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Case No: CA-2022-001747

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
JULIA Dias QC (sitting as a Deputy Judge of the High Court)
[2022] EWHC 1583 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/05/2023

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE NEWEY
and
LORD JUSTICE MALES

Between:

CNM ESTATES (TOLWORTH TOWER) LIMITED

**Claimant/
Appellant**

- and -

1) SIMON PETER CARVILL-BIGGS
2) FREDDY KHALASTCHI

**Defendants/
Respondents**

Christopher Lundie (instructed by **RSW Law**) for the **Appellant**
Mark Simpson KC and Isabel Barter (instructed by **Kennedys Law LLP**) for the
Respondents

Hearing date: 22 March 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 5 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE MALES:

1. This is an appeal from the decision of Ms Julia Dias QC (“the judge”) in which she held (1) that the appellant claimant (“CNM”) needed to obtain (and would be refused) relief from sanctions in order to be allowed to amend its Particulars of Claim to allege that the respondent defendants (“the Receivers”) were guilty of gross negligence; and (2) that permission to amend in order to allege wilful misconduct by the Receivers would be refused as a matter of discretion. CNM challenges both decisions. Although these were case management decisions which are not usually suitable for an appeal, I granted permission to appeal because it appeared at least arguable that the judge was wrong to have applied the relief from sanctions test in the circumstances of this case.

Background

2. Much of the argument before us was concerned with whether CNM has an arguable case. I therefore take the facts from CNM’s Particulars of Claim, in accordance with the approach of the Supreme Court in *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3, [2021] 1 WLR 1294 at [103] to [107], although many of them are disputed.
3. CNM was incorporated on 19th August 2014. Mr Wahid Samady was a director of the company and its ultimate beneficial owner. In October 2015 CNM acquired a property known as Tolworth Tower for a purchase price of about £60.5 million including acquisition costs, of which £54 million was funded by loans. CNM intended to develop the site, by refurbishing Tolworth Tower itself, re-cladding the north wing of a hotel on the site and converting office space into 78 residential apartments. In addition it planned to demolish a building known as “the Podium” in order to construct two new buildings comprising approximately 200 residential units and 10,000 square feet of retail space.
4. Unfortunately CNM defaulted and remained in default on its loan repayments when it failed to make a payment within five business days of 28th April 2017. This led to the lender entering into a contract for the sale of its loans to Tolworth Loan Ltd, a company connected to Meadow Capital Management LP (“Meadow”). On 3rd August 2017 CNM instructed the estate agents Knight Frank LLP to market the development site with a view to selling it for the best obtainable price. Before the marketing had begun, however, the Receivers were appointed pursuant to the lender’s rights under the mortgage and debenture which formed part of the security for the loans.
5. CNM contended that its default under the loans was itself caused by the lender and made a claim against the lender accordingly. However, that claim has been settled and we are not concerned with it. The only remaining claim in this action is against the Receivers and proceeds on the basis that they were duly appointed.
6. On or about 19th October 2017 the Receivers engaged Knight Frank to market the development site for sale. Knight Frank commenced marketing on or about 20th October 2017.
7. One unit in the Podium, known as the Broadway Bar Café (“the Café”), was subject to a 35 year lease dated 30th July 2003 in favour of Wizard Inns Ltd (“the Café Lease”). There was also a sub-Lease of the Café in favour of Hartland Residential Home Ltd. Wizard Inns surrendered the Café Lease on 20th February 2017, but the sub-lease remained in being.

8. By a contract dated 12th October 2017 (“the Hartland Agreement”) Mr Samady and his business partner Mr Michael Ross purchased an option either to take an assignment of the Café Sub-lease or to purchase the shares of Hartland. They were therefore in a position, by one route or another, to do a deal with any purchaser of the development site which would enable the purchaser to obtain vacant possession of the Podium. Vacant possession was necessary in order to permit the full development which CNM had intended. The ability to obtain vacant possession of the Podium was highly material to the value of the development site as a whole.

9. CNM pleads, at paragraph 72 of its Particulars of Claim, that:

“At all material times, once it became apparent to them that refinance and redevelopment in accordance with CNM’s original intentions was not achievable by reason of the events complained of herein, Mr Samady and Mr Ross have been/were willing to negotiate a sale of the Café Sub-lease to the Receivers and/or to a purchaser of the Development Site. Ownership of the Café Sub-lease, or its surrender, would allow/have allowed a purchaser of the Development to easily take vacant possession of the Podium and proceed with the intended second phase of development, and would therefore have/have had a material favourable impact on the value of the Development Site to that purchaser.”

10. The words which I have italicised were the subject of a Request for Further Information. CNM’s response was that the date when it became apparent that refinance and redevelopment in accordance with its original intentions was not achievable was 8th December 2017, the date when the Receivers entered into a contract for the sale of the property to a company called Tolworth Tower Investment Ltd (“TTIL”). Thus the plea in paragraph 72 must be understood as limited to a plea that CNM was willing to negotiate a sale of the Café Sub-Lease after 8th December 2017, when the development site had already been sold. Any such negotiation would therefore have been with the purchaser of the site. It follows that the plea that CNM was willing to negotiate a sale of the Café Sub-Lease with the Receivers is incoherent and can be ignored: by the time CNM says that it was willing to negotiate, the Receivers had no further interest in the site.

11. CNM pleads further, at paragraph 74, that:

“The facts set out at paragraph 72 above (including the willingness to sell the Café Sub- lease) were communicated (i) to Knight Frank by no later than 14 November 2017, and (ii) to the Receivers (specifically Mr Khalastchi) by no later than 15 November 2017. Reliance is placed upon emails sent respectively on those dates by Mr Samady (i) to Mr Justin Gaze of Knight Frank, copied to the Receivers, and (ii) to, or copied to, the Receivers. The purchase of the shares in Hartland by Mr Samady and Mr Ross, ultimately achieved by means of a special purpose vehicle, would have been highly material to any prospective purchaser of the Development Site if, as should have been the case, the Receivers had informed such prospective

purchasers of that fact, and that Mr Samady and Mr Ross were anxious to conclude arrangements in connection with the Café Bar on terms favourable to a person wishing to develop the Development Site. This would have been critical to any development business plan.”

