[2024] EWHC 2191 (Ch)

Case No: IL 2020 000079

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30/08/2024

Before :

CHIEF MASTER SHUMAN

- -

Between :

ILLIQUIDX LIMITED	**Claimant**
- and -	
ALTANA WEALTH LIMITED & ORS	**Defendants**

- -
- -

RICHARD SALTER KC, MARK VINALL and CHARLES WALL (instructed by Reynolds Porter Chamberlain LLP) for the Claimant
TOM MOODY-STUART KC and BEN LONGSTAFF (instructed by Fieldfisher LLP) for the Defendants

Hearing dates: 23-24 May 2024, 13 June 2024

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Approved Judgment

The judgment was handed down remotely at 10am on 30 August 2024 by circulation to the parties or their representatives by email and by release to the National Archives.

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CHIEF MASTER SHUMAN

CHIEF MASTER SHUMAN :

1. This is a claim concerning the business opportunity of monetising Venezuelan sovereign debt. The claim form was issued on 27 July 2020. The amended claim form, issued on 12 January 2021, alleges breach of contract, breach of confidence, breach of trade secrets and copyright infringement. The claimant seeks: declaratory and injunctive relief; an order for delivery up or destruction upon oath of articles or materials; an enquiry as to damages including additional damages pursuant to section 97(2) of the Copyright Designs and Patents Act 1988 and/or such damages as may be appropriate pursuant to the Intellectual Property (Enforcement etc) Regulations 2006 an account of the profit which it is said will exceed £10 million; and an order for all appropriate measures for the dissemination and publication of the judgment.

2. The statements of case are now at the stage of re-amended particulars of claim with supporting confidential annexes 1 to 7, amended defence with supporting confidential annexes 1 to 6 and reply with confidential annex. I have before me draft re-re-amended particulars of claim with draft re-re-amended confidential annex 1 and 5, re-amended defence with draft re-amended confidential annex 4, 5 and 6. In addition the defendants have made two Part 18 requests. The first is dated 22 October 2020, which was responded to on 5 November 2020. The second is dated 18 May 2022, which was responded to on 22 June 2022. At the Costs and Case Management Conference in December 2022 the Court ordered the claimant to provide further substantive responses to the Second Part 18 Request, which the claimant did on 16 January 2023. Some of the responses are confidential and annex A to the first response is confidential.

3. The claim is listed for trial in the latter part of 2024. There are confidentiality orders in place that mean that some of the documentation is contained in confidential bundles, and some are in open bundles. The parties have made various applications which can be separated into 8 discrete sections, all of which were argued out at length. There were 10 lever arch bundles together with 3 authorities bundles. The claimant's skeleton argument was 30 pages long, the defendants' 94 pages long. Whilst I am not encouraging a practice of filing long skeletons they were helpful given the density of this case and the inadequate time estimate that the parties agreed. This case brings into sharp relief the importance of realistic time estimates factoring in that the judge has not 'lived and breathed' the case for many years unlike the parties' legal teams and that this is but one of many cases which each are entitled to and rightly require a proportionate amount of the court's finite resources.

4. The applications and case management conference were heard in open court, with safeguards in place for referencing confidential material.

5. The applications can be separated out as follows.

    (1) The defendants' application for strike out and/or summary judgment in respect of the claimant's case on AV Securities, made by application notice dated 15 March 2024, and permission for the defendants to amend the statements of case accordingly:

        a) the defendants rely on the second and third witness statements of Thomas McKenna dated respectively 15 March 2024 and 25 April 2024;

b) the claimant relies on the fourth witness statement of Daniel Hemming dated 12 April 2024.

(2) The claimant's application for permission to amend its claim in respect of AV Securities, made by application notice dated 15 March 2024:

a) the claimant relies on the second and fifth witness statements of Daniel Hemming dated respectively 15 March 2024 and 12 April 2024;

b) the defendants rely on the first witness statement of Natasha Rao dated 2 April 2024.

(3) The claimant's application for permission to amend its claim in respect of its remaining pleading amendments, made by application notice dated 15 March 2024.

(4) The defendants' application for strike out and/or summary judgment in respect of the claim for injunctive relief made by application notice dated 15 March 2024:

a) the defendants rely on the second and third witness statements of Thomas McKenna dated respectively 15 March 2024 and 25 April 2024;

b) the claimant relies on the fourth witness statement of Daniel Hemming dated 12 April 2024.

(5) The defendants' application in respect of the trial witness evidence and compliance with practice direction 57 AC made by application notice dated 23 April 2024:

a) the defendants rely on the second and third witness statements of Natasha Rao dated respectively 23 April 2024 and 14 May 2024;

b) the claimant relies on the sixth witness statement of Daniel Hemming dated 7 May 2024.

(6) The claimant's application for permission to adduce expert evidence notice dated 29 April 2024:

a) the claimant relies on the seventh witness statement of Daniel Hemming dated 17 May 2024;

b) the defendants rely on the fourth witness statement of Thomas McKenna dated 10 May 2024.

(7) The claimant's application for further disclosure pursuant to either paragraph 17.1 or paragraph 18.1 of PD 57 AD made by application notice dated 2 February 2024:

a) the claimant relies on the first and third witness statements of Daniel Hemming to 2 February 2024 and 20 March 2024;

b) the defendants rely on the first witness statement of Thomas McKenna dated 6 March 2024.

(8) The defendants' application for further disclosure pursuant to either paragraph 17.1 or paragraph 18.1 of PD 57 AD made by application notice dated 15 March 2024:

a) the defendants rely on the second and third witness statements of Thomas McKenna dated respectively 15 March 2024 and 25 April 2024;

b) the claimant relies on the fourth witness statement of Daniel Hemming dated 12 April 2024.

6. The cross-disclosure applications are dealt with in a separate judgment.

THE CLAIM AND FACTUAL MATRIX

7. The claimant alleges that it specialises in illiquid markets, in particular Venezuelan and other emerging markets. Its activities are said to include both sales and trading and the provision of advisory services in respect of trading and investing in illiquid securities, including distressed sovereign debt, bankruptcy claims and non-performing loans. The claimant was under the directorship and senior management of Ms Galina Alabatchka (Ms Alabatchka) and Mr Celestine Amore (Mr Amore).

8. The first defendant is a company incorporated in England and Wales specialising in investment fund management, offering opportunities to third parties to invest in particular funds which it manages. The second defendant is the founder, controlling shareholder and Chief Investment Officer of the first defendant. The fourth defendant is a company incorporated in England and Wales which provides broad consultancy services to the first defendant. The third defendant is the sole director and sole shareholder of the fourth defendant.

9. This case concerns a relationship between the claimant and the defendants over a short period, April 2019 to Autumn 2019.

10. The claimant says that since around May 2017 it developed experience in trading and/or researching distressed investment opportunities in Venezuela, including those investments that were subject to OFAC sanctions. In April 2019 it is said that the claimant approached the third defendant in respect of pursuing an investment strategy for distressed investment opportunities in Venezuela. The third defendant introduced the claimant to the second defendant.

11. From April 2019, by way of a joint venture, the parties explored the possibility of and worked on creating a joint funding vehicle to pursue distressed investment opportunities in Venezuela.

12. On 28 June 2019 the second defendant sent Ms Alabatchka and Mr Amore a letter mapping out the proposals for the joint venture, which was signed on 29 June 2019 by the second defendant, the third defendant and on behalf of the claimant, Ms Alabatchka and Mr Amore ("the JV document").

13. On 8 July 2019 the parties entered into a non-disclosure and non-circumvention agreement, ("the NDA").

14. The first paragraph of the NDA refers to, "potential Venezuela related credit investment opportunities, including (but not limited to) Venezuelan government/corporate bonds and claims and other Venezuelan receivables, private equity and other such Venezuela related opportunities ("Opportunities") to be sourced by IlliquidX Limited".

15. The NDA then defines "Confidential Information" as follows,

> "means any and all information relating to ALTANA and/or to IlliquidX and/or any Opportunities and which is considered by the disclosing Party to be of a confidential nature (or is marked or described as confidential) and furthermore includes, without limitation:
>
> …
>
> (b) information of whatever nature relating to IlliquidX or any of the Opportunities that IlliquidX introduces and/or presents to ALTANA or Brevent, whether eventually invested in or not, which is or has been furnished to ALTANA or Brevent, or to any of their respective Representatives, in oral, written, visual, magnetic, electronic or other form by IlliquidX or its Representatives, or which is or has been furnished by IlliquidX or its Representatives to ALTANA or Brevent, or any of their respective Representatives, in each case in connection with any Opportunities; …"

16. Clause 1 of the NDA under the heading "Confidentiality Undertaking" provides that,

> "Each party undertakes (a) to keep all Confidential Information confidential and not to disclose it to anyone ,,,, save to the extent permitted by paragraph 1.1 below ….and (b) to use the Confidential Information only for the purpose of sourcing, evaluating and (as applicable) introducing and/or presenting Opportunities (the "Permitted Purpose")"

17. "Permitted Disclosure" is then set out in sub-clause 1.1 as,

> "1.1 The undertakings in this letter shall not apply to any Confidential Information which:
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> (a) at the time of supply is in the public domain;
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> (b) subsequently comes into the public domain other than as a result of a breach of the undertakings contained in this Letter;
>
> (c) at the time of supply is rightfully in the receiving Party's possession or control or was independently developed by the

> receiving Party or its Representatives prior to disclosure of the same hereunder; or
>
> (d) subsequently comes into a Party's possession or control from a third party who is rightfully in possession or control of it and is not bound by any obligation of confidence or secrecy to ALTANA, Brevent or IlliquidX."

18. Finally, the NDA provides under clause 1.2(h) that,

> "This Letter constitutes the entire understanding between the Parties in relation to the disclosure of Confidential Information for the Permitted Purpose and supersedes all prior communications, agreements and understandings (whether express or implied, written or oral) concerning the subject matter hereof. Any amendment to this Letter must be agreed and recorded in writing between each of the Parties."

19. During the period of the joint venture the parties discussed the pursuit of distressed investment opportunities in Venezuela, including those subject to OFAC sanctions. As alleged by the claimant, it provided confidential information to the defendants at this time. Marketing materials were prepared and distributed to attract potential investors. A segregated portfolio company in the Cayman Islands, Canaima SPC, was incorporated on 17 September 2019 for the purposes of the joint venture.

20. In autumn 2019 the parties went their separate ways.

21. In the first half of 2020 the Altana Credit Opportunities Fund ("the ACOF Fund") was launched. This is one of the first defendant's funds and it is described on its website as a fund which "allows unique access to the distressed sovereign debt of Venezuela." The second and third defendants are listed as investment committee members of the ACOF fund. It has the same registration date and registration number as Canaima SPC.

22. In summary, the claimant's case is that the market, including the defendants, did not appreciate the existence or potential value of distressed investment opportunities in Venezuela, nor understand how to monetise the same. It says that it provided confidential information to the defendants which changed the defendants' perspective on distressed investment opportunities in Venezuela. By setting up, managing and operating the ACOF fund the claimant alleges that the defendants have misused the alleged confidential information, unlawfully acquired, used or disclosed trade secrets, infringed the claimant's copyright and in respect of the first and fourth defendants only, breached the terms of the NDA.

