claimant.

26. The Defendant's submissions, in summary, are that:

    a. No 'claim' is actually made by the Second Claimant. It is not a party to the MSA nor the alleged 2016 Agreement and, despite seeking relief by the Prayer and attempting to make claims against D in the Reply (at paragraph 3), it is now acknowledged that it is not entitled to any relief and does not plead any cause of action in these proceedings;
    b. The Second Claimant does not need to remain a party in order to be bound by the judgment. All that is being determined in the present proceedings is whether the Defendant has breached any obligations under or arising from the MSA and (if it is a contract at all) the alleged 2016 Agreement, to neither of which the Second Claimant is a party. Any claim Ansomar might have in its capacity as a shareholder of TL would inevitably have to be litigated by way of a derivative claim in Cyprus, that is via a claim by the Company, TL (with the shareholder suing on its behalf), rather than a claim by Ansomar as shareholder. It is said that this context means that any judgment on the claim is a long way from raising an issue estoppel, but in any event the status of a judgment by an English court, which would be a foreign judgment in Cyprus,

would be a matter for Cyprus law and it has not been shown that Cyprus law is the same as English law in this regard;

c. Even if it was appropriate to maintain Ansomar in the proceedings, it cannot be a claimant without making a claim, and so would need to be a nominal defendant;
d. The Claimants' attempts to maintain the Second Claimant in the proceedings represent an attempt to avoid the costs consequences of discontinuance of its claim; and
e. Accordingly, the Defendant invites the Court to dismiss Ansomar's claim and to refuse permission for the proposed amendments.

27. CPR r.2.3(1) defines a claimant as "*a person who makes a claim*". It is now clear and indeed is made explicit in the proposed amendment to paragraph 1 of the draft Particulars of Claim, that the Second Claimant is not making any claim and does not seek any relief. In those circumstances, it would appear to be inapposite that it should be party to the proceedings as a claimant (even if it does have the same or a similar interest to Mr Pedriks as Mr Lord QC contended).

28. However, that does not mean that Ansomar cannot be a party to the proceedings as a nominal defendant. The question is whether it is necessary or appropriate for it to be a party to the proceedings either:

a. in order to make good the cause of action; or
b. in order to bind Ansomar to any judgment on the claim.

29. As to the issue of which out of Mr Pedriks or Ansomar is entitled to advance the cause of action, Mr Lilly clarified that the Defendant is not alleging, and will not seek to allege, that the present causes of action claimed by Mr Pedriks against the Defendant cannot be maintained as a result of the share transfer to Ansomar. Whilst he said he was not binding the Defendant not to take a reflective loss point (i.e. that a shareholder cannot make a personal claim for loss reflected in the value of the shareholding) he stated that the Defendant's contention would be that any loss or damage has been suffered by TL (not Ansomar) and the only party to proceedings that could cure this issue would be TL. Accordingly, this point does not affect whether or not Ansomar should be a party.

30. In circumstances where the Defendant has now made clear that it is <u>not</u> alleged that Mr Pedriks cannot maintain his causes of action on the basis that Ansomar (as opposed to Mr Pedriks) is the proper claimant, then even if it may have been considered prudent to join Ansomar to avoid such a defence being advanced, it is no longer necessary to maintain Ansomar in the proceedings for this purpose.

31. As to the question of whether Ansomar should be maintained in the proceedings in order to be bound by the judgment on the claim, it was apparently common ground between the parties that any cause of action that Ansomar might have would be by way of derivative claim (in Cyprus) and would not be a personal shareholder dispute. It would be a matter for Cypus law as to whether or not an English judgment would be binding on Ansomar, yet there is no expert evidence as to Cyprus law in this regard. I am not satisfied on the material before me that the contention that maintaining Ansomar in these proceedings would shut it out from bringing any other

claim concerning the same subject matter and/or obtaining a potentially irreconcilable judgment has been made out. Further, insofar as there is said by the Claimants to be a benefit for the Defendant in keeping Ansomar in the proceedings, such benefit has been disavowed by the Defendant, who seems content to accept any risk of future proceedings by Ansomar that may exist if it is not maintained as a party to this claim.

32. In circumstances where Ansomar does not need to be a party in order to maintain the cause of action and there is, on the argument and evidence before me, no more than a possibility that its participation would shut out a future claim by it in Cyprus, I consider that the appropriate course is now to dismiss Ansomar's claim and for the claim to be continued by Mr Pedriks as sole claimant. I further refuse permission for the proposed amendments to paragraphs 1, 13 (first line), 23, 28, 28.8, 31 and the Prayer (the heading, (ii) and (iii)), which are all consequent upon Ansomar being maintained as a Second Claimant.

33. As identified above, both sides argue that the position taken by the other is costs-driven. However, the issue of where any costs incurred by reason of the Second Claimant's claim should fall is separate to the issue of what should now happen in relation to whether the Second Claimant should remain in the proceedings. Its claim has not been discontinued and accordingly, the costs consequences set out in CPR 38.6 do not apply but in any event, even in the event of discontinuance, it is open to the Court to "*order otherwise*". I will give the parties the opportunity to make further submissions as to costs in light of my decision.