12. The emails referred to in this paragraph say, respectively, as follows:

“I would like to inform you that we have agreed and signed terms for the Vacant Possession of the Pub Lease at TT. Please inform buyers that VP [vacant possession] would be available.”

and

“Re the pub lease agreement to purchase lease holder has been entered which is good news for the asset and is a key driver of value for bidders in the sale process. Therefore urgently the sales data room requires updating and each interested party informed without which bids will be somewhat meaningless.”

13. Although CNM’s pleading refers also to a conversation with Mr Justin Gaze of Knight Frank, CNM’s counsel, Mr Christopher Lundie, confirmed that CNM does not contend that any material information was conveyed in this conversation beyond what is said in the emails quoted above. It is apparent that the emails say rather less than is claimed for them in the pleading. Moreover, CNM does not allege that it ever gave any indication of the terms on which vacant possession would be available or the price which it would demand from any purchaser. It merely pleads that the terms would be a matter for negotiation.
14. CNM admits that the Receivers requested a copy of the agreement which Mr Samady was saying had been signed, and that Mr Samady declined to provide this. Accordingly the knowledge which the Receivers had was limited to the content of the two emails quoted above, and has to be seen in the context that Mr Samady was not prepared to provide the agreement which he claimed to have concluded, and that although he was saying in general terms that vacant possession would be available, he did not at any stage give any indication of the terms (and in particular the price) on which it would be available.
15. Paragraph 75 of the pleading deals with an online virtual data room:
- “The Receivers opened, or caused to be opened, an online virtual data room (the ‘Data Room’) for the purpose of marketing the Development Site and making information available (electronically) to potential purchasers. The Data Room included the 2003 Café Lease, but did not include (i) any information concerning the surrender of that lease to which the title had been closed, or (ii) any information concerning the Café Sub-lease and the fact that this lease was available to be purchased.”
16. However, so far as the Café Sub-lease was concerned, it is wrong to say, even on CNM’s case, that the lease “was available to be purchased”. As already pointed out,

CNM's own case is that Mr Samady and Mr Ross were only willing to enter into negotiations to sell the sub-Lease once the sale of the development site was concluded on 8th December 2017.

17. In the event the bid process conducted by Knight Frank was closed on or about 29th November 2017. It is CNM's case that only one final bid was received, from TTIL, a Jersey registered company connected with Meadow, the entity to which the loans had been sold. By a contract dated 8th December 2017 the Receivers agreed to sell the development site to TTIL for the total outstanding balance of the loans (something in excess of £80 million) which, according to CNM, was below its true market value. Completion was to take place on 31st March 2018.

CNM's claims against the Receivers

18. CNM's original pleaded case was that the Receivers were in breach of their equitable duties to exercise proper skill and care to obtain the best price reasonably obtainable on the sale of the development site. The particulars of breach were set out in paragraph 80 of the Particulars of Claim as follows:

"PARTICULARS OF BREACH

- (1) the Receivers failed to market the Development Site adequately in all respects, including in particular by marketing it for approximately just 40 days;
- (2) the Receivers caused or permitted the 2003 Café Lease to be provided to potential bidders, in particular via the Data Room, notwithstanding that it had been surrendered and/or failed to make the fact of its surrender known to potential bidders;
- (3) the Receivers failed to take reasonable steps to ascertain the terms on which the Café Sub-Lease might be acquired, thereby failing in their duty to familiarise themselves with the nature of the asset which they were marketing;
- (4) the Receivers:
 - (i) failed to inform potential purchasers that [the] Café Sub-Lease was available to be purchased or their other terms would be available, for example for the acquisition of the shares of Hartland (as to which possible purchase/other terms, potential purchasers could and should have been referred to Mr Samady for further information), such that it was therefore possible to secure vacant possession of the Podium; and
 - (ii) as pleaded in paragraphs 25.3, 25.12 and 25.14 of the Knight Frank Defence, on various occasions between 30th October 2017 and 14th November 2017 inclusive, [Mr Carvill-Biggs] took active steps to cause Knight Frank to

withhold from the market information about the Hartland Agreement. Those paragraphs deal respectively with the Receivers' instructions to Knight Frank:

(a) on or about 30th October 2017 not to inform the market about information imparted by Mr Samady to Mr Gaze about having recently 'come to an agreement' with Wizard 'about surrendering' the Café Lease unless and until the receivers and/or Knight Frank had documentary evidence of the surrender,

(b) on or about 10th November 2017, not to release to potential purchasers documents that have been provided to the Receivers by the Claimant's former solicitors relating to the surrender of the Café Lease, *and to the sub-lease*. These in turn had been passed to Knight Frank. This was despite Knight Frank's specifically having advised the Receivers that discussions with potential purchasers were starting to centre around the ability to 'deliver the [development] scheme with the current tenants in situ' and in particular the Wizard Inns' tenant.

(c) on or about 14th November 2007, in terms similar to those pleaded at (a) above.

Until disclosure has been provided, CNM is unable more fully to particularise these matters as it is dependent at present upon what has been pleaded by Knight Frank in its Defence.

- (5) the Receivers otherwise failed to market the Development Site on the basis that it was or could be available without any lease or occupation encumbering the Café or to invite potential purchasers to submit bids on the basis of vacant possession being available;
- (6) the Receivers failed to give proper or adequate consideration to the question of whether TTIL's bid represented a reasonable price for the Development site, or whether it might be possible to obtain a better price; and
- (7) the Receivers failed to give proper consideration to the interests of CNM when assessing whether to accept TTIL's bid or to extend the sale process, particularly given the apparent close connection between TTIL and Meadow."