23. Similarly in broad terms the defendants deny the totality of the claims. In particular they deny that the third and fourth defendants are jointly liable on the basis that they have no material influence over the ACOF fund. It is the defendants' case that there was already a public market in distressed Venezuelan debt and that they were already familiar with the distressed investment opportunities in Venezuela, as they had been in respect of previous defaulting sovereigns. The defendants maintain that the distressed investment opportunities in Venezuela were, at all material times, in the public domain. Similarly, the matters said to constitute parts of the claimant's "special insight" were

also public and have been actively discussed by the claimant on its public website. In setting up and running the ACOF fund the defendants used only their own pre-existing and extensive knowledge skills and experience, supported by their own legal advisers and ongoing research. They have therefore not unlawfully relied on information provided by the claimant, any information that was confidential or protectible as confidential information was not communicated to the defendants.

24. The crux of the claim turns on whether the defendants have misused confidential information relating to distressed Venezuelan sovereign debt. The claimant's case is that its confidential information was a business opportunity about how to invest in and monetise Venezuelan distressed debt, relayed to the defendants during the joint venture. It is therefore readily apparent how central the issue of confidential information is.

25. A recurring issue in this case is the defendants' complaint about how the claimant frames its case on what is said to be confidential information.

26. The claimant has set out in re-amended confidential annex 1 the information which it alleges to have been confidential. In re-amended confidential annex 5 the claimant sets out how that confidential information is alleged to have been misused.

27. At an earlier stage in this claim the claimant sought to amend its breach of confidence case, and therefore its claim to protection of its trade secrets, by pleading a "Big Idea" and underlying "Detail". In refusing to grant permission to amend in respect of the "Big Idea", Master McQuail at paragraph 62 of her judgment[1] said,

> "I conclude therefore that the proposed amendments to paragraph 18 and [amended confidential annex 1] failed to particularise the information or combination of elements of information said by the claimant to be confidential or secret adequately and they purport to define concepts said to be relied upon in ways which obscure their possible meanings so that the defendants cannot understand the case they have to meet."

28. Miles J on appeal refused to grant the claimant's permission to appeal this aspect of the judgment. He accepted counsel for the defendants' submission that, "the pleading of the big idea is not intelligible. There is no specification of a recipe of application, a key feature of the claim. It is unclear how paragraphs 2 and 3 of the amended confidential annex 1 interrelate."[2]

29. He did go on to allow the appeal in respect of the proposed pleading of "Detail". At paragraph 35 he summarised the outline of the claimant's submissions, at sub-paragraph ii),

> "the draft amendments also identify specific passages or features of the document said to contain confidential information. The claimant offered in the court below to delete the phrase "without prejudice as to generality" where it appears in the draft. Without deletion, the amendments would have the effect of specifying

[1] [2021] EWHC 647
[2] [2022] EWHC 126 (Ch), paragraphs 31 iii) and 32.

> features or passages said to be confidential. Any doubt about this can be cured by the defendants asking for further information."

30. Preferring the claimant's arguments Miles J at paragraph 37 said,

> "iii) the draft amended ACA now specifies certain passages or features of the document said to be confidential. That part of the pleading can only be helpful to the defendants, as it specifies the material said specifically to be confidential. The claimant offered below and in here to delete those parts of the pleading which use the phrase "without prejudice as to generality" or similar phrases. It also seems to me that the claimant could and should be required to specify as a condition of any permission to amend whether there are any other specific passages in those documents that they rely on as containing specific confidential information. (That would be in the alternative to their overall contention that the documents themselves were confidential.) The draft pleading, together with any information provided under this condition will thus serve the helpful purpose of identifying those parts of the document said specifically to contain confidential information. That is an improvement on the existing unamended CA1.
>
> iv) I consider that, in contrast to my conclusions about the Big Idea, this part of the pleading is intelligible. If there is anything further shortcoming in particularity, that can be addressed by arequest for further information."

THE APPLICATIONS

31. It is of fundamental importance that each party understands and knows the case which they must address. The shape of the case, as set out in the statements of case, will inform all aspects of the court process, the disclosure that is required, the evidence of fact that will be needed, and the list of issues for trial that ultimately the court will have to determine. As Birss LJ observed in Ali v Dinc [2022] EWCA Civ 34, at paragraph 24,

> "To these statements of principle I wish only to add the following. These problems are all concerned with the interests of justice and, in particular, with circumstances which cause prejudice to the losing party. The common sort of prejudice which is to be avoided is that a new point has arisen in such a way that the losing party was not given a proper chance to call evidence or ask questions which could have addressed it."

32. The thread that permeates each of the applications before the court is how the claimant sets out its case on the business opportunity and whether the confidential information is that set out in the Detail, in a more narrow sense, so that it is limited to a combination of pieces of information identified in the Detail or whether as the claimant has advanced at the hearing can include information not set out in the Detail. The defendants have taken issue with this throughout this claim, so it is not a new issue that the claimant is having to grapple with.

33. One of the common themes of the claimant's submissions that this is all too late, it is rather tricky and should be left to the trial judge to work through at trial. Consideration of timing is a factor, particularly when applications are made late, but what the court should never do is abdicate its duty to further the overriding objective. Sometimes where there is a late application it may be that the most appropriate way for the court to deal justly with the case and at proportionate cost is to let the matters be determined at trial. Sometimes, as is here, it is right to go through the applications at some length to see how the court should further the overriding objective by reference to the matters set out in CPR 1.1(2).

(1) The defendants' application for strike out and/or summary judgment in respect of the claimant's case on AV Securities

34. The court has power to strike out the whole or part of a claim. CPR r. 3.4 provides that,

> "(2) The court may strike out a statement of case if it appears to the court-
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
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> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order.
>
> (3) When the court strikes out a statement of case it may make any consequential order it considers appropriate."

35. The Practice Direction 3A sets out some examples of particulars of claim that might fall within r. 3.4,

> "1.2 The following are examples of cases where the court may conclude that particulars of claim (whether contained in a claim form or filed separately) fall within rule 3.4(2)(a):
>
> (1) those which set out no facts indicating what the claim is about, for example 'Money owed £5000',
>
> (2) those which are incoherent and make no sense,
>
> (3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.
>
> 1.3 A claim may fall within rule 3.4(2)(b) where it is vexatious, scurrilous or obviously ill-founded."

36. Pursuant to CPR 24.2 a court may give summary judgment on the whole of a claim or on a particular issue if:

> "(a) it considers that—
>
> (i) the claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) the defendant has no real prospect of successfully defending the claim or issue; … and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

37. The principles applicable to summary judgment are set out in the oft quoted decision of Lewison J, in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch). A decision that was approved by the Court of Appeal in AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098 in the context of an application for reverse summary judgment, but the principles are applicable either way, at paragraph 15,

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says 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 contemporaneous documents: ED & F Man Liquid Products v Patel at [10]
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of

> the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63 ;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

38. In some cases, there may be little practical difference in the distinction between strike out and summary judgment, for example, where the court is being asked to determine a point of law. However, in MF Tel Sarl v Visa Europe Ltd [2023] EWHC 1336 (Ch) Master Marsh rejected the argument by the defendant's counsel that there was no material difference between CPR r.3.4 and r.24.2. At paragraph 34,

> "(1) The focus under CPR rule 3.4(2)(a) is on the statement of case and for the purposes of the application the applicant is usually bound to accept the accuracy of the facts pleaded unless they are contradictory or obviously wrong."
>
> (2) By contrast under CPR rule 24.2 the court is considering the claim or an issue in it and may be required, without conducting a mini-trial, to examine the evidence that is relied upon to prove the claim. The court is permitted to evaluate the evidence before it and to consider the evidence that can reasonably be expected to be available at trial. Furthermore, there is a second limb to CPR rule 24.2 which the applicant must establish even if the respondent has no real prospect of success at a trial.
>
> (3) The test for striking out as it has been interpreted leaves no scope for the statement of case showing a claim that has some prospect of success. The claim must be unwinnable or bound to fail. Under CPR rule 24.2 it is not good enough for a point to be merely arguable, it must have a real prospect of success. An

> application to strike out might fail whereas the same application for summary judgment might succeed.

39. As to CPR rule 24.2 Master Marsh observed in Saeed v Ibrahim [2018] EWHC 3 (Ch) at paragraph 46,

> "although the second limb of part 24.2 is not often in play, an application for summary judgment made close to the trial may well provide circumstances in which the court could conclude that, even if the first limb of part 24.2 is met, there are compelling reasons why the case should go to trial."

Although the example he then goes on to give relates to retaining a party in the proceedings rather than allowing the claim to proceed in the name of the first claimant alone.

(2) the claimant's application for permission to amend its claim in respect of AV Securities

40. Under CPR r.17.1,

> "(1) A party may amend their statement of case, including by removing, adding or substituting a party, at any time before it has been served on any other party.
>
> (2) If his statement of case has been served, a party may amend it only—
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> (a) with the written consent of all the other parties; or
>
> (b) with the permission of the court."

41. When exercising its discretionary power, the court must have regard to the overriding objective. As helpfully summarised in the White Book 2024, notes 17.3.5,

> "An obvious starting point is that the court should have regard to all the matters mentioned in r.1.1(2) so as to deal with the case "justly and at proportionate cost" in accordance with the overriding objective … Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused and injustice to the opposing party and other litigants in general if the amendment is permitted. Many cases reported on applications to amend dwell upon the need to show some prospects of success (see para.17.3.6) and the heavier burden which the overriding objective places upon an applicant seeking permission to make a late amendment (see para.17.3.8)."

42. The principles for the court when considering an application to amend were summarised by the Court of Appeal in Kawasaki KK v James Kemball [2021] EWCA Civ 33 at paragraphs 16 to 18,

> "16. It was common ground that on an application to serve a claim on a defendant out of the jurisdiction, a claimant needs to establish a serious issue to be tried, which means a case which has a real as opposed to fanciful prospect of success, the same test as applies to applications for summary judgment: Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2102] 1 WLR 1804 per Lord Collins JSC."
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> 17. The Court will apply the same test when considering an application to amend a statement of case, and will also refuse permission to amend to raise a case which does not have a real prospect of success.
>
> 18. In both these contexts:
>
> (1) It is not enough that the claim is merely arguable; it must carry some degree of conviction: ED & F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472 at paragraph 8; Global Asset Capital Inc. v Aabar Block SARL [2017] 4 WLR 164 at paragraph 27(1).
>
> (2) The pleading must be coherent and properly particularised: Elite Property Holdings Ltd v Barclays Bank Plc [2019] EWCA Civ 204 at paragraph 42.
>
> (3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: Elite Property at paragraph 41. [16] to [18], making clear that essentially the same test as for summary judgment was applicable:

43. Mr Salter KC on behalf of the claimant submits that the claimant is not seeking to add a new claim, so it is therefore unnecessary for the claimant to show a prospect of real success. To support this proposition, he relied on Gerko v Seal [2023] EWHC 63. This was a decision of HHJ Parfitt sitting as a judge of the High Court determining whether a claim in unlawful means conspiracy met the bare necessities for a claim so that it should be allowed to go to trial. Counsel for the claimant argued that because the proposed amendments were only further particulars of the alleged conspiracy he did not need to show that they had a real prospect of success so that if the claim survived the application to strike out they should be allowed in regardless. The judge concluded that the additional particulars were in substance the introduction of a new allegation of dishonesty so whether there was a rule in respect of additional particulars was irrelevant. He decided that the claim in unlawful means conspiracy did not meet the basic requirements of a viable claim, did not limit themselves to plead essential facts and were neither cogent nor persuasive and did not have a real prospect of success. That part of the claim was struck out. He went on to make some observations about the 'amendment rule' and the pleading of particulars, at paragraph 190,

> "iii) no real prospect test is about substantive causes of action or defences rather than the factual detail within a statement of case …
>
> v) if it is assumed that a proposed amendment is a proper particular and merely adds the fact to an existing cause of action then there are no real prospect test is irrelevant because such particular is not a cause of action
>
> vi) this suggests that if there is any role that then it has a very limited scope."