Issue 2: The claim for a contractual account

34. This issue concerns the amendment proposed at paragraph 13B of the draft Amended Particulars of Claim, which pleads that, on their proper construction, clauses 1 and 2 of the MSA obliged the Defendant to provide, or to procure TL to provide, an account of TL's financial activities for 2014 and thereafter up to the sale of TL's business, and an account into what were the sums available for distribution by way of dividend to the shareholders and to ensure payment to Mr Pedriks of all sums that should have been paid to him by way of dividend, and new paragraph (v) of the Prayer, which seeks such an account.

35. The Claimants' submissions, in summary, are that:

    a. The claim for a contractual account arises from the obligation in clause 1 of the MSA to provide the financial information set out and the further obligation in clause 2 of the MSA to pay a dividend to shareholders "*in such sum as the Company shall determine to be the maximum available for distribution*";
    b. The Defendant does not suggest that the implied term pleaded in paragraph 13C of the Amended Particulars of Claim be struck out, namely that the Defendant was "*obliged to cause or procure* [TL] *to declare and pay a dividend to its shareholders including* [Mr Pedriks] *in the maximum sum available for lawful distribution to its shareholders*" and has not sought to strike out existing paragraph (v) of the existing Prayer (amended to (vi) in the draft Amended Particulars of Claim) which seeks "*All further proper accounts, inquiries, and directions relating to the Defendant's appropriation of monies and/or receipt of benefits by the Defendant from Ticketpro and/or its*

subsidiaries and/or associated companies, thereby reducing its working capital/excess cash available for distribution to all shareholders";

c. Further, the Defendant does appear to recognise that there needs to be a 'reckoning': paragraph 4.2(h) of the Defence and Schedule 1 to the Defence, responded to in the Reply paragraph 10;
d. The Court has wide powers to order the taking of an account where a remedy sought by a claimant in their claim form necessarily involves taking an account or making an inquiry (CPR 24PD.6 and 40APD); and
e. The account that is sought is an account that will ensure that the Defendant complies with his contractual obligations pursuant to the MSA and will provide the information that he agreed to provide. Unless the Defendant provides the account sought (which reflects clauses 1 and 2 of the MSA and the implied term), the Defendant cannot comply with his contractual obligations to Mr Pedriks.

36. The Defendant's submissions, in summary, are that:

a. The obligation in clause 1 of the MSA is merely to "*endeavour*" to provide two specific documents, namely (i) a summary of TL's 2014 financial activities and (ii) TL's 2014 draft financial statements. Clause 2 of the MSA places no obligation on the face of it on any of the parties, but at this time, Mr Pedriks was also a director. Accordingly, the request for a contractual account bears no relation to the actual terms of the contract agreed;
b. In addition, the request for an account "*and thereafter up to the sale of TL's business*" is not required by clauses 1 or 2. Insofar as it is said that this is needed for clause 2 in respect of the dividend, one has to look to the accounts required by clause 1 which are only the 2014 accounts. There is no business necessity to expand the scope of the account beyond that agreed; and
c. The Claimants appear to be seeking to take an account of the management and administration of TL given the way the claim is being cast for an account, in relation to alleged fiduciary duties and the Promissory Note; however this is not a claim for an account of the affairs of TL given that any duty owed regarding the management and affairs of TL is undoubtedly owed to TL and not to Mr Pedriks. It would be the company, TL, which would have to claim an account from a director, and the proper procedure would be by way of a derivative claim litigated in Cyprus.

37. In circumstances where:

a. The Claimant is already claiming an account at paragraph (v) of the existing Prayer to the Particulars of Claim (new paragraph (vi)) relating to the Defendant's appropriation of monies and/or receipt of benefits by him from TL and/or its subsidiaries and/or associated companies and this is not objected to by the Defendant;
b. The new claim for an account appears to be a subset of the existing claim for an account (or at least substantially overlaps with it); and
c. The Defendant does recognise the need for a reckoning by Schedule 1 to his Defence

I find that the request for a contractual account of TL's financial activities for 2014 and an account into what sums were available for distribution by way of dividend to the shareholders is directly related to what is already in issue on the statements of case and with which the Defendant will inevitably have to deal.

38. I have had some concern that the claim for an account is not just in relation to 2014 but also "*thereafter up to the sale of TL's business*" given that this is not contractually provided for by clause 1 of the MSA where the documents to be provided both relate only to the 2014 year. However, the dividend envisaged by clause 2 of the MSA as being paid by the end of March 2015 (which did not happen) and the Sale was envisaged by clause 6 of the MSA as having a targeted completion date of 30 June 2015 (which again did not take place at that time). The non-payment of dividend and delay to the Sale form part of the subject matter of the claim. It seems be arguable, with at least some prospect of success, that, as a matter of construction, if the dividend was not paid and the Sale did not happen in the envisaged timescales for reasons wholly or partly under the Defendant's control, the Defendant's obligations impliedly continued beyond the periods expressly provided for and up to the date of the Sale which finally occurred on 9 February 2017. Whether or not the contention succeeds will be a matter for the trial Judge.

