



Neutral Citation Number: [2019] EWHC 78 (QB)

Case No: HQ15D04837

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 25th January 2019

Before :

ROWENA COLLINS RICE
(Sitting as a Deputy High Court Judge)

Between :

(1) RICHARD OLSEN
OLSEN PARTNERSHIP LTD

Claimant

- and -

(1) RICHARD GRIFFIN
(2) ANDREW WEST
(3) ANDREW HORSLEY
VOLTER (UK) LIMITED

Defendants

Mr Arfan Khan (instructed by Solacexis Solicitors) for the **Claimants**
Mr Thomas Croxford QC (instructed by Addleshaw Goddard LLP) for the **Defendants**

Hearing dates: 23rd & 24th October 2018; 17th December 2018

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.

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Ms Rowena Collins Rice :

The Defendants' application for a terminating ruling

1. This case came before me to hear the Defendants' application for summary judgment and/or strike out of the Claimants' claim which had been issued on 20th November 2015 and set out in their particulars of claim dated 16th November 2015 ('the 2015 claim'). At the heart of their claim lay a number of grievances raised the first Claimant, Mr Olsen: he objected to having been removed as a director of Volter (UK) Ltd ('Volter'), to the circumstances of the transfer of his shareholding in that company, and to a number of associated losses said to have been sustained by him and the company he and his wife owned and managed, Olsen Partnership Ltd. For these losses, compensation was being sought.
2. At first sight, Mr Olsen's grievances had the appearance of company law matters, and the claim of Olsen Partnership Ltd a matter of commercial contract law between companies. The 2015 claim was, however, pleaded under the heads of breach of contract, breach of fiduciary duty, common law conspiracy to injure, tortious misrepresentation, common law negligence, breach of statutory duty under the Landlord and Tenant Act 1954, and defamation.
3. The Defendants – Volter and three individuals who were, with Mr Olsen, its directors and shareholders at the relevant time – objected to these claims on the basis that they were incoherently pleaded, incapable of establishing an entitlement in law and/or had no realistic prospect of success. These objections were addressed with particularity to each of the heads of claim pleaded in turn. However, the central thrust of the Defendants' objection to the claim was that it was principally founded on the assertion of an express oral contract, or joint venture agreement, among the parties, which was not coherently pleaded or adequately evidenced, and which would, in any

event, have been inconsistent with the individual parties' obligations and duties in company law.

4. The Defendants' application for a terminating ruling (strike-out and/or summary judgment) was heard over two days in October 2018. The Claimants' oral submissions sought with some insistence to justify each of the heads of claim in turn, albeit on the basis that any defects were capable of being cured by amendment. As regards the central contractual proposition, however, their oral submissions were not focused clearly on making good the pleadings of an express oral joint venture contract, but instead appeared to rely to a degree on an implied contract, or possibly more than one, arising by course of conduct or possibly to be deduced from written exchanges identifiable within the voluminous documentation relating to this case.
5. I indicated at the close of submissions in October that the possibility (I put it no higher) of a coherent claim founded on implied contract was sufficiently discernible on the materials before me to make it in the interests of justice for the hearing to be adjourned before any decisions were taken, to allow the Claimants an opportunity to apply to amend their pleadings to that effect if so advised. That was for the following reasons. First, because there was a sufficient potential congruence of substance and fact between the existing pleadings, the Claimants' oral submissions, and any such potential application, to admit of the possibility that a variation along those lines could properly be regarded as an amended version of the current pleadings rather than a separate and novel proposition. Second, because I could not properly be satisfied at that stage that a case, if coherently pleaded on such an amended basis, would have no realistic prospect of success and be bound to fail.