19. Although the words "and to the sub-lease" in sub-paragraph (4)(ii)(b), which I have italicised in the quotation above, purport to be taken from Knight Frank's Defence to the third party claim made against them by the Receivers (which has now been settled), in fact no such words are contained in Knight Frank's Defence. Further, the entirety of

sub-paragraph (4)(ii) is concerned with things allegedly done by the Receivers between 30th October and 14th November 2017 “to cause Knight Frank to withhold from the market information about the Hartland Agreement”. But as CNM admits, Knight Frank and the Receivers were not told about the Hartland Agreement until the emails of 14th and 15th November 2017 which I have quoted above. Before that they knew nothing about it and so could not have withheld information about it from the market. In fact the paragraphs of Knight Frank’s Defence in the third-party proceedings on which this plea is expressly founded have nothing to do with the Hartland Agreement. Accordingly the whole of the plea in sub-paragraph (iv)(ii) is misconceived.

The preliminary issue

20. The Receivers denied CNM’s claims on the facts, but also pleaded that the claims were precluded by various terms of the security documents pursuant to which they were appointed. In June 2020 Mr Justice Foxton tried a preliminary issue, as a result of which he held that the Receivers would only be liable for breach of the equitable duty of care owed to CNM where the liability in question was directly caused by the Receivers’ gross negligence or wilful misconduct (*CNM Estates (Tolworth Tower) Ltd v VeCref I Sarl* [2020] EWHC 1605 (Comm) at [80]). Permission to appeal was subsequently refused by Lord Justice Flaux. As Mr Justice Foxton also held when dealing with consequential issues arising from his judgment, no case of gross negligence or wilful misconduct was then pleaded. It followed that, unless amended, the claim was bound to fail.

The unless order

21. However, months went by and CNM took no steps to amend its Particulars of Claim. On 12th January 2021 the Receivers invited CNM to discontinue its claim or to provide a draft amendment for the Receivers to consider. In March 2021 CNM sought advice from leading counsel and, on 8th April 2021, indicated that it intended to continue with its claim and to seek permission to serve an amended pleading. However, it did not do so, as a result of which the Receivers applied to the court for directions. Before the application was heard, Mr Samady (at that stage acting without lawyers, although CNM had previously had five different firms of solicitors and at least two counsel teams acting for it) advised on 29th October 2021 that CNM intended to advance a case of wilful misconduct. Eventually, on 3rd November 2021, shortly before the hearing for directions was due to take place, CNM agreed the terms of an order which was then duly made by Mr Justice Bryan (“the unless order”). It provided by consent that:

“The Claimant shall, by 4pm on Friday, 14 January 2022 serve on the parties and CE File draft Re-Re-Amended Particulars of Claim (‘the Proposed RRAPOC’), failing which its claim shall be struck out.”

22. CNM did serve a draft pleading on 14th January 2022, which pleaded a case of wilful misconduct. It did not at that stage make an allegation of gross negligence. Nor did it make a formal application to amend.
23. The Receivers indicated that CNM would need to make a formal application to amend at the second case management conference, which was listed for 11th May 2022. This resulted in CNM issuing an application on 6th May 2022, appended to which was a

further Re-Re-Amended Particulars of Claim which, this time, included a plea of gross negligence as well as wilful misconduct. In the event CNM sought an adjournment of the case management conference, which took place before the judge on 25th and 27th May 2022.

The proposed amendments

24. The proposed amendments assert for the first time that the failures alleged against the Receivers were not merely negligent, but were part of a deliberate scheme by the Receivers to suppress any interest on the part of potential buyers in order to enable TTIL, an associate of Meadow which had purchased the loans, to secure the site at the lowest possible price, such that the entire bidding process conducted by Knight Frank was a sham.

25. Thus it is proposed to add the following to paragraph 74 should of the Particulars of Claim which I have set out at [11] above:

“However, the Receivers wilfully withheld this information from perspective [*sic.*] buyers, despite multiple requests from Knight Frank for this information to be made available as requested by potential buyers. Both Knight Frank and potential buyers viewed this as critical information which would have a very significant impact on the value of the property. The Receivers did so, wilfully, to suppress the buyer interest, and hence the value of the highest bid in order, that TTIL/Meadows, who appointed them, could reach their known objective of securing the site purchase at the lowest possible price.”

26. In similar vein, CNM proposes to add the following to paragraph 75, dealing with the failure to include information about the Café Lease and Sub-lease in the data room:

“This was a wilful omission by the Receivers to suppress the buyer interest, and hence the value of the highest bid in order, that TTIL/Meadows, who appointed them, could reach their known objective of securing the site purchase at the lowest possible price. Despite protests from Knight Frank, they were instructed by the Receivers to ‘go to market come what may’.”

27. The quotation “go to market come what may” purports to be taken from an email sent by Mr Carvill-Biggs to Knight Frank on 17th October 2017. It is a misquotation. The email complains about what is said to be Mr Samady’s obstruction of the marketing of the site and says that:

“I want to make it plainly clear that his [Mr Samady’s] obstruction only hampers the marketing effort and come what may, we shall launch tomorrow with the information as it stands.”

28. The email had nothing to do with the Café Lease and could not have had anything to do with the Hartland Agreement relating to the Café sub-Lease, about which (as CNM accepts) the Receivers and Knight Frank knew nothing at this time.

29. The allegation that the entire bid process was a sham is contained in paragraph 76 of the draft amendment:

“The Receivers conducted the bid process to enable the ‘pre-selected’ buyer TTIL/Meadows to purchase the property at the lowest possible price and on the best delayed completion terms, dictated by TTIL/Meadows, thereby rendering the entire process a sham.”