39. I therefore grant permission for the amendments to add paragraph 13B and new sub-paragraph (v) of the Prayer.

Issue 3: Alleged fiduciary duties

40. This issue concerns the amendments proposed to paragraphs 13E, 13F, 21D, 21E, 24, 26.5-26.8 and 27.4-27.8 of the draft Amended Particulars of Claim. These seek to allege that, in addition to his contractual duties, the Defendant was in a fiduciary relationship with Mr Pedriks in relation to the MSA and that he owed and breached his fiduciary duties. These duties which are alleged on the part of the Defendant include duties to act in good faith and with fidelity, not to make a secret profit, not to put himself in a position where his interests conflicted with Mr Pedriks' interests, to take account of all genuine assets and only genuine liabilities, disregarding any liabilities that were not real, to replenish the assets of TL in respect of any transaction to which he or his associates had been party, the effect of which was to deplete the assets of TL, and to account for the Defendant's rateable share of any improper transaction which artificially reduced the "*maximum amount available for distribution*".

41. The Claimants' submissions, in summary, are that:

    a. It is alleged that the Defendant owes Mr Pedriks (i) fiduciary duties arising out of the MSA and alleged 2016 Agreement and (ii) a duty to account in respect of the activities of the Company, TL, which arise from the Defendant's role as the executive director of TL (which is the only capacity in which he could comply with his obligations in the MSA) and its subsidiaries as well as his role as a signatory on its bank account with the ability to operate the bank account without reference to the Claimants;
    b. Whilst it is frankly accepted that, absent special circumstances, a director does not normally owe fiduciary duties to a company's shareholders (as opposed to

owing fiduciary duties to the company), as was explained by the Court of Appeal in *Peskin v Anderson* [2001] 1 BCLC 372 at [31-34], in special circumstances directors may also owe fiduciary duties to shareholders. This is for example, where events take place which bring the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations (such as a duty to disclose material facts to shareholders) with such duties, in general, being attracted by and attached to a person who undertakes or who, depending on all the circumstances, is treated as having assumed responsibility to act on behalf of, or for the benefit of, another person;

c. In *Sharp v Blank* [2017] BCC 187 Nugee J at [10] referred to a number of cases where fiduciary duties arose, most commonly in circumstances involving only a limited number of shareholders and often a sale of shares. It is contended that this is because in those kinds of cases the person who assumes the fiduciary duties is in a position of control and has greater information than the other shareholders;
d. A number of other authorities also support of the contention that a fiduciary relationship can arise between shareholders as follows:
    i. *Ross River v Waverley Commercial* [2013] EWCA Civ 910, where the Court of Appeal at [35-36] referred to the case of *Murad v Al-Saraj* [2004] EWHC 1235 (Ch) which held that a fiduciary relationship can arise between shareholders as a result of the relationship between them;
    ii. *Elliott v Wheeldon* [1993] BCLC 53, which related to an agreement between the plaintiff and defendant to combine their respective businesses, company A and company B, by A taking over B and that they would run the new business as a quasi-partnership. A became insolvent resulting in the plaintiff being called up by the bank on his guarantee. The plaintiff alleged that the defendant, in his capacity as a director of A, owed a fiduciary duty to him as guarantor, which duties he had breached by misappropriating A's funds, thereby causing A to become insolvent. The Court of Appeal rejected the defendant's application to strike out on the grounds that it disclosed no cause of action;
    iii. *Lloyd v Sutcliffe* [2007] EWCA (Civ) 153, where the court recognised an agreement to share profits enforceable in equity; and
    iv. *Ross River Ltd v Cambridge Football Club Ltd* [2007] 41 EG 201, where Briggs J (as he then was) explained at [195] that "*each case will turn on its own facts*" and adopted the guidance set out by Professor Paul Finn in his essay "Fiduciary Law in the Modern World" that "*An appraisal (i) of the manner in which, and the apparent purpose for which rights, powers, duties and directions are allocated by the contract; (ii) of the contract's particular commercial or business setting, and (iii) of the self-serving actions lawfully open to a party both under, and notwithstanding the contract will, as a rule, indicate decisively whether the role and reason of a party in the contract (or a discrete part of it) can properly be said to be to serve his own interest, the parties' joint interests, or the interests of the other party*."
e. The categories of fiduciary relationships are not closed;

f. Here, the Defendant agreed to provide financial information to Mr Pedriks and agreed that a dividend would be declared in "*the maximum available for distribution*". The parties were in a very close factual relationship and the MSA brought them into even closer contact. The Defendant was the only person who possessed the relevant information and was in control of TL and its finances and he could only comply with the obligations he undertook because he was the executive director. As a result, fiduciary duties were imposed on the Defendant;
g. The fact that the agreement arose against the background of a dispute does not preclude one party undertaking fiduciary obligations to the other as part of the resolution of that dispute. The Defendant was thereafter required to act in the best interest of both himself and Mr Pedriks. Nothing turns on the fact that it is not asserted by Mr Pedriks (and he does not take on the burden of proving) that fiduciary duties arose before the Mediation.
h. The question for the Court to determine at trial is a factual one, namely whether or not the facts are sufficient to give rise to fiduciary duties, and accordingly, the proposed allegations that the Defendant owed, and breached, fiduciary duties together with the claim for an account that arises not only as a result of the contractual claims but independently as a result of those fiduciary duties, should not be struck out and are matters on which the Claimants stand a real prospect of succeeding at trial.

