



Neutral Citation Number: [2024] EWHC 1235 (Comm)

Case No: CL-2021-000412

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 17/05/2024

Before :

THE HON. MR JUSTICE BRYAN

Between :

INVEST BANK P.S.C.

Claimant

- and -

- (1) **AHMAD MOHAMMAD EL-HUSSEINI**
(2) **MOHAMMED AHMAD EL-HUSSEINY**
(3) **ALEXANDER AHMAD EL-HUSSEINY**
(4) **ZIAD AHMAD EL-HUSSEINY**
(5) **RAMZY AHMAD EL-HUSSEINY**
(6) **JOAN EVA HENRY**
(7) **VIRTUE TRUSTEES (SWITZERLAND) A.G.**
(8) **GLOBAL GREEN DEVELOPMENT LIMITED**

Defendant

Tim Penny KC and Marc Delehanty

(instructed by **PCB Byrne LLP**) for the **Claimant (Bank)**

Niranjan Venkatesan and Constantine Fraser

(instructed by **Debenhams Ottaway LLP**) for **D2 (Mo) and D6 (Joan)**

Tiffany Scott KC and Emma Hargreaves

(instructed by **Edwin Coe LLP** for **D7 (Virtue)**)

D1, D3, D4, D5 and D8 were unrepresented

(**D3, D4 and D5** appeared in person)

Hearing dates: 16 and 17 May 2024

APPROVED JUDGMENT

MR JUSTICE BRYAN :

A. INTRODUCTION AND BACKGROUND

1. The parties appear before the Court upon the hearing of the two day Pre Trial Review of the claims in this action (recently extended at my instigation and direction from one day), in advance of a 4 week trial due to commence on 1 July 2024, with the skeleton argument for trial of the Claimant Invest Bank P.S.C. (the “Bank”) being due on 26 June 2024 (i.e. just over 5 weeks away). By such time all matters must be pleaded out, all issues crystallised, any and all further disclosure given and any and all further factual and expert evidence must have been served, and all in good time before that so as to facilitate the preparation of the respective skeletons and to enable proper and fair preparation for the trial itself (preparation which will inevitably be both extensive and onerous). The parties state they are trial ready subject only to a number of matters arising on the PTR, and that should be capable of resolution at the PTR, none of which would give rise to difficulties in relation to the trial still less put in jeopardy the viability of the trial or its current duration.
2. However, there is a very recent substantive (and substantial) application on the part of the Bank to Re-Re-Re-Re-Re-Amend its Particulars of Claim, which must inevitably be determined at the start of the PTR and before the remainder of the PTR can take place, and which has major potential implications in relation to preparation for trial and whether (if the amendments are allowed in whole or in part) the trial could go ahead, namely the Bank’s application dated 25 April 2024 to serve Re-Re-Re-Re-Re-Amended Particulars of Claim with consequential directions sought for responsive amended Defences (and Reply) (the “Amendment Application”) (the Bank also accepting, in its evidence, that further witness evidence will also be likely).
3. In relation to the Amendment Application:
 - (1) The Amendment Application is supported by the Eighteenth Witness Statement of Trevor Mascarenhas of PCB Byrne LLP also dated 25 April 2024 (“Mascarenhas 18”).
 - (2) In circumstances in which the Bank achieved an expedited listing of the Amendment Application upon the PTR (without which, realistically, the Amendment Application would never even have got on before trial based on an appropriate one day estimate), the Amendment Application is opposed (on behalf of the Second Defendant, Mohammed Ahmad El-Husseiny (“Mo”) and the Sixth Defendant Joan Eva Henry (“Joan”)) by the Sixth Witness Statement of Juliet Schalker of Debenhams Ottaway LLP (“Schalker 6”) dated 9 May 2024 (served within short order and on the basis of a truncated timescale for responsive evidence on what is a heavy application). Schalker 6 is accompanied by an Annex 1 which is a table setting out dates (by reference to documents) by which it is said the Bank could have pleaded the proposed amendments (setting out dates, before 5 July 2021 and/or September 2021 and/or October 2021 and/or January, February or March 2022 and/or October 2023 and/or (in one instance) January 2024 (the “Schalker Table”). Mo and Joan have also served a preliminary letter report on UAE and Lebanese law from Professor Hadi Slim dated 8 May 2024 (the “Hadi Report”) and on which they seek to rely on the Amendment Application.