30. The plea of gross negligence is dealt with more shortly. The Particulars of Breach contained in paragraph 80 are materially unchanged, but the plea is added in paragraph 81 that:

“The Claimant will contend that the breaches of duty set out above constitute gross negligence on the part of the Receivers. ...”

31. The amendments appear to have been settled by Mr Samady himself. They are not signed by counsel or by any lawyer owing professional duties not to make allegations of what is effectively fraud without reasonable grounds on which to do so.

The judgments

32. The judge dealt separately with the pleas of gross negligence and wilful misconduct.

33. So far as gross negligence was concerned, she took the view, which she indicated to counsel at an early stage, that CNM was in breach of the unless order and needed relief from sanction in order to advance this case. That led to Mr Lundie making an oral application for relief from sanction, which the judge refused in a short *extempore* judgment. She said that CNM had done nothing to progress its claim since the judgment on the preliminary issue; that the Receivers had had to flush out whether an amendment was going to be made and, if so, what it was; that the unless order had been CNM’s last chance to put its house in order; and that even then, the draft amendment was left until the last minute. She said that:

“... this was an unless order, it was designed to be the last chance and it seems to me that I would drive a coach and horses through the spirit and intent of that order if I am now to say that it should not take effect in accordance with its terms.”

34. Accordingly she refused permission to advance the case based on gross negligence.

35. The judge did not explain in her short judgment why she had concluded that relief from sanction was necessary for the gross negligence plea to be advanced, but she explained her thinking in her later ruling refusing permission to appeal. She said that the unless order gave CNM a final chance to advance a case which would not be precluded by the judgment on the preliminary issue and that it did not permit CNM to avoid its claim being struck out by serving an amendment in one form but then seeking permission to raise a completely different claim.

36. After hearing argument on the issue of wilful misconduct, the judge gave a further *extempore* judgment refusing permission to amend. She recorded that the principles

applicable to the grant of such permission were not in dispute, said that she had “a general discretion whether to permit an amendment, my essential task being to balance the prejudice to one party if the amendments are allowed against the prejudice to the other if they are disallowed”, and identified the principal relevant factors as being the lateness of the application, any reasons for delay, the adequacy of the pleading and whether it had a real prospect of success, of which the latter two were the most important. As to these, the judge held that the proposed amendment just about set out with sufficient clarity the nature of the case which CNM sought to make, but that the claim was internally incoherent and inconsistent in some respects, such that the claim was “decidedly weak” and “lacks conviction”. She weighed this against other factors, including that in view of the procedural history (which included a series of failures by CNM to comply with orders of the court even before the hearing of the preliminary issue) the Receivers could fairly claim to have been “mucked about”, that the case of wilful misconduct was “a very serious allegation to make against professional people”, and that it had been “raised at the last minute in a claim which has now been ongoing for over four years”, even though the trial was still some way off. Overall, the judge’s conclusion was that:

“36. Taking a step back and balancing the factors all in the scales, I cannot regard this as anything other than a claim which is speculative and weak, even if I charitably assume that it is just about pleadable. In my judgment, therefore, it would not be right or in accordance with the overriding objective to allow it to continue for another two or three years occupying court time, which has many other calls on it.”

Submissions on appeal

37. For CNM Mr Lundie submits that the judge was wrong to hold that relief against sanction was required before permission could be given to advance a plea of gross negligence. He submitted that the unless order required CNM to serve a draft pleading by 14th January 2018 if it was to avoid a strike out, which is what it had done. There was therefore no question of CNM being in breach of the unless order and there was nothing in the order which prevented CNM from seeking permission to make a further amendment, which should be dealt with in the ordinary way. Accordingly this was not a case of failure to comply with an order within the scope of CPR 3.8(1) and no sanction was applicable from which relief needed to be sought. Mr Lundie submitted also that, if relief from sanction was necessary, the judge ought to have granted it.
38. As to wilful misconduct, the judge was wrong to have concluded that the proposed amendment was speculative and weak. It was a claim with a real prospect of success which the judge ought to have permitted to go to trial. What she had done, in effect, was to conduct a mini-trial, contrary to the well established approach that this is not appropriate.
39. Mr Mark Simpson KC for the Receivers supported the judge’s reasoning and submitted, by a Respondent’s Notice, that if the judge had not found that the claim had no real prospect of success, she ought to have done so.

Analysis

Was relief from sanction needed?

40. I deal first with the question whether CNM needed relief from sanction in order to be able to apply for permission to advance a case of gross negligence.
41. CPR 3.8(1) provides that:

“Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.”
42. Whether relief from sanction should be granted must be determined in accordance with the approach set out in the well-known case of *Denton v T.H. White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3296, but before that approach comes into play, two prior questions must be considered. The first is whether a rule, practice direction or court order imposes a sanction. The second is whether a party has failed to comply with the rule, practice direction or court order in question.
43. In the present case the unless order undoubtedly imposed a sanction, namely that in the event of non-compliance CNM’s claim would be struck out. That means that its whole claim would be struck out. There was no scope for the halfway house adopted by the judge, which was to hold that the effect of the order was to prevent CNM from pursuing a claim which was not included in the draft amendment served within the time specified, while permitting the claim which it had pleaded in time to go forward. That is not what the unless order said. The correct position was that either CNM had complied with the order, in which case no question of relief from sanction arose, or it had not, in which case (subject to relief from sanction) its whole claim was struck out.
44. So did CNM comply with the order? This is a binary question. Either it did or not. What the order required CNM to do was to serve a draft amendment to its Particulars of Claim within the specified deadline. That is what it did. It cannot be, and was not, suggested that the document which CNM served was not a “draft Re-Re-Amended Particulars of Claim”. Accordingly it complied with the order. That should have been the end of any question of relief from sanction being needed.
45. I would accept that it is possible to envisage a case where a party who is required to comply with an unless order, for example by serving a pleading, does something within the deadline which cannot properly be regarded as compliance, for example by serving a document which contains gibberish or blank sheets of paper or that a party may serve a Response to a Request for Further Information which provides some but not all of the information which a party has been ordered to provide. In such a case, it would be obvious that there has been non-compliance and the sanction takes effect. But this case is far removed from anything like that.
46. I conclude, therefore, that the judge was wrong to rule against CNM on this issue. She should have considered the application to amend to plead gross negligence on its merits, as she did with the amendment concerning wilful misconduct. We must therefore consider the question of amendment for ourselves. Before doing this, however, I shall consider the judge’s approach to the issue of wilful misconduct.