6. I also indicated that such an application to amend the claim would face a number of significant obstacles which it would need to address. It would have to specify: how any contract arose on the facts so as to fix all of the Defendants, and especially Volter, with legal liability; how it could lawfully bind the Defendant individuals (and Volter) consistently with their legal duties as company directors; and how its terms were consistent with Volter's articles of association as from time to time in force, with other formal constitutional or contractual company documentation (including a relevant Shareholders' Agreement), and with the framework of company law more generally. It would also have to deal explicitly with the terms of the default judgment that the Defendants had already obtained on a counter-claim in this case.
7. I made clear at the same time that it was not the court's responsibility to guide the drafting of pleadings, much less to suggest a case to the Claimants. That was the Claimants' entire responsibility. The hearing was being adjourned on the simple basis that, on an application for strike-out or summary judgment seeking to extinguish an entire action, I considered it fair to provide an opportunity for the case as submitted to me orally on behalf of the Claimants to be expressed formally in a manner which was legally intelligible and reasonable and fair to expect the Defendants to respond to in substance.
8. I also indicated that, even if an application to amend along these lines was successful, fairness to the Defendants was also likely to require further restrictions to be placed on the continuation of this claim. The first issue under that heading related to the multiplicity of other heads of claim beyond the contractual. I questioned, at the close of submissions, whether a number of these were not parasitic on, or added little meaningful to, the principal contractual claim.

9. For example, the claim relating to breach of fiduciary duty itself appeared to be predicated on such a duty arising contractually, since no other coherent legal basis was suggested in support of it. The claim relating to conspiracy to injure appeared to rest on a proposition about unlawful means and loss which was closely related to the existence of the alleged joint venture contract. The representations complained of under the misrepresentation heading appeared to go to the terms of the alleged contract. What was alleged in relation to the Landlord and Tenant Act appeared to relate to an arrangement properly described as a contractual licence to occupy. It was not clear to me on the pleadings, including as amplified in oral submissions, what any of these heads of claim added to the contractual claim, whether or not as potentially amended, nor how the Claimants would be materially disadvantaged by their removal. The multiplicity and overlap of causes of action cited indeed appeared on the face of it potentially oppressive to the Defendants. Any amended pleadings would need to address this.
10. To the extent that the multiple heads of claim pleaded were not subsumed by the claim in contract, this aspect of the pleadings also appeared to be defective for a range of other reasons. For example, no fiduciary duty or duty of care could be properly pleaded in a context such as the present, where such a duty is not shown to be consistent with the fiduciary duties of directors to their company (and to give rise to a duty not to cause economic loss). Tortious misrepresentation could not be properly pleaded without clear reference to a statement of present fact (whether or not as to intention) and an explanation of its contemporaneous falsity. A claim under the Landlord and Tenant Act properly required a reference to a written tenancy agreement within the terms of the Act, or some other legally recognisable basis for the existence of a tenancy. A claim in defamation could not be brought without pleading serious

harm (which was neither pleaded nor evidenced, and which it strained the bounds of credibility as things stood to suggest could be so evidenced). Compensation for wrongful or unfair dismissal could not be claimed without reference to an employment contract (and were in any event claims to be brought in the Employment Tribunal). In all of these respects, the 2015 pleadings appeared to be problematically defective. Again, any application to amend would need to address these issues.

11. I also indicated at the close of submissions in October that, even if the contract claim were satisfactorily amended and shorn of duplicative or insubstantial additional heads of claim, the Claimants were still likely to face considerable hurdles in their endeavours to cast what appeared essentially to be a company law grievance in the mould of contract law. Mr Croxford had made some powerful points in his submissions about the inherent problems at the heart of such a project. The Defendants had already been put to some inconvenience by the terms of this claim and the manner in which the litigation had been advanced to date. Mr Khan made some acknowledgment of that issue but put to me that that should sound in costs rather than in terminating rulings. To the extent that I might in due course have been prepared to agree with that, it seemed to me to likely to be fair, in contemplating the continuation of this litigation, that it should be subject to conditions to protect the Defendants' position on costs and on the timetable for proceeding.

The Claimants' application to amend their claim

12. By an application dated 14th November 2018, the Claimants sought to take the opportunity, provided by the adjournment, to amend their claim. That application consisted simply of a draft amended particulars of claim settled by a Silk and a draft order. These draft particulars comprised the deletion of the entirety of the previous

particulars and their replacement by a new set founded on four distinct contractual propositions: (i) breach of an implied contract between Mr Olsen's company and Volter for the provision of marketing services, (ii) breach of an express oral contract between Mr Olsen and the individual Defendants relating to the setting up and running of Volter, (iii) a wrongful dismissal claim and (iv) breach of a Volter Shareholders' Agreement. During the course of a half-day hearing before me on 17th December, Mr Khan set out his case for the Claimants being permitted to amend their pleadings along these lines.