44. The judge's comments can only be obiter. Mr Salter KC has not put forward any authorities that modify the effect of the Court of Appeal's analysis in Kawasaki.

45. In any event the court can and should exercise its case management powers. There needs to be clarity and coherency in the claimant's proposed amendment, it needs to be grounded in the evidence. Accepting Mr Salter KC's argument, which I do not accept is open to me, would allow parties to simply argue they are merely adding detail and the balance of allowing the amendment will weigh in their favour. This has serious consequences when an application, such as this, is made so late when the parties have already given extensive disclosure and exchanged trial witness statements.

46. The burden is on the claimant to show that the proposed amendments have a real prospect of success, that they are properly particularised and that they are supported by evidence establishing an arguable case.

47. However, there is a slight caveat to that. Mr Salter KC made the same point but in relation to deletions, arguing that there is no need to show a real prospect of success when a party is simply making deletions. He relied on Sofer v Swiss Independent Trustees SA [2021] EWHC 2196 (Ch), a decision of HHJ Paul Matthews sitting as a judge of the High Court. The claimant sought to amend his amended reply to bring the statements of case in line with his witness evidence and to make two averments. The substantive effect of which was to reduce the issues between the parties rather than to increase them. At paragraph 32 the judge stated that

> "The problem is that, since the substance of the proposed amendments is a retreat from what was previously alleged, the test of real prospect of success cannot be applied to what is in effect being abandoned. The claimant is accepting that he has no such prospect and is seeking to excise it. It would make no sense for me to refuse permission to do this, and thus leave in play allegations which are no longer in issue. What the defendant instead means, in saying that the amendment has no real prospect of success, is that what is left after parts have been abandoned does not satisfy the real prospect test. But in my judgment this is the wrong approach to the problem. What is left was always there, and no permission is needed from the court to leave it there."

At paragraph 34,

> "In the present case, however, the original allegation in paragraph 11(2) was in general terms, and is now sought to be rewritten in more specific, but narrower terms. In my judgment, the form of the claim and of the amendment do not trump the substance. The substance of the application in this case is of a reduction in the scope of the claim, and in my judgment it would be wrong on such an application to apply the test of real prospect either to that part which is being abandoned, or to that part which is being retained."

48. There is some force in that analysis. Although that does presuppose that the amendments sought are narrowing the issues before the court. The Judge in Sofer also observed that if the allegation is that the claim, after deletion, does not enjoy a real prospect of success then the defendant should apply for reverse summary judgment. They had not done so in that case, the application was made at an early stage in the proceedings, before disclosure, and it narrowed the issues between the parties. Here of course the defendants have made an application for strikeout and summary judgment.

AV SECURITIES (1) Application to strike out/summary judgment and (2) Application to amend

49. The courts have reiterated that claims in respect of confidential information or trade secrets need to be properly particularised both in respect of the information relied on and the misuse that is complained of.

50. In a previous judgment[3], concerning the request for further information, I set out the relevant law, which I repeat below.

51. In CF Partners (UK) LLP v Barclays Bank Plc [2014] EWHC 3049, Hildyard J set out under the heading "Duty of confidence: law and equity" uncontroversial statements as to the law. At paragraph 121 onwards he said,"

> "The subject matter must be 'information', and that information must be clear and identifiable…
>
> 122. To warrant equitable protection, the information must have the 'necessary quality of confidence about it'…
>
> 123. Confidentiality does not attach to trivial or useless information: but the measure is not its commercial value; it is whether the preservation of its confidentiality is of substantial concern to the claimant, and the threshold in this regard is not a high one…
>
> 124. The basic attribute or quality which must be shown to attach to the information for it to be treated as confidential is inaccessibility: the information cannot be treated as confidential if it is common knowledge or generally accessible and in the public domain. Whether the information is so generally

[3] 8 December 2022, given ex tempore.

> accessible is a question of degree depending on the particular case. It is not necessary for a claimant to show that no one else knew of or had access to the information."

52. Specifically, he went on to say,

> "A special collation and presentation of information, the individual components of which are not of themselves or individually confidential, may have the quality of confidence: for example, a customer list may be composed of particular names all of which are publicly available, but the list will nevertheless be confidential."

53. In Ocular Sciences Ltd v Aspect Vision Care Ltd [1997] RPC 289 Laddie J gave a warning about pleadings in breach of confidence claims, at page 359,

> "The rules relating to the particularity of pleadings apply to breach of confidence actions as they apply to all other proceedings. But it is well recognised that breach of confidence actions can be used to oppress and harass competitors and ex-employees. The courts are therefore careful to ensure that the plaintiff gives full and proper particulars of all the confidential information on which he intends to rely in the proceedings. If the plaintiff fails to do this the court may infer that the purpose of the litigation is harassment rather than the protection of the plaintiff's rights and may strike out the action as an abuse of process."

54. At page 360 he continued with his caution,

> "The requirement of particularity may impose a heavy burden on the plaintiff. In a case where the plaintiff has a large quantity of confidential information and much of it has been taken by the defendant, the obligation to identify all of it might involve a great deal of work and time. Whether in such a case the court would be receptive to a plaintiff who asks for leave to pursue the defendant on some items of confidential information only, the rest being left to another time, is a difficult question which does not arise in this case. The normal approach of the court is that if a plaintiff wishes to seek relief against a defendant for misuse of confidential information it is his duty to ensure that the defendant knows what information is in issue. This is not only for the reasons set out by Edmund Davies LJ in John Zinc but for at least two other reasons. First, the plaintiff usually seeks an injunction to restrain the defendant from using its confidential information. Unless the confidential information is properly identified, an injunction in such terms is of uncertain scope and may be difficult to enforce: See for example PA Thomas & Co v Mould [1968] 2 QB 913 and Suhner & Co AG v Transradio Ltd [1967] RPC 329. Secondly, the defendant must know what he has to meet. He may wish to show that the items of information relied

> on by the plaintiff are matters of public knowledge. His ability to defend himself will be compromised if the plaintiff can rely on matters of which no proper warning was given. It is for all these reasons that failure to give proper particulars may be a particularly damaging abuse of process.
>
> These principles do not apply only to the question of the content of the pleadings. Just as it may be an abuse of process to fail properly to identify the information on which the plaintiff relies, it can be an abuse to give proper particulars but of information which is not, in fact, confidential. A claim based even in part on wide and unsupportable claims of confidentiality can be used as an instrument of oppression or harassment against a defendant."

55. In Celgard v Shenzhen Senior Technology Material Co Ltd [2021] FRS 1 C alleged that a former employee had passed trade secrets and confidential information to S. Arnold LJ looked at the protection of trade secrets under English law,

> "23. The first is that, whatever its origins may have been, in its contemporary incarnation the doctrine of misuse of confidential information is, as Lord Hoffmann made clear in *Douglas v Hello!*, all about the control of information. The second is that misuse of confidential information is a species of unfair competition: see art.10 of the Paris Convention for the Protection of Industrial Property read together with art.39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), and the discussion below of the Trade Secrets Directive and of art.6 of European Parliament and Council Regulation 864/2007 of 11 July 2009 on the law applicable to non-contractual obligations ("the Rome II Regulation").
>
> 24. These points apply with particular force to trade secrets."

56. Having set out the judgment of Laddie J In Ocular Sciences and the importance of particularising both the information which is alleged to be a trade secret and its misuses he went on at paragraph 34 to state,

> "There is no dispute that considerations identified by Laddie J apply with equal force to a claim brought under the Regulations[4] as they do to a claim brought purely in equity."

57. Turning to the applications concerning AV as custodian, both parties agree that in considering the defendants' application I should look at the draft re-re-amended particulars of claim, the draft re-re-amended confidential annex 1 and the draft re-re-amended confidential annex 5.

58. The defendants' draft order seeks to strike out paragraph A11 (including its sub paragraphs) and 3(ml) in the re-amended confidential annex 1. This sets out the claimant's case on the selection of custodian and pleads as one of the documents in the

[4] A reference to the Trade Secrets (Enforcement etc) Regulations 2018, SI 2018/597.

detail, at 3(ml), Mr Amore's 30 September email. They also seek to strike out in the re-amended confidential annex 5, paragraph 3(3) which "pending disclosure" sets out the best particulars of the defendants' misuse that the claimant can provide. Also point (i) in the third sentence of paragraph 5(5) in the re-amended confidential annex 5, so that the following is deleted, "in particular, the defendants misused: (i) the claimant's identification of AV as a suitable custodian of Venezuelan securities"[5].

59. The claimant seeks to amend how it has pleaded the selection of the custodian, by making additions or deletions in the draft re-re-amended confidential annex 1 in paragraph A11 and each of the 3 sub-paragraphs thereunder. It has made substantial amendments in the draft re-re-amended confidential annex 5, adding another approximately 22 pages to its pleading on misuse, which are not opposed. In addition, the claimant seeks to add a further four pages under subparagraph 5(4) about the selection of the custodian, this is controversial.

60. The claimant's case is that the defendants have misused allegedly confidential information which it is said was a business opportunity about how to invest in and monetise Venezuelan distressed debt. The confidential information was said to have been imparted to the defendants during the parties' joint venture in 2019. The misuse is said to have arisen out of the defendants' distribution of promotional materials relating to the launch of its own investment fund in early 2020, the ACOF fund, and the operation of the ACOF fund itself from 2020.

61. Paragraph 19 of the re-amended particulars of claim sets out the claimant's case on confidential information. Under the particulars it is asserted that,

> "a. re-amended confidential annex 1 identifies the claimant's confidential information on which the claimant relies in these proceedings."

62. Re-amended confidential annex 1 at paragraph A1 pleads in respect of the business opportunity that,

> "the claimant provided the defendants a package of confidential information (the business opportunity)."

It is asserted that in providing the business opportunity to the defendants the claimant gave the defendants special insight into the monetisation of distressed Venezuelan credit opportunities, paragraph A3. The particulars of the business opportunity are then pleaded at A4 to A12.