Wilful misconduct

47. It was common ground before the judge that this was a late amendment, albeit not a “very late” amendment which put a trial date at risk. The applicable principles, which were not in dispute, were conveniently summarised by Mrs Justice Carr in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at [36] to [38], a summary which has been adopted in other cases. It was not suggested that the judge’s summary of the applicable principles in this case, which I have set out at [36] above, was mistaken.
48. One necessary condition for any amendment is that the claim as amended should have a real prospect of success, which is the same test as applies on a summary judgment application. There is no point in giving permission for an amendment which is fanciful and which has no real prospect of success. In this regard the principal focus must be on the pleading in question and no attempt should be made to resolve disputed matters of evidence (conducting a mini-trial): *Okpabi* at [103] to [107]. It is, however, appropriate to consider whether a proposed pleading is coherent and contains properly particularised elements of the cause of action relied upon (*Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at [42]).
49. Even if an amendment clears that initial hurdle and has a real prospect of success, whether to allow the amendment remains a matter of discretion. I would accept, however, that in general (and save perhaps in the case of “very late” amendments) it is not appropriate to consider the strength or weakness of the claim as a factor relevant to that exercise of discretion, for the reasons given by the Master of the Rolls and Lord Justice Newey at [69] to [77] of their judgment.
50. It is therefore necessary to consider whether the proposed plea of wilful misconduct has a real prospect of success. For this purpose I would draw a distinction between the allegations relating to the Hartland Agreement (in short, that the Receivers failed to draw the attention of purchasers to the fact that Mr Samady and his partner had acquired an option which could enable a purchaser to obtain vacant possession of the Podium) and the remaining claims. For the reasons which I shall explain, I consider that on the face of CNM’s own pleadings the allegations relating to the Hartland Agreement are indeed fanciful, with no real prospect of success. They are internally contradictory and largely incoherent. I would accept, however, that the same cannot be said of the remaining claims by reference to CNM’s pleading alone.
51. Dealing first with the Hartland Agreement, as Mr Simpson submitted, and as I have sought to show, CNM’s own case has to admit that the Receivers knew nothing about the Hartland Agreement until mid-November 2017; even then Mr Samady would not provide a copy of the agreement despite a request to do so; and he would not have been willing to negotiate with any proposed purchaser until that purchaser had committed itself to a purchase of the site, or even to indicate at what price he might be willing to sell if a purchaser did commit itself.
52. So what were the Receivers supposed to do? The highest that CNM has been able to put its case, in paragraph 30B of its Amended Reply, is that “prospective purchasers should have been informed at the time when the Development Site was still being marketed of the situation as it then stood”, i.e. that Mr Samady claimed to be in a position to give vacant possession of the Podium. For my part I find it hard to think that

the Receivers can be criticised for not informing prospective purchasers about this when it is apparent that this was merely a claim by Mr Samady which he was not prepared to support by providing a copy of the Hartland Agreement, let alone that their failure to do so could be characterised as wilful misconduct.

53. In this regard it must be remembered that wilful misconduct is very different from negligence or even gross negligence. It involves deliberate wrongdoing. It is sufficient to take the summary by Mr Justice Longmore in *National Semi-conductors (UK) Ltd v UPS Ltd* [1996] 2 Lloyd's Rep 212 at p.214:

“If I summarise the principle in my own words, it would be to say that for wilful misconduct to be proved there must be either (1) an intention to do something which the actor knows to be wrong or (2) a reckless act in the sense that the actor is aware that loss may result from his act and yet does not care where the loss will result or not or, to use Mr Justice Barry's words in *Horobin's* case, ‘he took the risk which he knew he ought not to take’ [1952] 2 Lloyd's Rep at p.460.”

54. In the present case the misconduct alleged is of the former kind.
55. But I would not rest my decision merely on the implausibility of CNM's case. The further question arises, even if the Receivers had informed prospective purchasers, what difference would it have made? At this stage, as CNM admits, Mr Samady was not prepared to negotiate with any such prospective purchaser. He was still hoping that CNM would be able to complete the development itself as originally intended, which would be impossible if a sale to a purchaser had taken place. So on CNM's own pleaded case Mr Samady did not want to give any encouragement to a prospective purchaser. The most that he would have said if approached by any prospective purchaser was that if that purchaser did conclude a contract for the purchase of the site, it should come and talk to him. A prospective purchaser in that position could only sensibly conclude that Mr Samady would seek to extract maximum value from his ability to provide vacant possession of the Podium in any negotiation, as he would have been entitled to do, and that it should pitch any bid for the development site accordingly. But that is no different from the position in which a prospective purchaser would have been anyway if the Hartland Agreement had not existed. At all events, CNM has pleaded no facts which would have led the Receivers to understand that Mr Samady was prepared to allow a prospective purchaser to obtain vacant possession for anything less than full value.
56. Returning to the particulars of breach of duty in paragraph 80 of the Particulars of Claim set out at [18] above, which must now be viewed also as particulars of wilful misconduct and gross negligence, it can be seen that the allegations relating to the Hartland Agreement are the principal components of the claim. I have already pointed out at [19] above that the plea in sub-paragraph (iv)(ii) is misconceived, but it can also be seen that the whole of sub-paragraphs (3) to (5) depend on CNM making good its allegations relating to the Hartland Agreement. In my view the judge should have held that it has no prospect of doing so.
57. What is left of the claim once those allegations are stripped away, as in my judgment they must be? All that is left are the allegations that the marketing period was too short (paragraph 80(1)), that the Receivers did not draw the attention of prospective

purchasers to the fact that the Café Lease had been surrendered (paragraph 80(2)), and the very general and unparticularised allegations that the Receivers deliberately failed to give proper consideration to the question whether TTIL's bid represented a reasonable price for the development site and failed to give proper consideration to the interests of CNM.