13. There was no dispute about the correct approach to an application of this nature. The court has discretion to permit amendment if, in all the circumstances of a case, it is in the interests of justice to do so, and may do so subject to conditions. However a court should not allow a party to amend if the proposed amendment would be liable to be struck out or susceptible to adverse summary judgment. The Defendants submitted that this was just such a case: that the amended particulars of claim would properly be subject to strike-out (under CPR rule 3.4) and/or summary judgment (under CPR rule 24) and the amendment should therefore not be permitted to be made.
14. The principles which a court must more particularly apply where strike-out and/or summary judgment are in issue may be briefly summarised. (In doing so, I draw on the formulation set out by Lewison J in *Easyair (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 399 (Ch) at paragraph 15.) A court must consider whether the case as pleaded by a claimant has a 'realistic' prospect of success. A realistic prospect is one which is more than merely arguable; it must carry some degree of conviction. In deciding that, a court does not conduct a 'mini-trial' of the case, but nor is it required to take at face value and without analysis everything that a claimant submits. It must

test whether there is real substance in the factual assertions made. It must take into account the evidence actually before it and evidence that could reasonably be expected to be available at trial. A court should hesitate to make a final decision without trial, if there are reasonable grounds for believing a fuller investigation of the facts would add to or alter the evidence available to a trial judge and so potentially affect the outcome of a case. At the same time, if the question of whether a case should proceed comes down to an issue of law or construction which a court is satisfied it has all the evidence necessary for determining, and the parties have had an adequate opportunity to address it, the court should ‘grasp the nettle’ and decide it; if an applicant’s case is bad in law, the sooner that is determined the better.

15. Mr Khan proposed that the amended particulars of claim would have a realistic prospect of success, that they were consistent with legal principle and that there was real substance to the factual assertions made. In those circumstances, he proposed, it was in the interests of justice for the amended claim now to proceed to trial.
16. I read Mr Khan’s skeleton argument with care, and prepared to receive his submissions with especial attentiveness. Mr Croxford had characterised the application before me as the Claimants’ “last chance to get it right” under threat of strike-out, and the opportunity they had been given to do so as “generous”. That is not the approach I took; the application fell to be considered simply on its merits. There were a number of aspects of the new draft pleadings, however, that on the face of it merited explanation, and the application itself provided no context beyond the draft. The new draft, for example, did not appear to address the company law framework or the Defendants’ default judgment. Having previously sought with vigour to justify the previous particulars of claim in all respects, the Claimants’ new

draft appeared largely to have abandoned the attempt and to propose a claim which was in some respects amended or reformulated and in some respects apparently novel. The facts pleaded in the new particulars appeared in at least some respects to be inconsistent with some of the facts as previously pleaded.

(i) The implied contract claim

17. Mr Khan proposed that the first head of the draft pleadings properly set out the case for an implied contract arising between the two companies for the provision by Mr Olsen's company of "essential marketing services to the Fourth Defendant for business development until the Fourth Defendant remained in business". Offer and acceptance were stated to arise from a brief email exchange in the spring of 2013, and terms from a course of conduct comprising the raising and payment of invoices thereafter. The subsistence of the contract was said to be evidenced by further email exchanges and by Mr Olsen's company taking up occupation of space in Volter's premises. Breaches were said to consist of Volter ceasing to accept and pay for marketing work towards the end of 2013. Damages were claimed in relation to unpaid-for work and on a continuing monthly basis to the present day.
18. The Defendants objected that this proposition did not comply with the rubric set out in the authorities (in particular *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195) for the recognition of an implied contract, not least a contract between companies. That rubric specifies that a contract will not be implied from conduct unless it is necessary to do so (that is, the conduct must be consistent only with a contractual explanation); that offer, acceptance and intention to create legal relations must be clearly evidenced; and that the terms must constitute an agreement on essentials with sufficient certainty to be enforceable. The Defendants

objected that, even put at its highest, the evidence relied on by the Claimants was not capable of founding a successful claim based on implied contract. That was essentially because the emails and other conduct in question were entirely susceptible, on their face, to alternative explanations other than the conclusion of a continuing contract of the nature alleged (in particular, for example, as a series of discrete supply arrangements and as a separate contractual occupancy arrangement); those alternatives were nowhere addressed in the pleadings. The Defendants also objected that the terms contended for were both extravagant (supply of marketing services for the lifetime of Volter as a going concern) and uncertain ('essential marketing services for business development'); in neither respect, it was said, was such a contract on the face of the pleadings sufficiently evidenced or capable of being practically enforceable.