63. The "Detail" of the claimant's case is set out in A13 and A14 of the re-amended confidential annex 1 as follows.

> "THE DETAIL "
>
> A13. As stated above, the Business Opportunity was a package of confidential information. It was made up of component pieces of confidential information contained in and/or evidenced by the documents and/or other communications

[5] inserted for ease of reference because it is by no means clear from the way in which confidential annex 5 has been amended, re-amended and now proposed to be re-re-amended.

that the Claimant provided to the Defendants in circumstances giving rise to an obligation of confidence. Those component pieces of confidential information (the "Detail") are set out below.

A14. For the avoidance of doubt, the Claimant avers that the Business Opportunity as a whole is confidential regardless of whether any particular component piece is or is not confidential.

3. The Claimant's case is that each Document (and Legal Advice) is itself confidential. Without prejudice to the foregoing, the Claimant identifies within the Documents (and Legal Advice) the specific passages and/or parts of the Documents/Legal Advice on which it relies as confidential, and confirms that it does not rely on any passage not so specified.

Documents

a. The Canaima Capital Presentation;

b. The Due Diligence Note;

b1 9 July Email

c. The Venezuela Data Slides;

d. The 17 July Slides;

e. Mr Amore's 22 July Email;

f. Mr Amore's 08 August Email & Mr Amore's 09 & 10 August Emails;

g. The Private Offering Memorandums;

h. The 12 August Fund Fact Sheet;

i. Mr Amore's 06 September Email;

j. The Service Provider A Documents;

k. Mr Amore's 19 September Email;

l. The Canaima Fund Presentation;

m. The Canaima Fund Fact Sheet;

[m1 Mr Amore's 30 September Email];

n. Mr Amore's 01 October Email & Documents;

> o. The Petrojam Presentation;
>
> p. Mr Amore's 10 October Email;
>
> q. The PDVSA Timeline Email;
>
> r. The Claim Management Presentation;
>
> s. Mr Amore's 28 October Email;
>
> t. The Promissory Note Presentation;
>
> Introduction of parties
>
> u. The introduction of parties relating to the opportunities: [Law Firm] and [Advisor];
>
> Legal Advice
>
> v. [Law Firm] legal advice: the [Law Firm] Opinion;
>
> w. [Advisor]'s legal advice: the Limitations Document, the Trustee v Fiscal Agent Memo and the [Advisor] Gulati Email."

64. The defendants sought clarity about "the detail" in their second part 18 request dated 18 May 2022. At request 7 they asked this,

> "7. In order that the defendants can understand the nature of the case against them:
>
> a. Please confirm that the information set out under the detail is what is also referred to as the claimant's confidential information in RAPOC and in the title of RACA1."
>
> b. If the confirmation request (a) is not provided, please provide full particulars of all differences between the detail, the package of confidential information in the claimant's confidential information.

65. On 22 June 2022 the claimant responded,

> "7a. Not confirmed. The RACA1 also pleads the business opportunity as confidential information.
>
> 7b. The claimant's case on its confidential information is adequately pleaded in ACA1;
>
> (1) claimant relies on the business opportunity that is the package of confidential information. Component pieces of confidential information in business opportunity, set out in documents and to introductions, pleaded in the detail. The business opportunity as

> a whole is confidential regardless of whether any particular component piece of information (as set out in the detail) is or is not confidential.
>
> (2) in addition to the detail, the particulars of the business opportunity plead and refer to specific communications between the parties (such as telephone or other discussions and meetings) during which the claimant explained the business opportunity to the defendants and/or educated the defendants in the process of monetisation of distressed Venezuelan credit opportunities. If and insofar as such oral communications are not themselves specifically identified in the detail, the claimant also relies on those communications as the means pursuant to which the claimant provided and imparted the business opportunity to the defendants."

66. In Mr Hemming's sixth witness statement he says that "It is Illiquidx's pleaded case that its Confidential Information does go beyond that pleaded in the Detail of RACA1[6]." He also emphasised that the defendants have had clarity on this point for nearly 2 years and does not understand why the defendants read the claim in such a narrow way. A point that was reiterated by counsel for the claimant in his opening submissions.

67. I note though that when the defendants asked in a letter dated 16 March 2022 about the scope of the business opportunity in paragraphs A13 and A14 the claimant's then solicitors replied,

> "paragraphs A13 and A14 are clear. If the question is about the components of the Business Opportunity, the position is set out at para. 3 of "the Detail". In line with para. 38 of the Judgment of Mr Justice Miles, the Claimant does not rely on any other components."

This was confirmed before the defendants consented to the draft re-amended particulars of claim and the draft re-amended confidential annex 1. On 18 May 2022 the defendants served their amended defence and annexes.

68. I consider that there is some force in the defendants' concern that the claimant is attempting to go beyond its pleaded case. The nature of the information howsoever conveyed is limited to that set out in the detail. As counsel for the defendants submits, "the defendants are not only left playing "whack a mole" seeking to show the previously unidentified elements were not confidential, but they also cannot understand or address the allegations of misuse and cannot define the scope of the relief sought."

69. The issue between the parties is a deceptively narrow one about the claimant's identification of AV securities as an appropriate custodian.

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[6] Paragraph 13.

70. The claimant originally pleaded that the claimant had identified and/or built-up relationships with custodians through its contacts and expertise. The claimant identified and introduced them to the defendants.

71. Paragraph A11 of the re-re-amended confidential annex 1 sets out that Mr Amore introduced the second defendant to EFG on 2 August 2019, but they were ultimately unwilling to act. The claimant identified AV securities as an appropriate entity, which they had a commercial relationship with, and they also employed a former employee of AV securities. During a telephone call on 27 September 2019 the claimant is said to have pitched the business opportunity to AV securities; the second defendant was also on this telephone call. Following which in an email dated 30 September 2019 Mr Amore advised the defendants, "I would start process with AV securities to open an account whilst we check others too."

72. The claimant now seeks to amend its case it is said in two respects. Firstly, to plead further detail, following disclosure. Secondly to make "minor" amendments to address the defendants' complaints that the claimant's existing case is unclear. As to the defendants' application it is said that these can be summarised principally as: a one-sided interpretation of the documentary evidence, specifically Mr Amore's email dated 30 September 2019; and, that Mr Amore's purported identification of AV securities on 30 September could not have added anything to what the second defendant had already gleaned and recognised from Mr Cuilla's detailed explanation. The simple point in relation to both is that they involve disputed issues of fact and are classic examples of matters that should be left to be determined at trial.

73. As to the amendments I do not consider that changing the claim from pleading expressly that the claimant introduced AV securities to the defendants to the claimant identifying AV securities as an appropriate custodian can be characterised as adding detail. It is implicit in that amendment that the claimant accepts that it did not introduce AV securities to the defendants, which brings with it a connation that the defendants already knew of AV securities. That is clear from the fact that the claimant retains the word "introduced" in respect of EFG, a potential other custodian, and notably no longer uses that word in respect of AV securities in paragraph A11. It does use "introduced" in the draft re-reamended confidential annex 5, but is silent on who introduced AV securities. The implication must be that it was not the claimant. The question then is how does this change feed into the claimant's case on confidential information? It must now be asserted that the claimant identified AV securities as a suitable custodian, that information was conveyed to the defendants, who subsequently misused it.

74. Looking at the evidence supporting the identification of AV securities, the claimant relies on an email from Mr Amore to the second defendant dated 30 September 2019 wherein he stated,

> "Yes I know bank mercantile and can check with our contacts there.
>
> I would start process with AV Securities to open an account whilst we check others too.

> What do you think ? custody with AV securities segregated within LATINCLEAR is a good starting point and fastest. Thoughts?!!!"

75. Whilst the extent of the claimant's pre-existing knowledge of AV securities is in issue, the factual matrix leading up to the 30 September 2019 email from Mr Amore to the second defendant should not be controversial. What appears from the evidence is that Mr Juan Argento, said to be the second defendant's contact, introduced AV securities.

76. There was a telephone call on 30 August 2019 between the second defendant, Mr Justin Reizes (also said to be the second defendant's contact), and Mr Argento. Neither Mr Amore nor Ms Alabatchka appear to have been present at this meeting, although they were copied into the emails.

77. There were also telephone calls on 12 September 2019 and 17 September 2019.

78. On 17 September 2019 Mr Argento sent the second defendant an email, copied to Mr Amore,

> "You can call Antonio Ciulla at activalores. He can explain the options. [telephone number and email address removed]
>
> He is good friends with good friends so let me know how it goes."

79. From the email string it appears that the second defendant set up the telephone call between Mr Ciulla of AV securities, himself and Mr Amore, which took place on 27 September 2019.

80. The transcript of the telephone call on 27 September 2019 is in the bundle. Mr Ciulla explains in some detail why AV securities, and its custodian partners including Latinclear, would be a suitable custodian. In a follow up email on 27 September 2019 Mr Cuilla reiterated that AV securities would be a suitable custodian. The second defendant replied on 30 September 2019

> "Antonio,
>
> Many thanks
>
> Let us read and we will revert. The flash is less useful to me than Celestino given my non Spanish skills. However we should set up a call with Gonzalo , your trader and research team. I suggest we do this once we have a launch date"

81. On 30 September 2019 Mr Amore forwarded to the second defendant, Mr Kastner and Ms Alabatchka an email update from Yasser Ahmad at EFG, adding, "We need to look for alternatives!!" The second defendant replied saying "Am looking Have contacted latin clear."

82. Mr Amore then sent the 30 September 2019 which the claimant relies on to support its case that the claimant identified AV securities as an appropriate custodian. The second defendant responded by stating that he would prefer to work with a bank.

83. Going back then to the pleaded case, the claimant's confidential information is identified in the re-amended confidential annex 1. Paragraph A11 states that,

> "Because of the OFAC sanctions , very few custodians were willing to hold, trade and/or settle Venezuelan bonds. The defendants did not know of any such custodian. Identification and use of an appropriate custodian was essential to the realisation of the Business Opportunity. Given the need to file claims before the expiry of any prescription period, there was limited time to raise funds to purchase Venezuelan government bonds and set up a relationship with a custodian."

There are two features to this, the need to identify a custodian and the need to work speedily.

84. The factual matrix does not support the contention that the defendants did not know of any such custodian. It also raises doubts as to the claimant's interpretation of the 30 September 2019 email, although I do bear in mind that speed was also an essential element of the proposed monetisation of the sovereign debt. Furthermore, the second defendant's trial evidence is that he was not keen to "go with AV because they were Panama-based and not a custodian in the classic sense, but there weren't many other options so we decided to proceed further with them." With some irony I note that counsel for the claimant submits that the defendants should not be "salami slicing" and casting doubt on one component of the confidential information, yet that is what the draft amended pleading attempts to do by placing this email out of context. I also reject counsel for the claimant's argument that the defendants' interpretation of the 30 September 2019 is tendentious: it is an interpretation that is entirely open to be made.

85. With some degree of reluctance, I do consider that the issue of the "identification" of AV securities should go to trial. It seems to me it is so inextricably built into the package of confidential information and therefore the business opportunity that is this claim, that to strip this aspect out now would be artificial, and wrong. The selection of the custodian, on the claimant's case, was essential in order to realise the business opportunity. I also bear in mind that the re-amended pleading was agreed when the parties consented to the order of Deputy Master Collaco-Moraes dated 30 March 2022. The defendants have set out its case in respect of AV securities, albeit in respect of the then allegation of introduction, although it was always an intrinsic part of the claimant's case that they identified AV securities as an appropriate custodian.