42. The Defendant's submissions, in summary, are as follows:

a. A fiduciary relationship would give rise to a duty of undivided loyalty based upon mutual trust and confidence (*Bristol & West Building Society v Mothew* [1998] Ch 1 at 18B per Millett LJ (as he then was) and *John Youngs Insurance Services Ltd v Aviva Insurance Service UK Ltd* [2012] 1 All ER (Comm) 1045 at [94(3)] per Ramsay J). Fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another person and to make discretionary decisions on behalf of that person. The essential idea is that a person in such a position is not entitled to use their position for their own private advantage but is required to act unselfishly in what they perceive to be the best interests of the principal: *Al Nehayan v Kent* [2018 EWHC 333 (Comm) at [157] and [159];
b. It is not reasonably arguable that such a duty would arise at a time when Mr Pedriks and the Defendant were in dispute and Mr Pedriks was alleging serious misconduct and fraud in respect of the Defendant's conduct of the administration of TL and subsequently, the execution of the MSA;
c. It is not enough that one commercial party puts faith in another party to fulfil the terms of the contract between them (see *John Youngs* at [94(7)]). The Court should be slow to introduce fiduciary relationships into contractual relationships because the parties have the freedom to contract on the terms agreed, and the nature of the contract will inevitably be changed by the overlay of implied fiduciary duties (*Re Goldcorp Exchange Limited* [1995] 1 AC 74 at 98F per Lord Mustill);
d. In any event, the express terms of the MSA are inconsistent with a general duty to account in respect of TL's affairs and, accordingly are inconsistent with (a) fiduciary duties arising generally and (b) the amended prayer which seeks such an account:

i. The parties recorded and sought to record in formal written documents the terms that they had agreed;
ii. Such terms arose out of a pre-existing commercial relationship in respect of which the Claimants make no allegations that they owed each other any fiduciary duties; therefore, it is not reasonably arguable that the MSA changed the position;
iii. The Defendant entered into the MSA in his personal capacity (and not as a director or representative of the Company) and the Claimants admit the same in respect of the alleged 2016 Agreement;
iv. There is no evidence whatsoever that any of the parties thought that they were agreeing to anything beyond that which was set out in the MSA and indeed Mr Pedriks is not permitted to rely upon any discussions at the Mediation itself, because they are covered by 'without prejudice' privilege. The Defendant has not himself waived privilege as he did not refer to the contents of the Mediation but instead to the disputes that gave rise to the Mediation, which have been ventilated on an open basis; and
v. The terms of the MSA are not consistent with the creation of a fiduciary relationship. Mr Pedriks' rights to information are set out within the express terms of the agreement. Thus (i) any alleged wider duty to account is inconsistent with the express terms of the MSA and thus any averment of a wider duty to account in equity is bound to fail; and (ii) the fact that the parties agreed to such a limited flow of information from the Defendant to Mr Pedriks suggests that they did not intend there to be a wider fiduciary relationship between them. If such a fiduciary relationship did exist, one would expect a far more extensive duty to account to have been expressly provided for within the MSA. It is even less arguable that the alleged 2016 Agreement changed the position (if the agreement was concluded at all);

e. For these reasons, it is contended that the amendments stand no reasonable prospect of success.

43. I have considered carefully the authorities to which I have been referred regarding whether and in what circumstances fiduciary duties have been held to be owed by a director to shareholders, and/or a fiduciary relationship can exist concurrently with contractual obligations. Whilst it is clearly exceptional for a director to owe fiduciary duties to a shareholder, as was acknowledged by Mr Lord QC, I agree with the Claimants that the question of whether or not the Defendant owed fiduciary duties to Mr Pedriks is a fact sensitive question and the legal issue must be determined based on the circumstances of each case. Whilst the exceptional nature of a fiduciary relationship between a director and shareholder means that Mr Pedriks will undoubtedly have a significant challenge to establish that the Defendant owed him fiduciary, as well as contractual obligations, this is an unusual case and one that is not on all fours with the previous authorities. I am unable to conclude at this early stage, when no written evidence from the Defendant (other than on the conversion of the Promissory Note from dollars into euros in TL's accounts) has been adduced, and I do not know what evidence will ultimately be before the Judge at trial regarding the proximity of the relationship between Mr Pedriks and Mr Grimaux or the degree of control exercised by the latter compared to the former, that this is a case which could never be considered to be exceptional. Further, the legal submissions will in any event

be more fully developed than it was possible to do during the hearing before me, albeit that at times (in particular on this issue and issue (5)) it was at risk of turning into a mini-trial. I cannot safely conclude at this point in time that there is no basis in established law for the proposed amendments and/or that they do not have 'some' prospect of success.

44. Accordingly, I grant permission for the proposed amendments at 13E, 13F, 21D, 21E, 24, 26.5-26.8 and 27.4-27.8 of the draft Amended Particulars of Claim.

Issue 4: Alleged irrelevant background

45. This issue concerns the existing Particulars of Claim at paragraphs 7-10. The Defendant invites the Court to strike out these paragraphs on the basis that they are irrelevant to the claim.