58. I do not think that it is possible by reference to the pleading itself to say that these claims have no real prospect of success. Without expert evidence the court has no way of knowing, for example, what would be a normal period in which to test the market for a property like Tolworth Tower.
59. I might have been prepared to allow the plea of wilful misconduct to be made so far as these remaining claims are concerned, even though I regard them as implausible, as matters currently stand, although CNM has made no application to amend limited to these remaining claims. The application before the judge was for permission to amend to advance a claim which included the Hartland Agreement allegations and she was right, in my view, to refuse permission.

Gross negligence

60. Much the same considerations would have applied to the issue of gross negligence if the judge had dealt with this as a late application to amend, rather than as a case where relief from sanction was required. As she did not do so, it is for us to exercise a discretion afresh. For the reasons already given in relation to wilful misconduct, I would conclude that the allegations relating to the Hartland Agreement do not have a real prospect of success, and that permission to amend to advance a claim which includes these allegations should be refused.
61. It is unnecessary to consider whether permission should be granted so far as the remaining allegations are concerned, in part because there has been no such application and in part because the conclusion reached by the Master of the Rolls and Lord Justice Newey is that the claim as a whole, including the Hartland Agreement allegations, does have a real prospect of success and that permission to amend should be granted.

Disposal

62. For my part, although my reasoning differs from that of the judge, I would have dismissed the appeal, with the consequence that her order dismissing the claim against the Receivers for damages and/or equitable compensation would have stood. As my Lords have reached a different conclusion, however, the appeal would have been allowed. However, in view of the settlement of the action (see [90] below), there will be no order as to the consequences of the appeal.

SIR GEOFFREY VOS, MASTER OF THE ROLLS and LORD JUSTICE NEWHEY:

63. We are grateful to Lord Justice Males for setting out the facts and the issues so clearly in the first 39 paragraphs of his judgment. We shall not repeat what he has said, and we will adopt his abbreviations.
64. We agree with Males LJ that the appeal should be allowed on ground 1 for the reasons he gives in [40]-[46]. The judge was, we think, wrong to have determined that CNM

required relief from sanction in order to apply to amend its Particulars of Claim to add the claim that CNM would contend that the (already pleaded) breaches of duty constituted “gross negligence on the part of the Receivers”. The judge ought to have considered that proposed amendment on the same basis as she was considering the application to amend to plead wilful misconduct on the part of the Receivers. The additional factor, so far as the gross negligence pleading was concerned, was, of course, that it was intimated later (on 6 May 2022) and after the deadline (on 14 January 2022) for filing the proposed RRAPOC had passed.

65. Accordingly, in our judgment, it is necessary for this court (a) to consider afresh whether CNM should be granted permission to amend to allege gross negligence, and (b) to consider whether the judge’s decision to refuse permission in respect of the wilful misconduct amendments should stand. We have reached the conclusion, despite Males LJ’s powerful reasoning, that CNM was entitled to be granted permission to make both amendments, so that the substantive appeal against the judge’s decisions should be allowed. We will seek to explain our reasons shortly.

The law applicable to granting permission to amend

66. Males LJ has already referred to three cases: *Okpabi v. Royal Dutch Shell Plc* [2021] UKSC 3, [2021] 1 WLR 1294 (“*Okpabi*”), *Quah Su-Ling v. Goldman Sachs International* [2015] EWHC 759 (Comm) (“*Quah Su-Ling*”), and *Elite Property Holdings Ltd v. Barclays Bank Plc* [2019] EWCA Civ 204 (“*Elite*”).
67. As can be seen from *Quah Su-Ling* at [38], the courts have distinguished between “late” and “very late” amendments, a “very late” amendment being one which would cause the trial date to be lost. As Lloyd LJ observed in *Swain-Mason v. Mills & Reeve LLP* [2011] EWCA Civ 14, [2011] 1 WLR 2735, at [72], “the court is and should be less ready to allow a very late amendment than it used to be in former times, and ... a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court”. *Quah Su-Ling* itself involved an application to make “very late” amendments and, in that context, Carr J thought it appropriate to assess the strength of the new case: see [57].
68. No one suggests that permission to amend is sought “very late” in the present case. To the contrary, the judge noted at [34] of her judgment that “the trial is still in the dim and distant future” and that “disclosure has not yet taken place”. Moreover, the amendments were specifically occasioned by Foxton J’s decision; CNM had no need to plead either wilful misconduct or gross negligence before that decision was made. Indeed, subject to any arguments as to abuse, it would still be open to CNM to issue fresh proceedings against the Receivers if it were denied permission to amend. Contracts for the alleged sale at an undervalue were exchanged on 7 December 2017, less than six years ago.
69. The question which then arises is how far it is appropriate to consider the strength of a proposed claim in such circumstances. There is no doubt that permission to amend should be refused if it is apparent that a proposed claim would have no real prospect of success. To what extent, if any, is it otherwise relevant to gauge the prospects of success of the amendments?

70. In *Elite*, the claimants appealed against a refusal of permission to amend. Having explained at [40] that there was no dispute about the test to be applied, Asplin LJ (with whom Hamblen LJ and Nugee J agreed) said this:

“41. For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a *prima facie* case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No3)* [2003] 2 AC 1.