86. This has been very finely balanced as I consider that there is a significant degree of force in counsel for the defendants' submissions and the evidence of Ms Rao. The extent of the claimant's expertise and contacts and indeed its knowledge of the suitability of AV securities, out with the meeting on 27 September 2019, will need to be tested at trial. As will the claimant's case that the defendants acted on the claimant's identification and recommendation of AV securities.

87. The problem for the defendants is that this application is made at such a late stage. To an extent they have been caught in the dilemma of only being able to properly evaluate the evidence after disclosure and exchange of trial witness statements. However, I am not satisfied that the issue of the AV securities falls the wrong side of the line under CPR 3.4. Similarly, I consider that the case is probably more than arguable for the

purposes of CPR Part 24, but in any event in reaching that view I am wary of falling into the trap of evaluating evidence that should be tested orally under cross-examination. The trial judge will be in a better position to view the totality of the evidence, not one aspect of it. Furthermore, this is so close to trial that I consider that CPR r.24.2(b) is actively engaged. I cannot see the utility in striking out this part of the case now, it does not further the overriding objective at such a late stage and when this forms part of the package of confidential information that is the foundation of the claimant's alleged case.

88. I therefore dismiss the defendants' application to strike out paragraph A11 of the re-amended confidential annex 1, and paragraphs 3(3) and part of 5(5) in the re-amended confidential annex 5.

89. As to the proposed amendments, given my conclusions set out above it follows that I will give permission. I consider that the identification of AV securities was always part of the claimant's case, it could not be otherwise given that it forms part of the package of confidential information. Whilst there is a fundamental change in how the claimant presents its case on AV securities it is right that the pleadings reflect accurately the claimant's case now. However, permission is subject to the claimant making the following revisions to its draft:

(1) Paragraph A11(2), CA1. The claimant's case is that Mr Amore identified AV securities as a suitable custodian in his email dated 30 September 2019, otherwise that would not be included under the detail as m1. The claimant pleads that the defendants were introduced to AV securities but is silent on who made the introduction. In order for there to be clarity on the pleading and to narrow the issues for trial the claimant is to set out who, on its case, introduced the defendants to AV securities.

(2) Paragraph A11(3), CA1. At this late stage of the claim and given the lack of clarity historically it is unsatisfactory for the claimant to plead "in the light of, among other things' either it must set out what it relies on as "other things" or delete this and rely on its alleged prior knowledge of AV securities alone.

(3) Paragraph 5(4)(b), CA5. The same point as set out under (1). The claimant is to set out who, on its case, introduced the defendants to AV securities.

(3) The claimant's application for permission to amend its claim in respect of its remaining pleading amendments

90. These comprise:

(1) A new allegation of misuse relating to an entity called Service Provider A (paragraphs 31A to 31N of the draft re-re-amended particulars of claim and draft confidential annex 7), said to have taken place after the parties' joint venture ended.

(2) Adding detail about an entity called Apex, which goes to how the defendants set up the ACOF fund (paragraph 6(2) of the draft re-re-amended confidential annex 5).

(3) Relating to the defendants' selection of the PDVSA 2020 bond as one of the securities purchased and held by the ACOF fund (paragraph 19 of the draft re-re-amended confidential annex 5).

91. The other amendments concern permission to rely on two inadvertently disclosed privileged documents, two emails, both post-dating the issue of the claim and have been agreed by the defendants.

Service Provider A

92. These were originally included as additional allegations of misuse in the draft re-re-amended confidential annex 5, paragraph 16, although it relied on misuse that did not form part of the claimant's case on confidential information. These now form part of a new allegation of misuse in the draft re-re-amended particulars of claim.

93. It is alleged between the end of the joint venture and approximately February 2020 the claimant persuaded a company within the group of Service Provider A to act as fund administrator for its Canaima Fund and arrange the custody of Venezuelan securities with Custodian C. This is said to be confidential to the claimant and/or constituted trade secrets (the Service Provider A information). In October 2020 it is said that a promotional presentation for the Canaima Fund was sent out by the claimant, which included reference to Service Provider A.

94. The claimant's case is that the second defendant in late 2020 used improper means to discover the identity of Service Provider A. Although it appears to be uncontroversial that the first and second defendants already had an ongoing commercial relationship with Service Provider A, they were engaged as fund administrator for the Altana Digital Currency Fund since June 2018.

95. The alleged improper means is set out in paragraphs 31D to 31F. The second defendant asked Ms Maribel Montero to seek the 2020 promotional presentation from Mr Arnulphy, the claimant's employee. Although ultimately it is said that the second defendant obtained the presentation from AV securities.

96. It goes on to assert that there were communications between the second defendant and Employee B, a Service Provider A employee, wherein he was trying to cause Service Provider A to stop working with the claimant. In September 2021 the second defendant, on behalf of the first defendant, entered into a custodian agreement with a member of the Service Provider A group. The claimant alleges this is a misuse of the Service Provider A information.

97. It is striking that paragraph 4 of the draft re-re-amended particulars of claim makes the assertion that the defendants are jointly and severally liable in respect of the matters set out at paragraphs 30 to 31M, which includes the proposed 31A to 31M, but there is no specific pleading in respect of the third defendant and the fourth defendant.

98. In Lifestyle Equities CV v Ahmad [2024] UKSC 17, Lord Leggatt drew the strands together on accessory liability as follows,

> "135. To summarise, there is a general principle of the common law that a person who knowingly procures another person to

> commit an actionable wrong will be jointly liable with that other person for the wrong committed. The liability of the procurer is an accessory liability. Where the primary wrong is a breach of contract, this accessory liability takes the form of a distinct tort. Where the primary wrong is a tort, however, there is no need to posit a separate tort of procuring another person to commit a tort. Where the general principle applies, the procurer is made jointly liable for the tort committed by the primary wrongdoer.
>
> 136. There is a further, distinct principle of accessory liability by which a person who assists another to commit a tort is made jointly liable for the tort committed by that person if the assistance is more than trivial and is given pursuant to a common design between the parties. On the facts of a particular case both principles may be engaged. But on the present state of the law assistance which falls short of procuring the primary wrongdoer to commit the tort cannot lead to liability unless it is given pursuant to a common design.
>
> 137. Although procuring a tort and assisting another to commit a tort pursuant to a common design are distinct bases for imposing accessory liability, they must operate consistently with each other and such that the law of accessory liability in tort is coherent. Considerations of principle, authority and analogy with principles of accessory liability in other areas of private law all support the conclusion that knowledge of the essential features of the tort is necessary to justify imposing joint liability on someone who has not actually committed the tort. …"

It is difficult to see how the claimant considers that it satisfies the test in Kawasaki, that this raises a case against all the defendants as joint tortfeasor which has a real prospect of success.

99. There is an issue between the parties as to whether the Service Provider A information has the necessary quality of confidentiality. The claimant refers to the first and second parts of the test in Coco v AN Clark (Engineers) Ltd [1968] FSR 415 Megarry J at 419, which I set out in full,

> "In my judgment, three elements are normally required if, apart from contract. a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M. R. in the Saltman case on page 215, must "have the necessary quality of confidence about it". Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

100. When the defendants say that the information was sometimes sent to third parties otherwise than subject to an obligation of confidence, the claimant says this muddles the first two parts of the test in Coco. If information is sometimes imparted to third parties in circumstances which did not import an obligation of confidence it does not

follow that the information cannot have had the necessary quality of confidence and that no one else, including the defendants, can evoke duties in respect of that information. The claimant submits that there are different gradations of confidentiality or secrecy. That may well be correct.

101. What is of concern though is not hypotheticals but the fact that the claimant is asserting that the Service Provider A information is confidential as a bare assertion, in a context where there is a serious doubt as to whether this is confidential information and more generally where there has been criticism throughout about the way in which the claimant has failed to plead out its case on confidentiality in a clear manner. At paragraph 31C the claimant accepts that it did provide information to potential investors, "without a non-disclosure agreement being in place, but when doing so would generally indicate that the claimant regarded the information as confidential." It is difficult to see how this satisfies the test in Coco, which the claimant's counsel specifically relied on to undermine the contents of Ms Rao's witness statement on this point[7]. The claimant is attempting to amend its claim to plead a new allegation of misuse of information which is temporally different to the rest of its case and at a very late stage. Whether this is analysed under a duty of confidence or trade secrets I am not satisfied that the necessary breach has been adequately pleaded or not such as to mean that the claimant can demonstrate a reasonable prospect of success.

102. The defendants have also invited the court to look at the evidence surrounding the 2020 promotional presentation. For example, two emails dated 2 June 2020 and 9 June 2020 sent out the presentation as an attachment with no suggestion that its contents were confidential or imposed any degree of obligation to maintain confidentiality on the recipient. The closing date in the attachment is said to be 31 August 2020. The claimant's response is to say that the individual concerned did enter into a non-disclosure agreement with the claimant, but this was months after the emails were sent and it is not entirely what was covered by it. The claimant has been reluctant to identify any other non-disclosure agreements. The claimant's trial evidence does not assert that the materials were confidential.

103. Mr Hemming has attempted to tackle this issue in his fifth witness statement, specifically paragraph 13, where he asserts that the claimant "at all times considered the Service Provider A Information confidential and either sent it subject to an NDA or generally subject to an indication that it was confidential", and in paragraph 25. That statement goes further than the proposed pleading and the evidence that so far the claimant has elected to disclose.

104. The claimant relies on a non-disclosure agreement signed with Service Provider A dated 21 December 2020, said to be effective from 1 April 2020. It asserts that it took reasonable steps to keep the fact that Service Provider A would act as fund administrator and Custodian C as custodian secret. This was after that information had been provided to third parties without adequate evidence before me that it was to be treated as confidential: without anything more that seems to be closing the stable door after the horse has bolted.

105. When the defendants complain that this issue is becoming an irrelevant satellite dispute there is something in that. I also question whether the claimant is in reality seeking to

[7] first witness statement, paragraph 15.3.3.

rely on this alleged misuse to undermine the credibility of the second defendant or the manner in which he conducts business.

106. The defendants also question what are the consequences that flow from this alleged misuse and what relief flows from this. Certainly, this temporally distinct allegation of misuse does not sit easily within paragraphs 32 to 34 of the draft re-re-amended particulars of claim that remain unchanged. Given the nature of this misuse I would have expected the relief claimed to plead out the consequences and relief specifically, not least when the defendants have an ongoing relationship with Service Provider A. If this were the only criticism of the proposed amendment then I might have been persuaded to give permission but for the reasons I have already set out this amendment does not show a reasonable prospect of success and permission will not be granted.

APEX

107. This is described by the claimant as a factual averment setting out how the defendants set up their own fund with AV Securities as custodian and Apex as administrator. Mr Hemming says at paragraph 46 of his second witness statement,

> "The Defendants have previously pleaded that "finding a suitable bank, custodian and administrator […] was one of the greatest challenges for the JV" and accordingly they cannot now deny that the parties' relationship with Apex as an administrator forms an important part of the narrative (and comprehensible particulars) as to how the Defendants' set up, managed and/or ran the ACOF Fund in order to exploit the Business Opportunity for their own benefit."