19. The Defendants also submitted that the evidence relied on should not in any event be put any higher than strictly merited. They drew my attention to the importance attached by the authorities (for example *Portland Stone Firms v Barclays Bank plc* [2018] EWHC 2341) to the adequate pleading of the primary facts relied on to found a head of claim in law. They argued that on any objective evaluation of the evidence referred to in support of an implied contract, that evidence was incapable of even suggesting, let alone necessitating, a contract in the terms contended for.
20. There was a further objection from the Defendants, which might be called the company law objection. That was that the course of conduct said to give rise to the implication of a contract between the two companies was in effect a course of conduct by the directors of those companies at a time when Mr Olsen was a director of both. That fact alone, and together with the alleged terms of the contract, would have given

rise to clear issues about conflict of interest which would have needed to have been (and were not) declared by Mr Olsen, and agreed and minuted by Volter, in order properly to found liability between the two companies.

21. Since this head of implied contract was central to the amendments sought, and not previously pleaded, the proposition required careful attention. Having considered it in the fullest light available, I have to agree with the Defendants that the new draft does not plead an implied contract capable of meeting the authorities' test of necessity. I do not need to go so far as to conclude that the facts pleaded are inconsistent with the contract alleged altogether (although the Defendants did raise some powerful and unanswered questions about that). It was not enough for the Claimants to plead consistency with evidence in any event. Their task on this application was, put simply, to plead facts that were inconsistent with anything else other than the contract proposed. The draft does not come close to doing that, or even to addressing the test properly, either on the face of the new draft or when the relevant evidence relied on is subjected to the least scrutiny. Nor do the draft pleadings address the company law objection, which would in itself raise a significant obstacle to the imputation of any contract as alleged. I cannot see a claim here which is good in law, coherently pleaded and stands any realistic prospect of success.

22. The Defendants objected further that in any event, the implied contract contended for was inconsistent with the second head of claim, the express oral contract claim.

(ii) The express oral contract claim

23. This head of claim in the new draft set out that Mr Olsen (and possibly his company also) and the three individual Defendants entered into an express oral contract 'on or around 16th April 2013' (the date of the incorporation of Volter). That contract was

said to relate to the setting up and incorporation of Volter, to a number of aspects of its commercial purpose, its financing and its governance, and to its contractual relationship with Mr Olsen's company. In particular, it was said to bind the individual Defendants to 'procure' Volter to make certain payments to Mr Olsen and to pay for certain services rendered by his company both to Volter and to another company.

24. It was further set out that this agreement was varied on a number of occasions, including to impose further obligations on the individual Defendants to 'procure' Volter to confer certain benefits on Mr Olsen and/or his company.
25. The Defendants submitted that this proposition faced the initial problem that the circumstances of the creation of an express oral agreement in these extensive terms were neither sufficiently pleaded nor adequately evidenced. 'On or around 16th April' in itself was vague. The creation of an express oral contract (as opposed to a contract implied by a course of conduct) is an historical event, at which the parties agree, by the words they speak to each other on that occasion, to become legally bound, and do so with the requisite degree of specificity. The Defendants objected that the creation of this contract at such an event was not adequately pleaded and that no sufficient contemporaneous evidence was proposed capable of establishing such an event. I agree that these are problems for the draft pleadings to which I heard no satisfactory answer in Mr Khan's submissions, to the extent that they sought to expand on the draft and on the factual basis (and documentary evidence) on which he proposed it should be taken to rely.
26. The Defendants raised a company law objection here also. Mr Khan's oral submissions sought to argue that no such objection could be made because the parties

contracted ‘in their personal capacities’. That, the Defendants countered, was an unsustainable proposition. The only capacities in which the individual Defendants could have executed the terms alleged, and therefore bound themselves to do so in the first place (particularly as to the ‘procuring’ of actions by Volter), was in their capacity as (future) directors of Volter. As such, they would have been bound by their legal duties to the company. No explanation was offered in the pleadings as to how such duties could be reconciled with the terms of this alleged contract, or how (or why) the individual Defendants could have entered a legally binding contract as to their future conduct as directors (or shareholders) to procure results regardless of whether they were a proper exercise of their powers and in the best interests of the company. Mr Khan sought to argue at one stage that reconciliation could be achieved by implying into the contract that its terms were subject to the directors’ legal duties. Leaving aside the fact that the Claimants’ task under this head was not to show that such reconciliation could be achieved, but to plead that it was in fact achieved, I did not find this a persuasive response to the company law objection.