- (3) The Bank replied to Schalker 6 in the Nineteenth Witness Statement of Trevor Mascarenhas dated 13 May 2024 (“Mascarenhas 19”), i.e. on the same day as the Bank’s Skeleton Argument for the PTR, and the day before the Skeleton Argument on behalf of D2 and D6 (which I will refer to, for ease of reference, as the “Defendants’ Skeleton Argument”), D2 and D6 leading the opposition to the majority of the proposed amendments. Mascarenhas 19 is accompanied by an Annex 1 thereto which is a table of documents upon which the Bank relies to advance its proposed amended case (the “Mascarenhas Table”). On the morning of the hearing yesterday, the Bank (without leave) provided a yet further statement from Mr Mascarenhas (“Mascarenhas 20”) responding to two points set out in the Defendants’ Skeleton Argument (addressing the timing of the making of the Amendment Application and correcting what had been said about Sheikh Tahnoon).
- (4) The Seventh Defendant, Virtue Trustees (Switzerland) A.G. (“Virtue”) through its solicitors Edwin Coe LLP, have corresponded with PCB Byrne (on behalf of the Bank) in relation to the Amendment Application. Virtue has also served a Skeleton Argument (the “Virtue Skeleton Argument”). Virtue complained about aspects of the proposed amendments (in particular as to their particularity), leading to further proposed amendments. By the time of the hearing the amendments so far as they related to Virtue were largely agreed between Virtue and the Bank and it was agreed that remaining matters could be addressed later in the PTR following this Judgment.
4. The First Defendant, Ahmad Mohammed El-Husseini (“Ahmad”), is not represented at the hearing and did not appear. The Third Defendant Alexander Ahmad El-Husseiny (“Alex”), the Fourth Defendant Ziad Ahmad El-Husseiny (“Ziad”) and the Fifth Defendant Ramzy Ahmad El-Husseiny (“Ramzy”) are not represented at the hearing, but they have all been present (Ramzy in Court, Alex and Ziad by video link) and I heard from each of them briefly on the Amendment Application. They each confirmed that they adopted the submissions of D2/D6 so far as they also relate to their position.
5. The draft Re-Re-Re-Re-Amended Particulars of Claim involve in the region of 143 amendments that D2 and D6 say are substantive. They have consented to (or are neutral as to) 66 of them (whilst identifying that even these will cause additional work, including pleading back to, very shortly before trial).
6. That leaves 77 amendments (which for ease of reference and definition hereafter I will refer to as the “Proposed Amendments”) which are objected to on behalf of D2 and D6 (and other Defendants) for a variety of reasons, the overarching reason being that they say that the trial date would be lost if permission were to be granted (in the context of the need for response pleas, disclosure, further factual evidence and expert evidence and the impact on fair trial preparation). The Proposed Amendments include what was contended by D2 and D6 to be a new allegation of dishonesty, a new allegation of bad faith, a new claim for \$15 million against Joan (not previously pleaded and said to be barred by limitation) and a new factual basis for the Bank’s existing claims under section 423 of the Insolvency Act 1986 (“Section 423”) which, if permitted, D2 and D6 say would require a further disclosure exercise, further witness evidence, and expert evidence of UAE and Lebanese law. It is submitted that the Proposed Amendments are variously either “very late” or on any view “late”, most

are time barred by section 35 of the Limitation Act 1980, others are embarrassing (in the technical sense) and others are said to have no real prospect of success.

7. In addition to the points made in correspondence and in the Defendants' Skeleton Argument such stance is also supported by the evidence of Ms Schalker, a solicitor of the Senior Courts and partner in Debenham Ottaway LLP, who states (amongst other matters) in Schalker 6 as follows:

“6. Mascarenhas 18 attempts to portray the amendments as a limited particularisation of the Bank's claim ahead of trial. In reality, the Bank's numerous proposed amendments are an attempt substantially to recast its case at the eleventh hour. They include new allegations of dishonesty against Joan, a new claim against her for up to \$15 million (which is in any event time-barred) and a new claim against both Joan and Mo that is also time-barred.

7. As I explain below, the amendments, if permitted, will require further investigation, further expert evidence, further factual evidence and further disclosure. This will inevitably result in the adjournment of the trial because that work cannot be done in the time that remains before trial; and the current 4-week listing is in any event inadequate to accommodate these further issues.