46. The Claimants' submissions, in summary are as follows:

    a. These paragraphs explain Mr Pedriks' investment in TL, the agreements that were reached about his shareholding and the background that led to the mediation and the MSA. They provide important information about the factual matrix against which the MSA and the subsequent 2016 Agreement are to be understood and construed;
    b. These paragraphs were the subject of many questions in the Request for Further Information, which does not make sense if they are irrelevant;
    c. The disputes between Mr Pedriks and the Defendant were not all fully and finally compromised by the MSA since it was only after the Defendant had put in the data room a detailed history of all the agreements and associated documents that evidence of some of the Defendant's misappropriations of TL's funds came to light; and
    d. Further, paragraph 10 to the Particulars of Claim pleads the background to the dispute concerning the Real Estate, which was the subject of clause 8 of the MSA and with which clause the Defendant has not complied.

47. The Defendant's submissions, in summary, are as follows:

    a. The Particulars of Claim set out the allegations (which have not been established) made by Mr Pedriks against the Defendant that gave rise to the Mediation and which were fully and finally settled by the MSA. No claim is now made in respect of these allegations. They are irrelevant and should be struck out as irrelevant, or at the very least as the pleading of evidence. In any event, these are not just allegations as to what was in dispute but averments that the allegations made were true;
    b. The Defendant relies on CPR 16.4(1)(a) which provides that the Particulars of Claim is to include a "*concise statement of facts on which the claimant relies*" and further emphasises the general need for concision in a statement of case;
    c. The paragraphs were considered irrelevant by the Defendant but more detail was requested in order to confirm this; and
    d. This objection is not purely technical since it has implications for the scope of parties' disclosure obligations.

48. Since the Defendant did not plead in his Defence to the paragraphs in question, I sought to identify in oral argument with Mr Lilly what exactly was controversial as between the parties in relation to them. The position appears to be as follows:

    a. In relation to paragraph 7 of the Particulars of Claim, which relates to Mr Pedriks' investment in TL, and appointment as a director, it was confirmed by Mr Lilly that there was no dispute;
    b. In relation to paragraph 8 of the Particulars of Claim, there is no dispute that Mr Pedriks share was increased to 25% but Mr Lilly said that there may be a dispute over the circumstances which caused the increase. There is a dispute over whether the business had been overvalued at the time Mr Pedriks made his initial investment, which Mr Lilly suggested might require expert evidence;
    c. In relation to paragraph 9, I am told that there are a number of disputes including as to whether TL's financial state was poor and it required money from Mr Pedriks, the circumstances of the resignation of the individual directors of Ticketpro Czech Republic, as well as the allegation that the Defendant used substantial sums of TL money to fund non-TL activities; and
    d. In relation to paragraph 10, the Defendant does not object to the pleading that Mr Periks was concerned about the purchase of the Real Estate by the Defendant. However, the allegations of misappropriation are disputed and it is contended that the disputes were settled by the MSA and it is therefore unnecessary to go into them.

49. My decision on the paragraphs in question is as follows:

    a. I cannot see any legitimate objection can be taken to paragraph 7 which appears to me to be proper factual background to the dispute and is in any event apparently agreed on the facts;
    b. The position is similar in relation to paragraph 8 save that, insofar as there is a dispute over the reason for the increase in Mr Pedriks' share, this can be pleaded to by the Defendant in its Amended Defence. Whilst this paragraph also relates to the background to the dispute, namely when, how and why Mr Pedriks came to have a 25% shareholding in TL, I do not consider that the pleaded matters are either irrelevant to the dispute or represent facts which Mr Pedriks is not entitled to plead or rely upon. The question of whether expert evidence is in fact required or appropriate will be a matter for the Court at a future CMC, as will any dispute over what documents need to be disclosed in relation to this paragraph; and
    c. In relation to paragraphs 9 and 10, the facts pleaded are disputed (save for the Real Estate allegation in paragraph 10 which is not objected to). Whilst these do plead allegations against the Defendant as averments, these are readily capable of being disputed in the Defendant's pleading in response and replied to by Mr Pedriks. The Court will then be able to assess the actual scope of any dispute against the pleaded cases, when considering whether and what disclosure obligations may arise. Any issues can be more readily and efficiently determined at that stage, rather than seeking to deal with this on the basis of one side's pleading and legal argument as is the case on this application. I do not consider that, at this early point in the proceedings and in

the absence of any pleading by the Defendant in relation to the allegations, I can safely conclude that the matters pleaded are clearly irrelevant to the dispute or would give rise to burdensome disclosure obligations.

50. The Defendant does legitimately raise a concern about whether Mr Pedriks is seeking to re-open the allegations he previously made against the Defendant which were settled by the MSA (as opposed to suing for breaches of the MSA or any other obligations which can be proved in law to arise as a result of the settlement). I agree with the Defendant that this course is not open to Mr Pedriks. However, there is a dispute between the parties as to what exactly was and was not settled by the MSA. Clause 11 of the MSA provided that it was in full and final settlement of any causes of action which the Parties have against each other arising from or relating to all matters raised in the Mediation but the parties are in dispute as to what matters constitute matters "*raised in the Mediation*", for example, in relation to the Promissory Note. The Real Estate allegation was raised in the Mediation but remains in issue in relation to whether there has been compliance by the Defendant with clause 8 of the MSA. It is contended by proposed paragraph 10 that Mr Pedriks only became aware of "clear evidence of the misappropriation of Company funds" after the Defendant had put into the data room established for the sale of TL's business, which is a basis on which it is contended that these matters were not raised in the Mediation.