42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon. With that test in mind, I turn to the grounds of appeal.”

71. In the authorities which Asplin LJ cited in this passage, the courts were not commenting on applications to amend as such, but rather on the principles applicable to summary judgment and setting aside default judgments. In *ED&F Man Liquid Products Ltd v. Patel* [2003] EWCA Civ 472, [2003] CP Rep 51, Potter LJ (with whom Peter Gibson LJ agreed) said this when comparing the test for summary judgment with that which applies to an application to set aside a default judgment:

“8. I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observation in [*Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd’s Rep 221] that the defence sought to be argued must carry some degree of conviction. Both approaches require the defendant to have a case which is better than merely arguable
....

10. It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be

susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p.467 and *Three Rivers DC v Bank of England (No.3)* [2001] UKHL16, [2001] 2 All ER 513 per Lord Hope of Craighead at ... [95].”

72. In *Three Rivers District Council v. Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1, Lord Hope had reiterated that it is not appropriate to conduct a mini-trial on an application for summary judgment. He said at [95]:

“The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.”

73. In a similar vein, the Supreme Court has recently stressed the importance of avoiding a mini-trial in the case of a challenge to the jurisdiction of the court. Lord Hamblen said this at [103]-[107] in *Okpabi*:

“103. ... Those proceedings were meant to be as defined in the particulars of claim for which permission to serve out was sought. In this case the challenge was made on the grounds that the claimants had no arguable case against the anchor defendant. Where, as in this case, there are particulars of claim, that is an issue which should ordinarily fall to be addressed by reference to the pleaded case.

104. If the issues are addressed by reference to the pleaded case, then the focus of the inquiry is clearly circumscribed and problems of lack of proportionality should generally be avoided.

105. In the present case, not only did the parties choose to swamp the court with evidence, but it appears that the claimants chose not to update their pleadings to reflect the evidence. ...

107. The result is that instead of focusing on the pleaded case and whether that discloses an arguable claim, the court is drawn into an evaluation of the weight of the evidence and the exercise of a judgment based on that evidence. That is not its task at this interlocutory stage. The factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable.”

74. Asplin LJ’s comments in *Elite* thus lend no support to any idea that, so far as the strength of a claim is concerned, the courts take a different approach in the context of a “late” amendment to that adopted in relation to summary judgment. To the contrary, Asplin LJ relied on cases in which the principles governing summary judgment applications were addressed, and her remarks reflect those principles. Nor were we taken to any other authority in which it had been held that, when considering a “late” (as opposed to a “very late”) amendment, it was permissible to attach weight to the apparent weakness of a case which would survive an application for reverse summary judgment.
75. As we have indicated, an application for permission to amend particulars of claim will be refused if the amendments put forward a new case which would have “no real prospect of succeeding” within the meaning of CPR Part 24. Beyond that, the Court has to strike a balance between the interests of the applicant and those of other parties and litigants more generally: “[i]n essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted” (*Nesbit Law Group LLP v. Acasta European Insurance Company Ltd* [2018] EWCA Civ 268, at [41] per Vos LJ).
76. Aside from very late amendments, we do not think the perceived strength of the case is normally a factor to be taken into account when undertaking that balancing exercise. As Carr J recognised, however, in *Quah Su-Ling* at [38(d)]: “lateness is not an absolute, but a relative concept”. There will therefore perhaps be cases where the quality of the delay is unclear. In such cases, it may be necessary to consider, as Carr J suggested: “a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done”. But even if it is necessary to adopt that approach when the amendment is on the cusp of being “late” and “very late”, it will never be appropriate to attempt to conduct a mini-trial.
77. The general rule is that, except in the case of “very late” amendments, unless it can be seen that a claim has no real prospect of succeeding, its merits should be determined at a full trial. The warnings against mini-trials apply with just as much force to applications to amend as they do to summary judgment or jurisdiction disputes. The CPR do not bar litigants from pursuing claims that might at an interlocutory stage be considered weak. In our view, HH Judge Eyre QC (as he then was) correctly summarised the principles applicable to the determination of an application to amend in *Scott v. Singh* [2020] EWHC 1714 (Comm) at [19]:

“The new case set out in the proposed pleading must have a real prospect of success The approach to be taken is to consider those prospects in the same way as for summary judgment namely whether there is a real as opposed to a fanciful prospect of the claim or defence being raised succeeding. It would clearly be pointless to allow an amendment if the claim or defence being raised would be defeated by a summary judgment application. However, at the stage of considering a proposed amendment that test imposes a comparatively low burden and the question is whether it is clear that the new claim or defence has no prospect of success. The court is not to engage in a mini-trial when considering a summary judgment application and even less is it to do so when considering whether or not to permit an amendment.”

The judge’s decision on the wilful misconduct case

78. As we read the judge’s judgment, she did not consider it possible to say that the wilful misconduct allegations for which CNM sought permission had no real prospect of success, but she thought them weak. She said, for example, that “even if it cannot be said that the case is bound to fail, it is ... decidedly weak and ... lacks conviction” ([30]) and that “[t]his is a poorly pleaded, inadequately particularised claim which is not obviously promising” ([31]) before concluding at [36]:

“Taking a step back and balancing the factors all in the scales, I cannot regard this as anything other than a claim which is speculative and weak, even if I charitably assume that it is just about pleadable. In my judgment, therefore, it would not be right or in accordance with the overriding objective to allow it to continue for another two or three years occupying court time, which has many other calls on it.”

There would have been no need for the judge to “[balance] the factors in the scales” if she had seen the claim which CNM wished to pursue as having no real prospect of success: permission to amend would necessarily have been refused regardless of any other factor.