108. It is unclear how if this is a key part of the narrative why it does not form part of the confidential information, the business opportunity or the detail. If this amendment stopped after the third sentence it might be more obvious that this simply forms part of the narrative. However, it goes on to make an innuendo that there may have been some reason why Apex no longer wished to proceed; I bear in mind that the second defendant says he had a pre-existing commercial relationship with Apex. It then goes on to plead at paragraph 6(3) of the draft re-re-amended confidential annex 5 that "the defendants continued to proceed to set up their fund misusing the Confidential Information for their own purposes."

109. Given its present form permission is not given for this amendment, which I consider to be improper and irrelevant.

PDVSA 2020

110. There is a dispute between the parties as to whether the defendants have consented to this amendment. The defendants' position is that they only object to the term, "undervalued and/or". I accept it is open to them to object to this.

111. PDVSA is a Venezuelan state-owned natural gas and oil company, which issued the PDVSA 2020 bond. Paragraph 3(d) of re-amended confidential annex 1 refers to 17 July Slides said to have been drafted entirely by the claimant and in which there is

specific reference to the PDVSA 2020 bond, and to the "underlying attractiveness of investing in Venezuelan debt".

112. Paragraph 19 of the draft re-re-amended confidential annex 5 refers back to this paragraph and goes further by asserting that "the bond identified as "PDVSA 20" was undervalued and/or an attractive investment opportunity".

113. Counsel for the claimant elides the concepts of attractiveness and undervalue. He submits that "undervalue" is open to the claimant if the presentation is interpreted as a whole. He also submits that this is really a matter for trial and interpretation by the trial judge.

114. The slide which refers to PDVSA 20 is headed "Recovery Strategy: Litigation and Creditors' Seizure of External Assets." When reading this particular slide and then the 17 July Slides more generally it would be fair to append a label, if one is needed, of it being "attractive", after all the claimant was attempting to solicit investment. Without more though it does not follow that "undervalue" is a label that can also be used. Undervalue has a connotation of something selling in the investment market for a price which is presumed to be below its true intrinsic value. Yet there is no reference to the price or value of this bond in the slides, or any other metric, which supports an assertion that it is undervalued.

115. Mr Hemming seeks to rely on other parts of the claimant's pleaded case to support his contention that describing the PDVSA 20 as undervalued follows from the fact that it "was secured by assets held in the US and that the fact of the bond being undervalued follows at least partially from the fact that it was secured (which is set out in the 17 July Slides and was unusual for Venezuelan / PDVSA bonds)"[8]. It is correct that the business opportunity defined in paragraph A1 of the re-amended confidential annex 1, which refers to the Opportunities defined in the NDA, generically refers to the market having "ignored and/or avoided and/or undervalued" Venezuelan credit opportunities. However, when the claimant goes on to plead at paragraph 6A specific Venezuelan credit opportunities which could be monetised, PDVSA 2020 is not specifically mentioned. In Ms Rao's witness statement, she sets at paragraph 18.7 whether PDVSA 2020 might be within the reference to the "17 PDVSA bonds" listed by OFAC General Licences 3E and 9D. The latter does mention PDVSA 2020 but not in the context of it being undervalued.

116. There is a need in this case for clarity in pleading, and for the claimant who seeks to make an amendment at a late stage to establish a factual basis which meets the merits test. The claimant has not done so, and permission is refused.

(4) The defendants' application for strike out and/or summary judgment in respect of the claim for injunctive relief

117. The defendants seek to strike out paragraph (2)(a) to (c) in the prayer to the re-amended particulars of claim. This seeks injunctive relief.

118. The claimant accepts that the claim for an injunction in respect of breaching the NDA, (2)(a), should be struck out. The NDA has already expired by effluxion of time either

[8] Mr Hemming's second witness statement, paragraph 51.

3 years from the date of the NDA or 3 years from the date of the final closing of the fund and/or SPV.

119. The remaining parts are, "(b) Misusing the Claimant's Confidential Information [and/or the information referred to in paragraph 3lM above]" and "(c) Unlawfully acquiring, using or disclosing Trade Secrets."

120. Whilst these are two different points I can take them both together. The defendants submit that as the claimant has conceded that the obligation under the NDA has come to an end there is no basis for injunctive relief founded on the NDA. Clause 1.2(h) of the NDA provides an entire agreement clause. It is said that there are no reasonable grounds disclosed in the statements of claim for there to be ongoing equitable obligations of confidence.

121. Paragraph 19 of the re-amended particulars of claim pleads that some of the claimant's confidential information pre-dates the signing of the NDA "and is protected by the equitable law of confidence" and some postdates the signing of the NDA and "is additionally protected by a contractual obligation of confidence."

122. Counsel for the defendants has queried, not least when only one document[9] was provided before the NDA, how it can be said by the claimant that the NDA did not apply to all of the Confidential Information and superseded any pre-NDA equitable obligation of confidence. Further how it is said that the equitable obligation of confidence did arise and exist in parallel with the obligations of the NDA, and why it remains ongoing. As to Trade Secrets, the same point is in effect made. Paragraph 20A of the re-amended particulars of claim asserts that Trade Secrets are identical to the claimant's confidential information.

123. There is significant force in those submissions. However, Mr Hemming in his evidence is clear that it is possible for equitable and contractual obligations to co-exist and the expiry of the NDA is irrelevant; a point that in principle the defendants accept. Whilst the defendants do not accept the reasoning set out in Mr Hemming's witness statement, specifically 61 onwards, I am considering an application for strike out and summary judgment, not determining the matter at trial.

124. Counsel for the claimant has developed this further in argument. In particular he referred to paragraph 50 of the re-amended defence where the defendants plead,

> "50. In relation to Clause 1 of the NDA, it is again denied that the "Opportunities" included, or could ever include, the general idea or concept of investing in distressed Venezuelan state or PDVSA bonds or other such instruments, which was in the public domain prior to any relevant relationship between the Claimant and Defendants. The Defendants envisaged that the Claimant's provision of Confidential Information would be in the nature of private claims and/or promissory notes sourced by the Claimant and over which they had exclusivity".

[9] (a) the Canaima Capital Presentation

125. Going back to paragraph 45,

> "45. The first sentence of paragraph 15 is admitted. The Defendants will rely on the full wording of the NDA. The remainder of paragraph 15 is noted. As part of the negotiations leading to the NDA, the Parties agreed that any confidential information would be identified as such and placed into an annex to the NDA; the Claimant never did this in respect of any of the matters now relied on and as the Claimant's Confidential Information or otherwise."

126. He submits that even on the defendants' own case there are matters that fall outside the NDA, even though they were disclosed during the period of the NDA. Counsel for the defendants submits this is a bad point.

127. Ultimately I am not satisfied that it meets the test for either strike out or summary judgment, although I consider this part of the claimant's claim to be very borderline. There is argument available to the claimant, even on the defendants' case, that an equitable duty co-exists and that a trial judge having had an opportunity to evaluate the factual and documentary evidence may grant injunctive relief.

128. As to summary judgment whilst this aspect of the claim does seem borderline, I do consider that this is a late application. There is a compelling reason for this matter being retained in the claim for determination at trial, when the Judge will have an opportunity to evaluate the oral testimony and the documentary evidence.

129. I dismiss this part of the defendants' application.

(5) The defendants' application in respect of trial witness evidence and compliance with practice direction 57 AC

130. The parties exchanged trial witness statements on 6 March 2024.

131. The other part of the defendants' application was for an extension of time for service of reply evidence in chief pending and following the determination of the application under 57AC. Although there was some disagreement between the parties as to how long that should be, the principle was accepted. An order was made on the papers on 3 May 2024, providing for an extension of one week after the disposal of this part of the defendants' application, but subject to this period being considered further at the hearing of the substantive applications.

132. The defendants contend that Mr Amore's witness statement dated 6 March 2024 and Ms Alabatchka's second witness statement dated 6 March 2024 do not comply with PD 57 AC. They seek an order from the court that the claimant is not entitled to rely on those statements in their current form and requiring the claimant to redraft those statements in accordance with PD 57 AC. In addition they seek an order that the claimant's solicitor, who signed the certificate of compliance for the statements, should explain the process by which the original statements were prepared and provide information about the extent to which the witness reviewed and selected the documents referred to in the statements and should address the matters set out in paragraph 3.7 of the appendix to PD 57 AC.

133. PD 57 AC was introduced for all Business and Property Court trial witness statements signed on or after 6 April 2021. It was designed to address the increasing problem of trial witness statements being over-long and over-lawyered so that they often no longer reflected the evidence in chief that that witness of fact could realistically give. This problem was acute in well-funded, document heavy business disputes in the Business and Property Courts. As Mr Justice Baker observed in his Implementation Report of the Witness Evidence Working dated 31 July 2020,

> "17. Thus, witnesses are too often asked to sign off by way of witness statement a detailed factual narrative that does not resemble the evidence in chief they could or would give, if required to do so without providing a witness statement first, and on which they are therefore exposed to lengthy, detailed cross-examination. This is not fair on the witnesses. Nor is it an efficient or helpful proxy for simple argument as to disputed elements of the factual narrative, by reference to the documents, where in reality the dispute is or should be one for argument and not for witness testimony."

134. PD 57 AC provides a restatement of the principles applicable to trial witness statements. At paragraph 2,

> "2.1 The purpose of a trial witness statement is to set out in writing the evidence in chief that a witness of fact would give if they were allowed to give oral evidence at trial without having provided the statement.
>
> 2.2 Trial witness statements are important in informing the parties and the court of the evidence a party intends to rely on at trial. Their use promotes the overriding objective by helping the court to deal with cases justly, efficiently and at proportionate cost, including by helping to put parties on an equal footing, saving time at trial and promoting settlement in advance of trial.
>
> 3.1 A trial witness statement must contain only–
>
> (1) evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial, and
>
> (2) the evidence as to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in evidence in chief if they were called to give oral evidence at trial and rule 32.5(2) did not apply.
>
> 3.3 A trial witness statement must comply with paragraphs 18.1 and 18.2 of Practice Direction 32, and for that purpose a witness's own language includes any language in which the witness is sufficiently fluent to give oral evidence (including under cross-examination) if required and is not limited to a witness's first or native language."

135. PD 57AD imposes three new requirements on the parties. (1) A list of documents that the witness has referred to or has been referred to for the purposes of providing the evidence set out in their witness statement. Paragraph 3.2 provides that,

> "3.2 A trial witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case, and must identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement. The requirement to identify documents the witness has referred to or been referred to does not affect any privilege that may exist in relation to any of those documents."

136. (2) Confirmation of compliance with PD 57 AC, both by the witness (paragraph 4.1) and by the relevant legal representative (paragraph 4.3). The witness at paragraph 4.1 must specifically confirm the following,

> "I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge.
>
> I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case.
>
> This witness statement sets out only my personal knowledge and recollection, in my own words.
>
> On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when.
>
> I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge."