51. I do not consider that I am able to determine at this point in time and on the material before me that there has been a full and final settlement at the Mediation of all matters in dispute between the parties such that the matters pleaded in paragraphs 9 and 10 can be held clearly to be irrelevant to the disputes which are properly raised in these proceedings.

52. In any event, in light of my decision on the proposed amendments regarding the alleged fiduciary obligations, as is acknowledged by Mr Brown at paragraph 44 of his witness statement, it may be that some of the allegations will be relevant in this regard in any event.

53. For these reasons, I refuse the Defendant's application to strike out paragraphs 7 - 10 inclusive of the Particulars of Claim.

54. I would, however, add the caveat that if Mr Pedriks, as a result of those paragraphs not being struck out, were to seek to re-open allegations where it is clear beyond dispute that they were "raised in the Mediation" and pursuant to clause 11 of the MSA have been fully and finally settled by it, this would be impermissible, and should not give rise to disclosure obligations on the part of the Defendant in relation to such allegations.

Issue 5: The Promissory Note

55. This issue concerns the existing Particulars of Claim at paragraph 15 (in part) and the proposed amendments to paragraphs 15 and 15A to 15E which clarify and expand the basis of the Claimants' case in relation to the Promissory Note and its effect on what sums were available for distribution to the shareholders.

56. The Claimants' submissions, in summary, are as follows:

a. It is contended in the Particulars of Claim and in revised form in the draft Amended Particulars of Claim that the Promissory Note is not a genuine debt of TL. The basis for this is set out in paragraphs 7 to 17 of Mr Pedriks' witness statement where his evidence is that the Promissory Note did not reflect the loan of any money from the Defendant (unlike Mr Pedriks' own promissory note) and was never intended to give rise to any obligation on the part of anyone to pay any sum to the Defendant;
b. The Promissory Note was not raised or relied upon by the Defendant until after the Mediation, despite the discussions between the parties before and at the Mediation concerning what sums were due to and from the respective shareholders. Mr Pedriks alleges that the Defendant made representations to Mr Pedriks at the Mediation, upon which he then relied to his detriment, to the effect that the debt was not owed by TL;
c. On the issue of whether Mr Pedriks is barred from alleging this by reason of 'without prejudice' privilege:
    i. The question of what was compromised by the MSA and the effect of clause 11 of the MSA are matters of construction of the MSA and are not covered by privilege;
    ii. The facts and matters referred to at paragraphs 15C-E of the draft Amended Particulars of Claim do not refer to any privileged matters;
    iii. Without prejudice to the above, two exceptions to the 'without prejudice' rule apply: firstly, "the interpretation exception" where the court is required to consider the factual matrix and surrounding circumstances so as to make an objective assessment of the parties' intention (*Oceanbulk Shipping and Trading SA v TNT Asia Ltd and ors* [2011] A AC 662) and secondly, "the estoppel exception" where statements made by one party to negotiations on which the other party is intended to rely and does rely giving rise to an estoppel are admissible; and
    iv. Further or alternatively, the Defendant has waived any privilege that may have existed relating to the subject matter of the Mediation and what was compromised by the MSA by referring to and relying upon the purpose of the Mediation and alleging that no dispute had arisen in respect of the Promissory Note at the Mediation in his Defence at paragraph 9.1;
d. The fact Mr Pedriks signed the Promissory Note does not deprive the proposed amendments of any reasonable prospect of success because:
    i. If no monetary sums were advanced by the Defendant pursuant to the Promissory Note, then there is nothing to repay;
    ii. If it is established at trial that the two parties never intended that either of them would rely on their respective promissory notes, then the Defendant cannot rely on the Promissory Note;
    iii. If the Defendant did not raise the Promissory Note at the Mediation and the parties settled matters concerning what was owed to each of the shareholders at the Mediation then the Defendant has waived any rights he had pursuant to the Promissory Note, particularly in light of clause 11 of the MSA; and

iv. In any event, the failure of the Defendant to raise the Promissory Note at the Mediation amounts to an implied representation as alleged in paragraph 15D of the draft Amended Particulars of Claim which was relied upon by the Mr Pedriks and gave rise to an estoppel.

e. The fact that Mr Pedriks signed off on the accounts is not determinative because the treatment of the Promissory Note was changed in the 2014 and 2015 financial statements where the figures changed and instead of being accounted for as a related party transaction, the Promissory Note was treated as a loan from a shareholder, which timing coincided with the need for the Defendant to have to pay TL back substantial sums of money and/or the Sale happening. Accordingly, it was not always clear to Mr Pedriks from the accounts that the Defendant was entitled to the sum represented by the Promissory Note; and

f. In any event, the Promissory Note is not enforceable and the Defendant cannot rely on it because the period of limitation, which runs in favour of the maker of a note payable on demand, runs from the date of the note or its issue (which here was in 2006) and not from when the demand is made on the Note (*Norton v Ellam* (1837) 2 M&W 461). Accordingly, TL is under no obligation in respect of the Promissory Note.