27. There were further objections. The Defendants characterised aspects of the alleged agreement in relation to the repayment of loans as unenforceable guarantees pursuant to the Statute of Frauds and in any event incapable of binding a company not yet incorporated. The terms of the alleged contract appeared to be inconsistent with, and superseded by, the Volter Shareholders’ Agreement (‘SA’) of 18th November 2013. Mr Khan said that the SA did not affect previously ‘accrued rights’ under the alleged contract, but did not appear properly to distinguish between any causes of action (for example for breach of contract) which might have already arisen under contract prior to the SA (that is, accrued rights properly so called), and a desire to resolve inconsistencies between the two agreements by preferring earlier terms if they were

more favourable to Mr Olsen, which is not a proposition recognisable in law. Nor are the provisions of the SA preserving other rights and duties apt to give precedence to pre-existing inconsistent contractual relationships between the parties.

28. As the Defendants also pointed out, an express contract in these terms as to provision of marketing services by Mr Olsen's company to Volter seemed to provide a different, and at best alternative, narrative to that pleaded under the implied contract head. The new draft did not articulate what was said to be the relationship between these two narratives.

(iii) The wrongful dismissal claim

29. This head of claim appeared to be entirely misconceived. As pleaded it related in factual terms to the termination of Mr Olsen's appointment as a director of Volter. However nowhere was any attempt made to establish the existence of an employment contract, which is of course an essential prerequisite to bringing proceedings for wrongful dismissal. It was not enough for the Claimants to show that Mr Olsen was appointed and dismissed as a director of Volter. They needed also show that he was, in addition, an employee of Volter. The draft pleadings did not address this basic point.
30. The only factual basis for this claim pleaded or developed in oral submissions was a reference in Volter's articles of association (3rd October 2013 version) to a power of the company to pay directors' remuneration, and the fact that Mr Olsen was in receipt of a pattern of monthly payments between July and December 2013. There was some apparent dispute about the basis for these payments, and in particular as to whether they amounted to remuneration or a form of loan repayment. But even establishing an entitlement to directors' remuneration does not establish an employment contract.

Nor is a claim for unpaid remuneration between December 2013 and September 2015 (while Mr Olsen was first suspended and then removed as a director) recognisable as a claim capable of being made good in wrongful dismissal proceedings.

31. The Defendants also correctly pointed out that an employment law claim founded on wrongful dismissal would in any event need to be brought in the Employment Tribunal.

(iv) The claim for breach of the Shareholders' Agreement

32. The final head of claim set out in the new draft was to the effect that the Defendants did not act in accordance with the SA in removing Mr Olsen as a director in the circumstances at the time, nor in relation to the consequences which occurred for his shareholding and his receipt of other benefits.
33. The SA provided for the compulsory transfer of the shares of 'bad leavers' on cessation of directorship. Mr Olsen was evidently treated by the Defendants as a bad leaver on the grounds that he had been removed as a director for having made unauthorised payments; his shares were transferred, registered in the name of the purchaser pursuant to a decision of the Board of Volter, and a price determined under a 'fair valuation' procedure was paid. The new draft raised strong objections to this entire course of conduct, but what it specifically sought by way of remedy was the revaluation of the shares, and the payment of a higher value to Mr Olsen, on the basis that he should properly have been regarded as a 'good leaver'.
34. Under the provisions of the SA, a transfer of shares appears to take place upon the determination of a transfer price and the registration of shares in the name of the purchaser. The value is payable to the transferor on transfer. The transfer price is established by an independent expert valuer. There are provisions in the SA

preventing the questioning of the validity of the sale and purchase of shares once effected. In other words, it appears that once the shares have been transferred there is no means by which the transfer price can be altered or impugned. It appears Mr Olsen did not actively engage with the valuation process at the time by making representations, nor did he seek to prevent the transfer of the shares.