79. In our view, the judge was mistaken in this case to attach significance to whether the proposed claim could be considered weak. Subject to the very limited exception mentioned at [14] above, the merits of the claim would have been material only if the application to amend had been “very late” in the sense in which Carr J used those words in *Quah Su-Ling*. We do not think the judge was entitled to refuse CNM permission to amend on the basis that the perceived weakness of the wilful misconduct claim meant that it “would not be right or in accordance with the overriding objective to allow it to continue for another two or three years occupying court time”.
80. That being so, this court must, as it seems to us, exercise its own discretion in relation to the wilful misconduct amendments as well as those relating to gross negligence.

Do the proposed amendments have a real prospect of success?

81. By way of Respondent's notice, the Receivers contend that, even if the judge did not so decide, the amendments for which CNM seeks permission do not have a real prospect of success. Our own view, having reviewed the proposed RRAPOC and the evidence considered by the judge, is that, whether or not the allegations which CNM wishes to make might be said to be weak, they cannot be characterised as fanciful. In short, they have a real prospect of success.

The Hartland Agreement allegations

82. Males LJ has explained the background to the Hartland Agreement at [7]-[19]. In our judgment, however, it is not possible to say, as he has, that significant parts of the draft pleading are incoherent or misconceived. Males LJ based his view mostly (a) on the fact that Knight Frank and the Receivers were not told about the Hartland Agreement until the emails of 14 and 15 November 2017, and (b) on CNM's further information to the effect that Mr Samady and Mr Ross were only willing to enter into negotiations to sell the sub-lease once the sale of the development site was concluded in December 2017. It seems to us that the emails themselves are important. They show at least that the Receivers knew three weeks before contracting for the sale that terms had been agreed for vacant possession of the Podium, that CNM thought that buyers should be informed because it was "good news for the asset" and "a key driver of value for bidders in the sale process", and that the sales data room required to be updated.
83. The fact that parts of the draft amended pleading refer to events prior to the emails does not mean that it is not fairly arguable that the Receivers ought to have done something after they were received. Moreover, the further information cannot be taken, in advance of a trial, completely to override the effect of the emails. Even if Mr Samady and Mr Ross would not have negotiated a deal before the sale, the fact that a deal was there to be negotiated afterwards might still have been a "key driver in the sale process". We are also not sure that, at this stage of the proceedings, the relevance of Knight Frank's pleading can be completely discounted.
84. *Elite* makes clear at [42] that:
- "The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon."
85. To say that the claim is weak is not the same as saying that the claim is incoherent. The allegations relating to the Hartland Agreement are not incoherent, simply because the basic complaint about what precisely the Receivers knew and at what times, and how Mr Samady and Mr Ross would have acted if approached by potential buyers to discuss issues relating to the Podium will require evidence at a trial before they can be properly evaluated.
86. Finally in this connection, we do not think that we are justified in deciding the question of causation on the information currently available. We do not think that we can conclude, as Males LJ has said, that a prospective purchaser "could only sensibly conclude that Mr Samady would seek to extract maximum value from his ability to

provide vacant possession of the Podium in any negotiation”. We do not know. What would have happened if purchasers had been told about the possibility that they could obtain vacant possession of the Podium is pre-eminently a matter for trial.

Other matters

87. As Mr Lundie emphasised during his submissions to us, the case which CNM wishes to mount is not founded exclusively on the Hartland Agreement allegations. Among other things, CNM complains about how the development site was marketed (in particular, because it was marketed for only about 40 days), about the Receivers’ failure to inform potential bidders that the Café Lease had been surrendered, about the fact that the Café Lease was included in the data room despite its surrender, that the Receivers deliberately failed to give proper consideration to whether TTIL’s bid represented a reasonable price and that the Receivers failed to give proper consideration to CNM’s interests when assessing whether to accept that bid or to extend the sale process. We agree with Males LJ that it is not possible by reference to the pleading itself to say that these claims have no real prospect of success, not least because we have no way of knowing for how long a property such as the development site would normally be marketed.

The gross negligence allegations

88. The allegations of gross negligence are of lesser gravity than the plea of wilful misconduct. If, therefore, there is, as we think there is, a real prospect of establishing that the Receivers wilfully failed to tell buyers about the Hartland Agreement, to market the property for long enough, and to amend the data room, there is a real prospect that the allegations, though weak, if made good, would be shown to amount gross negligence.

Re-exercising the discretion as regards the draft wilful misconduct and gross negligence pleadings

89. We cannot see why the balance of prejudice lies in favour of refusing CNM the right to take forward its pleadable case. Even a modest prospect of success has some significant value for CNM. It is true that more court time and costs will be incurred, but the pursuit of even weak claims is something that the CPR allows. It would, we think, in the particular circumstances of this case, be unjust to refuse permission to amend, even bearing in mind the serious allegations made against professional people. Not only is this not a case in which a trial date will be lost, but (unlike, say, *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609, [2015] CP Rep 14) it is not one in which the amendments will cause substantial duplication of cost and effort: disclosure has not taken place and, as the judge said at [32] of her judgment, “the basic factual disputes are the same as they ever were”. For the most part, the proposed amendments seek to draw inferences from matters that had been pleaded previously rather than to introduce new facts. Further, the parties agreed 14 January 2022 as the date by which CNM had to serve its proposed RRAPOC, and CNM complied with that deadline. It is true that the express plea of gross negligence was added subsequently, but (a) it did little more than give the Receivers notice that it was CNM’s contention that the negligence it was already alleging was “gross” and (b) the revised draft was served in advance of the pending case management conference. It is also to be recalled in this connection that the limitation period has not yet expired.

90. For these reasons, we would have allowed the appeal, and granted CNM permission to amend its Particulars of Claim in the form of the proposed RRAPOC. However, just before we were going to hand down these judgments to the parties in draft, they notified the court that they had compromised the entire claim. We told them that we intended nonetheless, for reasons that will be obvious, to hand down these judgments, as we have now done. Accordingly, we will make the consent order agreed by the parties notwithstanding our decision.