57. The Defendant's submissions, in summary, are as follows:

a. TL is precluded from denying the Promissory Note by operation of section 54 Bills of Exchange Act 1882. TL signed the Promissory Note and it cannot be treated as other than genuine. Whilst other promissory notes were converted from debt into equity, this was not the case with the Promissory Note and it is therefore in a different category;

b. Mr Pedriks is not entitled to rely on any alleged representation made at the Mediation because it is covered by 'without prejudice' privilege which has not been waived by the Defendant. The exceptions do not apply as there is no point of interpretation of the MSA which engages the principle in *Oceanbulk Shipping* and/or there is no clear and unambiguous statement on which there was reasonable reliance such as would engage the estoppel exception;

c. Even if Mr Pedriks can rely upon the representations, as a signatory to the Promissory Note in his capacity as director of TL, and having approved TL's accounts showing the debt owed, again as director of TL, a matter of weeks before the Mediation, he was aware when he entered into the MSA that TL had a binding debt under the Promissory Note which it would be required to repay before any payment could be effected to Mr Pedriks under the MSA, and accordingly, there is no real prospect of him showing that he reasonably relied upon any statements to the effect that the Promissory Note was not a genuine TL debt;

d. The issue of whether the Promissory Note is paid on presentation is a matter for TL and any defence (including limitation) can only be taken by TL, not Mr Pedriks. TL was not party to the MSA or any alleged representation or these proceedings; and

e. Accordingly, it is submitted that the averments stand no real prospect of success.

58. It is clear that numerous legal issues are raised by the proposed amendments including as to:

    a. the legal effect of section 54 of the 1882 Act;
    b. the effect of the limitation period (and any acknowledgements of the debt) on the enforceability of the Promissory Note;
    c. whether Mr Pedriks is precluded from asserting that the Promissory Note is not payable to the Defendant (because it is a matter for TL and/or because of his actions in signing the Note or approving its accounting treatment whilst he was a director of TL); and/or
    d. whether any representations made at the Mediation are admissible in evidence and if so, on what legal basis.

59. There are also factual issues arising, including:

    a. as to the circumstances in which the Promissory Note came to be issued;
    b. whether the Promissory Note was treated differently from the other promissory notes and not converted from debt into equity, and if so, for what reason
    c. the circumstances surrounding the changes in accounting treatment and their timing; and
    d. (subject to the issue of 'without prejudice' privilege and admissibility) whether the Promissory Note and/or debts owed by TL to the parties were discussed at the Mediation and if so, in what terms and what representations (if any) were made by the Defendant.

60. The Promissory Note and its enforceability against TL to the benefit of the Defendant (which has a direct effect on the "*maximum available for distribution*" pursuant to clause 2 of the MSA) would appear to be an issue at the heart of the claim.

61. I consider that the above issues are matters for trial on the basis of all the factual evidence and are not suitable for being summarily determined against Mr Pedriks on these applications, whether by striking out paragraph 15 of the existing Particulars of Claim or by refusing permission for the proposed amendments to paragraphs 15 and 15A to 15E of the draft Amended Particulars of Claim. In relation to the latter, I am unable to conclude that these amendments do not have at least 'some' prospect of success. Accordingly, I dismiss the Defendant's application to strike out paragraph 15 and grant permission for the said amendments.

Issue 6: The Alleged 2016 Agreement

62. This issue concerns the proposed amendments to paragraphs 20, 21, 21A and 21B of the draft Amended Particulars of Claim. These paragraphs plead an alleged "2016 Representation", namely that by email dated 14 September 2016 timed at 02:42, the Defendant represented to Mr Pedriks that the oral agreement made in the telephone conversation between them which took place on 13 September 2016 was a legally binding agreement. It is pleaded that it was intended that Mr Pedriks should rely on that representation and that he did so to his detriment. It is further alleged that the

Defendant is estopped by representation and/or convention from contending that the 2016 Agreement was not legally binding upon him.

63. The Claimants' submissions, in summary, are as follows:

a. This pleading raises factual questions which cannot be determined on a summary basis concerning whether or not the parties entered into a binding agreement in 2016 as pleaded in paragraph 18 of the Particulars of Claim (which the Defendant does not seek to strike out) or the Defendant made a representation to Mr Pedriks that the agreement reached was binding;
b. The issues raised are not purely legal matters because:
    i. It is not the law that a binding agreement can never arise in circumstances where the parties nevertheless contemplate recording their agreement in a written document to be drawn up by lawyers (Chitty on Contracts at [2-124]; *Edge Tools and Equipment Ltd v Greatstar Europe Ltd* [2018] EWHC 170);
    ii. The email does not state that the agreement is "subject to contract" or suggest that any agreement would have to await a formal written agreement being drawn up;
    iii. Mr Pedriks explains at paragraph 26 of his witness statement that "*It was made clear by both parties that the agreement reached was immediately binding, otherwise I would not sign the Incumbency Agreement. There was no discussion with regard to this being subject to contract. It was clearly understood that we had reached a binding agreement.*" If there is a dispute about this, then it is a factual issue which can only be resolved at trial; and
    iv. In subsequent emails, the Defendant confirmed the existence of the 2016 Agreement, as set out in paragraph 24 of the Reply and the emails therein referred to.
c. In any event, even if there was not a binding agreement, as a matter of law, that would not prevent an estoppel arising in circumstances where the Defendant represented that there was one, and Mr Pedriks relied on that (estoppel by representation) and/or the parties acted on the basis that there was a binding agreement (estoppel by convention). The Claimants place reliance on the authority of *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] 1 QB 84 in particular to assert that estoppel can prevent a defendant from relying on a defect in the validity of a contract.