35. These are all issues with which the pleadings might be expected to have to grapple. It is entirely unclear from the new draft how the Claimants reconcile what they seek under this heading with the terms of the SA. No explanation appears as to how the matter of the valuation might now be reopened after the event. Mr Olsen's claim for any value for his shares logically presupposes an effective transfer. In any event, his case for being treated as a good leaver appears from the draft to be predicated on the wrongful dismissal claim above. It is clear that Mr Olsen took exception to his removal as a director of Volter, both procedurally and in substance. But I cannot discern a logical chain of law, fact and reasoning in the draft pleadings connecting the specifics of those events, via the SA, to a claim for the retrospective revaluation of shares. The draft is in this respect insufficiently coherent.

Conclusion

36. In adjourning the Defendants' original application for a terminating ruling, I kept in mind that where a claim is apparently defective and therefore susceptible to be struck out or subject to summary judgment, a court should consider whether the defect in question might be cured by amendment and, if it might, whether it is right to give the claimant an opportunity to make the defect good. Mr Khan proposed in October that amendment (or costs) was the answer to such of the Defendants' objections as he acknowledged had force. Although, as I indicated at the time, the 2015 pleadings

appeared to be extensively defective, I considered, having heard full submissions on behalf of the Claimants, that these defects might indeed, at least to some degree, be cured by amendment and that the Claimants should have a fair opportunity to try to do so.

37. I have reminded myself now that I must, without conducting a mini-trial, consider the viability of the new draft pleadings in their proper context, including their evidential context as put to me. I have also been particularly mindful of the care and hesitation that is proper before making a terminating ruling without trial. My purpose throughout has been to try, with the assistance of Counsel, to perceive whether the Claimants have identified a case in their pleadings which is fit and able to go forward. I have sought to give the Claimants in particular a very full opportunity to assist me with that purpose.
38. At the same time, if, notwithstanding the fullest of opportunities and the most scrupulous of hesitation, pleadings cannot be read objectively on their own terms as stating a case which is coherent, sound in law and credibly explained in evidenced fact, it is unfair to all concerned to permit a case to go forward with no realistic prospect of success. For the reasons set out above, that is my conclusion in this case. The degree of potential I had perceived for amendment of the 2015 pleadings to remedy their defects and place this matter on a sound legal footing has not in the event been realised by these new draft pleadings. No suggestion has been made that the Claimants have been restricted in their ability to set out their case, whether by way of access to documents or otherwise, and no suggestion has been made that possible future developments of potential assistance to the Claimants should be allowed for. I have considered the new draft in the context the Claimants themselves suggested. My

conclusion does not rely on any findings of disputed fact or any judgment about the merits of the Claimants' underlying grievance. To the extent that any such grievance is in essence about company formation, governance, financing and decision making, I say nothing at all about any possible alternative cause of action in company law. My decision is simply about the viability of the proposed new pleadings. I cannot discern in them any realistic prospect of success. The new draft pleadings are not coherent, sound in law, or sufficient in their explanation of primary facts relied on.

39. So far as their original application for a terminating ruling is concerned, the Defendants proposed, with justification, that the changes in the formulation of the Claimants' case mean that the Defendants have largely achieved their purpose because the Claimants have effectively abandoned their original claim. Any other conclusion would indeed be unsatisfactory and unfair in the absence of cogent explanation and justification, of which there has been none.
40. The Defendants' application for a terminating ruling was well founded. The Claimants' endeavours to remedy the position by withdrawing the original pleadings and proposing new particulars of claim have been unsuccessful. Permission to amend in the form proposed is refused. It follows that there is no subsisting basis for advancing this claim. The claim is struck out.
41. Although not affecting my decision on the merits of this application, I note that the Defendants have been put to considerable, and unfair, trouble by some aspects of the Claimants' conduct of this matter. I include in those the fact that the Claimants' purpose to amend did not visibly surface before the hearing of the Defendants' application in October, that their vigorous defence faced with that application was in large part abandoned during the adjournment without explanation (other than

concession), that their application to amend of 14th November was unsupported by reasoning, and that the draft proposed was less than fully mindful of the indications given by the court on adjournment as to the some of the challenges it needed to deal with. Costs consequences seem inevitable.