137. The legal representative must also sign the statement, paragraph 4.2, confirming that,

> "I believe this trial witness statement complies with Practice Direction 57AC and paragraphs 18.1 and 18.2 of Practice Direction 32, and that it has been prepared in accordance with the Statement of Best Practice contained in the Appendix to Practice Direction 57AC."

138. (3) The trial witness statements should be compiled in accordance with the Statement of Best Practice, set out in Appendix 1 to the Practice Direction, (paragraph 3.4).

139. For the purposes of the application the relevant parts of appendix 1 are,

> "2.1 The content of any trial witness statement should be limited to the evidence in chief the relevant party and its legal

representatives (if the party is represented) believe the witness would give if …

(2) the principles set out in paragraphs 2.2 to 2.6 were followed.

…

2.3 Factual witnesses give evidence at trials to provide the court with testimony as to matters of which they have personal knowledge, including their recollection of matters they witnessed personally, where such testimony is relevant to issues of fact to be determined at trial, and:

(1) a matter will have been witnessed personally by a witness only if it was experienced by one of their primary senses (sight, hearing, smell, touch or taste), or if it was a matter internal to their mind (for example, what they thought about something at some time in the past or why they took some past decision or action),

(2) for the avoidance of doubt, factual witness testimony may include evidence of things said to a witness, since the witness can testify to the statement made to them, if (a) the fact that the statement was made to the witness is itself relevant to an issue to be determined at trial or (b) the truth of what was said to the witness is relevant to such an issue and the statement made to the witness is to be relied on as hearsay evidence.

2.4 The duty of factual witnesses is to give the court an honest account of matters known personally to them (including, if relevant to the issues in the case, what they recall as to matters witnessed personally by them or what they would or would not have done or thought if the facts, or their understanding of them, had been different). It is improper to put pressure of any kind on a witness to give anything other than their own account, to the best of their ability and recollection, of the matters about which the witness is asked to give evidence.

…

2.6 During evidence in chief given otherwise than by witness statement, the witness's memory may be refreshed by being shown a document, but only if the witness created or saw the document while the facts evidenced by or referred to in the document were still fresh in their mind, so that they would have known if they were accurate or inaccurate.

...

3.2 Any trial witness statement should be prepared in such a way as to avoid so far as possible any practice that might alter or

influence the recollection of the witness other than by refreshment of memory as described in paragraph 2.6 above.

3.3 Trial witness statements should be as concise as possible without omitting anything of significance.

3.4 A trial witness statement should refer to documents, if at all, only where necessary. It will generally not be necessary for a trial witness statement to refer to documents beyond providing a list to comply with paragraph 3.2 of Practice Direction 57AC, unless paragraph 3.7 below applies, or the witness's evidence is required to:

(1) prove or disprove the content, date or authenticity of the document;

(2) explain that the witness understood a document, or particular words or phrases, in a certain way when sending, receiving or otherwise encountering a document in the past; or

(3) confirm that the witness saw or did not see the document at the relevant time;

but in the case of (1) to (3) above if (and only if) such evidence is relevant. …

3.6 Trial witness statements should not –

(1) quote at any length from any document to which reference is made,

(2) seek to argue the case, either generally or on particular points,

(3) take the court through the documents in the case or set out a narrative derived from the documents, those being matters for argument, or

(4) include commentary on other evidence in the case (either documents or the evidence of other witnesses), that is to say set out matters of belief, opinion or argument about the meaning, effect, relevance or significance of that other evidence (save as set out at paragraph 3.4 above).

3.7 On important disputed matters of fact, a trial witness statement should, if practicable –

(1) state in the witness's own words how well they recall the matters addressed,

(2) state whether, and if so how and when, the witness's recollection in relation to those matters has been refreshed by reference to documents, identifying those documents."

140. As O'Farrell J said in Mansion Place Ltd v Fox Industrial Services Ltd [2021] EWHC 2747 (TCC), at paragraph 37, the purpose of PD 57 AC,

> "is to eradicate the improper use of witness statements as vehicles for narrative, commentary and argument".

141. PD 57 AC, paragraph 5, also provides that the court retains its full powers of case management and the full range of sanctions available to it. Some examples of the sanctions that the court may impose are set out in paragraph 5.2.

142. The claimant was critical of the timing of this application and in any event considers that the defendants have misunderstood the requirements of PD 57 AC. Counsel for the claimant quoting Mellor J in Lifestyle Equities v Royal County of Berkshire Polo Club Ltd [2022] EWHC 1244 at paragraph 98, submitted that applications such as this,

> "must not be used as litigation weapons … When assessing how to respond to a breach or a perceived breach of the practice direction a party must exercise common sense and have regard to proportionality. The practice direction is not to be taken as an encouragement to go through witness statements with a fine-tooth comb for the purpose of identifying as many instances of non-compliance as possible for use in trench warfare."

143. The claimant complains that the defendants should not filet and over analyse the witness statements to find some instances of purported non-compliance. It is said that identifying issues over 31 pages in the schedule to a letter dated 12 April 2024 is oppressive. Whilst over analysis of a trial witness statement for the purposes of PD 57 AC as part of a tactical trial strategy should be deprecated, if trial witness statements fall into the trap of failing to follow best practice, as set out in annex 1 to the practice direction, parties run the risk of applications such as this.

144. Mr Salter KC submits that many of the defendants' complaints have been abandoned and that there are only now 18 individual examples of purported non-compliance. To an extent the defendants appears to be damned if they assert too many particulars of non-compliance, it is said to be oppressive, against not asserting enough so that the claimant argues it would be disproportionate to apply the sanction sought by the defendants to the entirety of both witness statements. As to the latter Mr Salter KC relied on Primavera Associates Ltd v Hertsmere BC [2022] EWHC 1240 (Ch). A judge had already required the claimant to redraft a trial witness statement, which the defendant still took issue with and sought an order that the revised witness statement be struck out. The claimant relied on this one trial witness statement for a claim alleging that the defendant had been negligent in the planning process for certain developed land owned by the claimant causing loss and damage valued at around £1.7 million. The defendant's application was framed in a general way in its application notice. The judge emphasised that it is for the defendant to prove that the witness statement does not comply with PD 57 AC and that the appropriate sanction is to strike out the totality of that statement. At paragraph 23, HHJ Paul Matthews sitting as a High Court judge, said,

> "But merely calling the specified paragraphs "examples" does not somehow mean that the burden is thereby cast on the claimant in relation to the non-specified paragraphs. The burden

> is still on the defendant. Showing, for example, that one paragraph in a statement consists of argument does not prove that other paragraphs do as well."

He went on to strike out 11 paragraphs, or parts thereof, of the witness statement.

145. Mr Salter KC characterises the defendants' application as making two primary complaints: that the statements take the court through the documents so speculating that the process was document led and further that they are not focused on the pleaded case.

146. He submitted that the practice direction does not change the law about the admissibility of evidence, and it does not stop a witness giving evidence about what they heard, saw and thought when they were present at a particular meeting. That is undoubtedly correct. When I observed that hypothetical conjecture in a witness statement was not helpful for a trial judge though, he referred me to the order that I made on the 7 December 2022. This was an order made in customary CH1 form which simply provided for the parties to serve on the other the witness statement of the oral evidence which they intended to rely on in relation to any issues of fact. He suggested that there was no reason to limit evidence to particular issues because the order did not provide for that. The witness statements must still be relevant, structured to follow the shape of the case set out in the statements of claim, only referring to background where it is necessary for the court to understand the factual matrix. As PD 57 AC confirms the law, a "trial witness statement must contain only evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial… and a trial witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case"[10].

147. Whilst I remain of the view that hypothetical conjecture is not helpful, or indeed strictly admissible, I can see the force of the submission that the witness statements are lengthy because they narrate what happened. Ms Alabatchka and Mr Amore were the ones with first-hand knowledge of the events that this claim is concerned with. Although the revised CH1 form which is used in the Business and Property Courts (Chancery Division) does provide in a document heavy case, for a core bundle of documents with a narrative chronology, for use at the PTR and trial.

148. However the defendants' complaints go back to the issue that lies at the heart of all these applications, what is the claimant's case on the business opportunity and detail, and how was it said to be misused.

149. What concerns me about the two trial witness statements is that they should be the oral evidence of the person making them, of direct events, and be tethered to the case that the claimant is advancing at trial.

150. Ms Rao in her second witness statement refers to Mr Amore and Ms Alabatchka's witness statements as containing 187 and 83 in-line references to disclosure documents. Yet the claimant's case on the detail pleads only 31 documents. In contrast the defendants' two witness statements refer to 15 and 42 in-line references to contemporaneous documents, some of which are references to the same document. The claimant decries this analysis and suggests that it is speculative to suggest that the

[10] taken from paragraphs 3.1(1) and 3.2.

witness statements have been document led. Mr Hemming suggests the numbers give a false impression and that in fact the witnesses only refer to 90 and 60 documents respectively. It is hard to resist the defendants' conclusion though. For example, paragraph 137 of Mr Amore's statement refers to refreshing his memory with certain emails, then refreshing his memory with a telephone call, then reviewing emails before adding his thoughts. Whilst this all turns on the question of obtaining legal opinion, and is therefore relevant, the email first referenced is dated 12 August 2019, then he jumps to a telephone call transcript 9 days later and to emails chains in September. It is not clear from the statements how far the evidence reflected what the witness actually remembered of events or simply recalled events from the documents. As counsel for the defendants pithily, but perhaps a little flippantly, observes if the true source of the witness's recollection are the documents then the trial might as well proceed on the documents, specifically those that are pleaded.

151. I am very cautious about permitting such a forensic critique of the witness statements, and the risk of weaponizing PD 57 AC, but the overall sense one gets when reading these witness statements is that they have been constructed by reference to documents. Of course, a witness can refresh their memory but the documents leading the recollection of events is what PD 57 AC was designed to avoid. Ultimately the court needs the best evidence from the witness, what the witness actually remembers of events, so that it can ascertain the truth through accurate fact finding. As Phipson on Evidence at paragraph 45-01 observes, "the appreciation of evidence involves what can be described as a triangular balancing act between the three concepts of relevancy, admissibility and probative value."

152. In some parts of the statements the witnesses speculate on what might have been in the mind of the other party. For example, Ms Rao[11] refers to the following,

> "(a) Paragraph 154.1 of Amore 1 ("I was on the one hand struck that the Defendants did not already know what these features of the bonds were, but on the other hand it was not very surprising given their lack of experience in this area");
>
> (b) Paragraph 154.3 of Amore 1 ("I was not surprised that he did not know these points as he had had no experience in this area");
>
> (c) Paragraph 73 of Alabatchka 2 ("In order to do that that, we had, to an extent, to walk [Steffen] through the mechanics of things…");
>
> (d) Paragraph 97 of Alabatchka 2 ("Neither Lee nor Steffen were aware of what sanctions existed or where to find the official basis of the information or documents I was referring to");
>
> (e) Paragraph 105 of Alabatchka 2 ("He did not have the knowledge in respect of prescription that we did (referred to below))".

[11] Second witness statement, paragraph 34.