64. The Defendant's submissions, in summary, are as follows:

a. The proposed pleading is demurrable on the face of the email since it does not support the contention that "*the oral agreement made in the telephone conversation…was a legally binding agreement*" upon which Mr Pedriks relied;
    i. In his email sent directly after the 13 September 2019 conversation, Mr Pedriks recorded the contents of the discussion after which he noted that "*…your [i.e. the Defendant's] lawyer will now draft this into a formal agreement – but I would appreciate it if you could confirm that this is also your understanding*." Mr Pedriks therefore at that time (i)

referred to the discussion as an "*understanding*", not a binding agreement or contract; and consistent with that language, (ii) envisaged a formal document needed to be drawn up and agreed;

ii. In his response, the Defendant used the same language of "*understanding*" (not agreement) and also referred to his lawyer "*drafting something which shall be in your hands as quickly as possible*"; and

iii. There is no clear and unambiguous representation that a legally binding agreement had been reached in the telephone conversation and the email was equally consistent with the agreement being in the form of a non-binding heads of terms;

b. The draft written agreement was in fact prepared by the Defendant's lawyer and sent to Mr Pedriks on 25 September 2016. It was not drafted on the basis that a binding contract had already been entered into by the parties, but that was being recorded within the written document. Instead it contained language that (i) the agreement would be made on the date written on the contract (not 13 September 2016); (ii) the parties "*are interested in agreeing*" and (iii) that "*Now, therefore, the parties agree as follows*", all of which is consistent with a binding contract arising only upon execution of the written document. In response to this draft, Mr Pedriks did not contest this language or suggest that it should be amended to reflect the agreement already having been concluded but instead responded saying "*thanks – this looks ok in principle*";

c. The email of 14 September 2016 does not contain a representation as averred within the draft Amended Particulars of Claim, and in any event the contemporaneous documentation establishes that Mr Pedriks did not at the time believe that the alleged 2016 Agreement was conclusively binding. Accordingly, it is contended that he has no real prospect of succeeding in an assertion that that he could have reasonably relied upon the September email as a representation that the alleged 2016 Agreement was a finally binding contract; and

d. In response to the proposed estoppel argument, the Defendant contends that it is bad (or at least otiose) as a matter of law because:

i. If the alleged 2016 Agreement is a finally binding contract, then there is no need for Mr Pedriks to rely upon any alleged representations, or upon the estoppel. In that case, the proposed estoppel argument is redundant and unnecessary; and

ii. If the alleged 2016 Agreement is not a finally binding contract, then a promissory estoppel cannot effectively make it so binding, it being trite law that a promissory estoppel can only be used as a shield not a sword, whereas Mr Pedriks is seeking to sue on the promissory estoppel. If the alleged 2016 Agreement is not a finally binding contract, he has no cause of action independent from the estoppel. Where the defence is that there was no contract, estopped cannot be used to preclude that defence as it would be tantamount to allowing the estoppel to form its own cause of action.

65. I consider there is considerable force in the Defendant's contention that the email dated 14 September 2016 does not indicate on its face or support the proposition that the alleged 2016 Agreement was intended to be binding, and further that subsequent drafts, the terms of those drafts, and the fact the Agreement was never executed

confirms that they were not. There is also considerable force in the contentions that the pleaded estoppel is either redundant or cannot arise as a matter of law. However, the question for the Court is whether the proposed amendments have some or a real prospect of success, not whether they are likely to succeed.

66. Having considered the relevant documents, including the subsequent emails, I consider that this is not a pure issue of law, as has been submitted by the Defendant. Whilst it does appear to me to be improbable that the proposed allegations will succeed at trial, I cannot conclude that they lack any real prospect of success or that there are no matters of fact that may arise from the evidence in due course which might be relevant to their prospects of success. This is a matter for the trial judge to determine in light of all the evidence and full legal argument at trial.

67. In any event, given that it is already in issue whether or not the alleged 2016 Agreement is a finally binding contract, whilst I acknowledge that the alleged 2016 Representation does raise new issues, it does not appear to me that the allegation will substantially add to the evidence or submissions which will already be before the Court in order to determine whether or not the 14 September 2016 email gives rise to the alleged 2016 Representation as a matter of construction of the email in the context of the relevant documents, and/or whether, if the alleged 2016 Agreement is not finally binding, any estoppel can arise as a result of the alleged 2016 Representation as a matter of law.

68. Accordingly, I grant permission for Mr Pedriks to make the relevant amendments 20, 21, 21A and 21B of the draft Amended Particulars of Claim.