153. Mr Hemming tries to address this in his witness statement, suggesting that the quotes are rather selective. Counsel for the claimant was quite exercised when suggesting that if the court makes an order as sought it will be a finding of improper conduct on the part of the solicitor. It is no such thing, and the defendants do not suggest that it is.

154. I also note it is unhelpful in this case for the parties to be potentially working from unagreed transcripts. Both witness statements refer to a transcript of a telephone call on 4 July 2019, but this transcript has now been revised by the claimant's solicitors. When the defendants' solicitors have complained about this Mr Hemming states that they have had the audio since August 2023. That rather misses the point. Ms Rao believes that the telephone call transcripts referred to by Mr Amore in refreshing his memory run to some 199 pages, and those referred to by Ms Alabatchka 88 pages.

155. Mr Hemming's witness statement criticises the opportunistic nature of the defendants' application. I do not accept that criticism. The defendants quite properly tried to engage in this issue through correspondence, without success. This is part of the refrain from the defendants about trying to understand the claimant's core case.

156. I bear in mind the comments of Fancourt J in MacKenzie v Rosenblatt Solicitors [2023] EWHC 331 (Ch) about the importance of ensuring compliance and understanding of PD 57 AC. This was a professional negligence claim against solicitors. When analysing the witness statements and the oral evidence at trial the judge observed that the claimant's four witness statements were the careful work of a legal team. The defendant understandably had revisited all the documents in the case and may have done so before writing his witness statement. However, his statement failed to identify the documents that were used to prepare the witness statements. The Judge said that the evidence was "of a different character from what is written in his statement."

157. On balance I am satisfied that it is proportionate to order the claimant to rewrite the trial witness statement of Mr Amore and the second trial witness statement of Ms Alabatchka and that these must comply with PD 57AC. To do otherwise would be to dilute the role of the Practice Direction and to undermine its purpose in claims such as this one.

158. Additionally, the defendants seek an order that Daniel Hemming, the partner who signed both the certificates of compliance, should provide a witness statement setting out information that is focused on the role of documents in the witness statement and the process of preparation. The defendants submit that this is open to the court under its extensive case management powers. Whilst I accept it might be, the court should be reluctant to embroil the solicitor with conduct of the claim into the arena. That is what this order will amount to. I also cannot see the utility in making such an order when I have already directed that the trial witness statements be rewritten.

159. As to timing, both parties have significant teams of lawyers, and in the claimant's case another firm working on the case as well. It seems to me that 1 week is too short for the defendants to file responsive evidence but if the parties cannot agree the timing I will determine that at the consequentials hearing.

(6) The claimant's application for permission to adduce expert evidence

160. The claimant seeks permission under CPR 35.4 to adduce written and oral expert evidence in the field of the investment market in Latin American sovereign and corporate debt instruments. In the draft order they propose to rely on an expert named Daniel Osorio and that the defendants have permission to instruct their own expert. The claimant attaches to the draft order schedule A which lists two issues for the experts: what was/is the market perception of investment in Venezuelan distressed debt and the extent to which all or part of the "business opportunity" was generally known by market professionals who were/are not specialists in Latin American/Venezuelan sovereign and corporate debt. This in turn refers to schedule B which is the claimant's definition of what constitutes "business opportunity".

161. This it is submitted is relevant to the trial issues of whether the market had ignored and/or avoided and/or undervalued the "Opportunities" as defined in the NDA and whether the "confidential information" that the claimant contends it provided to the defendants is confidential and/or a trade secret or was as the defendants assert "generally known among or readily accessible to person with[in] the circles that normally deal in such information"[12].

162. In British Airways v Spencer [2015] EWHC 2477 (Ch) 57, [2015] Pens LR 519 at paragraph 68, Warren J identified three important questions for the court to ask itself in approaching the issue of whether to grant a party permission to rely on expert evidence,

> "(a) The first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.
>
> (b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it …
>
> (c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings."

163. The burden is on the claimant to persuade the court that such evidence will assist the court. It is envisaged in the rules that this issue will be addressed at an early stage of the proceedings, indeed the parties are asked to state whether expert evidence is required in the directions questionnaire. The danger of course in applying at a late stage is that if the court gives permission that may cause the trial date to be lost. As Warren J observed at paragraph 63,

> "A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with

[12] amended confidential defence annex 1 paragraph 47.2

> the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed. In striking that balance, the court should, in my judgment, be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date)."

164. The engagement of the court's case management powers and in particular the overriding objective was considered in Yesss (Electrical) UK v Martin Warren [2024] EWCA Civ 14. The judge below had allowed a late application for permission to rely on expert evidence in a new discipline that had not been addressed by the existing directions. The appeal ultimately failed but at paragraph 25 Birss LJ said,

> "25. The critical starting point, as the appellant's submissions recognise, is a breach of a rule, practice direction or order. It may seem trite to say that if there has been no breach of a rule, practice direction or order then the relief from sanctions provisions do not apply, but it is worth emphasising. That is because in some contexts it appears that the concept of "relief from sanctions" has been used as a label simply to characterise the tougher approach to case management and compliance which can be found in Mitchell and Denton. That is not right. The courts today do apply an approach to case management in general which is less tolerant of delays than before. The modern approach has a greater emphasis on compliance and the need for efficient conduct of litigation at proportionate cost. There is recognition that the need for efficiency and proportionate cost applies both in the given case and in relation to knock on effects on other cases. The basis in the rules for this general approach, as I mentioned in Lufthansa at [23], is not r3.9 and relief from sanctions, rather it is that the two principles identified are now embedded in the overriding objective (r1.1(2)(e) and (f)) and they play an important part in its application. That is why it can be said that the "ethos" of Denton applies even when r3.9 (relief from sanctions) is not engaged (c.f. FXF paragraph 76[13])."

165. This is undoubtedly a late application, and the timing of the application has a flavour of harking back to pre-CPR days. It was therefore somewhat remarkable for the claimant to criticise the defendants for "now" opposing the expert evidence application. Reference was made to the costs and case management conference on 7 December 2022 when Mr Moody-Stuart KC on behalf of the defendants had stated that, "there will be an issue between the parties as to what is known and what is trite what is generally out there. It may be that there would be a need for someone who is an expert in the bond markets to say look, this is all known. We cannot formulate that yet". The claimant's

[13] FXF v Ishinryu Karate Association [2023] EWCA Civ 891

position at this time, as set out in Counsel's skeleton argument, was that expert evidence was not necessary in these proceedings.

166. What this reveals is that in 2022 the parties were considering this point. There has been no material change to the defendants' case. By way of an example the amended defence dated 18 May 2022 at paragraph 57A pleads, "the only information conveyed by the claimant to the defendants prior to the NDA was in the nature of high-level concepts or ideas that were already in the public domain." The defendants made no application for permission to rely on expert evidence, neither did the claimant until the application dated 29 April 2024, that is currently before the court. The draft list of issues for trial remain in the same form as 7 December 2022.

167. The claimant's counsel was not able to provide any adequate explanation as to why if this expert evidence was necessary, as the claimant now contends, this epiphany had occurred so late in the day. Certainly, leading Counsel for the claimant at this hearing also represented the claimant at the costs and case management conference on 7 December 2022, which took place before me. It is also compounded by the manner in which the claimant's solicitors have sought to raise this issue. Rather than engage with the defendants' solicitors in advance of the application being made they merely copied the defendants' solicitors into a letter to the court dated 26 April 2024 seeking a listing of its then unissued application.

168. Is this evidence necessary? The claimant submits that it is, the court will need an overview of the state of the market's interest and knowledge that can only be provided by an expert witness. There is a difference between evidence of fact and evidence of opinion. Sometimes it is difficult to identify which side of the line the evidence falls on. Here what the claimant appears to be suggesting is that Mr Osorio will be giving evidence of his direct observations and perceptions of the market. Even then it is not just his, the claimant seeks to expand the people within the confidentiality club by another 4 identified individuals, presumably members of his team. It therefore follows that expert evidence is sought by the claimant is not necessary. This is a point that has been raised by the defendants although the claimant's retort is to say well if the evidence is given by witnesses of fact it will necessarily be anecdotal and biased towards the side calling them. Ultimately it will be a matter for the trial judge about the knowledge within the marketplace. It seems to me that this evidence can be dealt with by witnesses of fact, it is not necessary for the evidence to be given by an expert. That this is the correct analysis is reinforced by the claimant's own conduct. The claimant has not identified any material change in the issues for trial and as I have already said there has been no change in the defendants' position. Ultimately issues of confidentiality in this case are issues of fact for the court.

169. Will this evidence be of assistance to the court? The court will need to have an overview of the state of the market and the knowledge within the market. That evidence can be resolved by witnesses of fact, which the trial judge will be able to evaluate following cross-examination.

170. The question then is whether the expert evidence is reasonably required. The claimant criticises the defendants as conflating three issues, the market, what the defendants knew and what occurred between the parties. It is accepted that the expert will only be able to give an overview of the market, the latter issues being a matter for factual witnesses. However, the claimant has not limited the expert in this way, even a cursory

reading of schedule A and schedule B reveals the extent of the scope, fairly described by Mr McKenna in his fourth witness statement, paragraph 10.6(a) as "sweeping". There is some force in his point that what is sought seeks to cover the entire breadth of the claimant's case on confidential information, both as to individual elements and as a whole. This problem is of course of the claimant's own making. What they should have done is to engage with the defendants at an early stage not posit the claimant's unilateral view on what constituted the issues that an expert should consider and their own definition of "business opportunity".

171. It is also of concern that the expert's finalised or almost finalised report has been prepared on the claimant's unilateral analysis of the issues and characterisation of the "business opportunity". As to the latter that appears to be a differently nuanced paraphrased version of that set out in re-amended confidential Annex 1.

172. The claimant submits, having identified an expert, that his and his team's fees together with associated legal fees would be approximately £300,000. That it is argued in a claim for sums in excess of £10 million is proportionate. The claimant maintains that this application will cause little prejudice to the defendants and can be managed within the existing time frame so that there is no risk to the trial date. It was clear at the hearing before me that the claimant's experts report was either in a finalised or almost finalised form. The Claimant's letter dated 10 May 2024 suggests that their proposed expert had only started work in late March, it having taken them 6 weeks to find such an expert. So, by the middle of February 2024 the claimant was actively looking for an expert, but no mention was made of this to the defendants until 2 ½ months later.

173. Litigation needs to be conducted efficiently and at proportionate cost. I do not accept the submission that the defendants would be caused little prejudice. The timing of this application is such that I consider that if permission were granted the work required by the defendants would indeed lead to the trial date being vacated. The defendants submit that if permission were granted the defendants' witnesses of fact would wish to respond to matters of fact raised in the report. There must be a strong likelihood of that, not least when I consider that the evidence that the claimant suggests the expert will opine on will be matters of fact. I also bear in mind the current trial time estimate of 10 days. Given the way in which the parties argue every point permitting two experts to provide reports and in all probability being required to attend court to be cross-examined together with the additional witness evidence will not be accommodated within the current trial listing. The defendants are also sceptical about the estimated costs and consider them to be far too low on any objective view.

174. The claimant's application for permission is dismissed.