...

41. Joan and Mo will invite the Court to dismiss the amendment application. As explained above, I do not, with respect, consider that a fair trial with the current trial date is possible if the amendments are permitted.”

8. In contrast, and in addition to the views expressed by Mr Mascarenhas (a solicitor of the Senior Courts and partner in PCB Byrne) in Mascarenhas 18, 19 and 20, the stance of the Bank is set out in the Bank's Skeleton Argument where it is stated, amongst other matters:

“3. The Bank is a stranger to all [the] asset transfer transactions of D1. Its claims are necessarily inferential in nature. Its task has been to piece together what has happened from public records, disclosure and the explanations given by various Ds across their statements of case, interlocutory evidence and trial evidence in these proceedings. From these jigsaw pieces, an even clearer picture has emerged. The Bank moves to amend to put that clearer picture before the Court at trial for the just resolution of its s.423 claims.

4. D2, the eldest son of D1, and D6, the (ex-)wife of D1, lead the line in resisting this application. It is apparent that they wish to constrict the Bank (and the Court) in respect of the factual matters which may be considered when answering the central question for trial. The presentation of objections in Schalker-6 on the grounds of purported need for extensive additional disclosure, witness evidence and expert evidence is overblown and a case-study in the mischaracterisation of

molehills as mountains. **The only significant objection to (some of) the amendments is limitation but, as explained below, it would be most appropriate for such matters to be left for determination at trial (but if it is to be determined now, it plainly falls to be determined in favour of the Bank).**”

(emphasis added)

9. I emphasise the highlighted words above at the outset, for they foreshadow (albeit obliquely) that one of the alleged molehills might well be considered to be rather more of a mountain given that in relation to one of the proposed pleas it is accepted that such plea raises an entirely new cause of action against Joan (to the value of \$15 million), and which it is alleged is time-barred in circumstances where the Bank’s primary submission on the Amendment Application, and by way of riposte on limitation, is for the limitation issue to be batted off to trial necessitating, of course, all stages of preparation of the defence of such case taking place before trial, even if it were permissible and/or appropriate to adopt such a course (which the Defendants submit it is not), an issue I address in Section C below.
10. I have heard rather more than the equivalent of a full day’s oral argument on the Amendment Application. In circumstances where the Amendment Application needs to be determined before the remainder of the PTR can be proceeded with today, and any necessary directions given, and in circumstances where to reserve judgment would itself prevent the PTR being completed and would not allow sufficient time before trial for any consequential trial preparation, it is necessary to give judgment on the Amendment Application at this time on an ex tempore basis, and within the inherent time constraints upon doing so. Whilst this necessitates a concise approach to the evidence before me and associated submissions, I confirm that I have given careful consideration to all the evidence before me, and all the submissions that have been made to me.
11. As will appear, the disputed amendments can for the purposes of analysis be divided into four categories: the Medstar Amendments, the Tahnoon Amendments, the Knowledge Amendments and Miscellaneous Amendments. They are addressed in turn in due course below (in Section D). However before doing so it is first necessary to summarise the factual background and procedural history to date (in Section B) and the relevant legal principles (in Section C).

B. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

12. D1, Ahmad, is a Lebanese businessman, Joan, D6, was or is D1’s wife. Joan and Ahmad married on 26 June 1980. Their case is that they divorced pursuant to a divorce agreement dated 26 August 2017 (a copy of which was disclosed to the Bank in September 2021). It appears that there is an issue, raised by the Bank as to any significance of the same, and whether they still regard themselves as husband and wife and as to any purpose of them divorcing. Mo, D2, is Ahmad’s eldest son. D3, D4 and D5 are also sons (D2-D5 are collectively referred to by the Bank as the “Sons” and D1, D6 and the Sons are collectively referred to by the Bank as the “Family

Defendants". D7 is a trustee of a trust set up by Ahmad, and D8 is a company of which D5 is sole director.

13. D1 is the judgment debtor of the Bank in an amount £19.6m plus interest. The debt arises from judgments obtained against him in Abu Dhabi on personal guarantees he gave for his UAE companies' indebtedness to the Bank, with default judgment subsequently entered against him in England. None of the outstanding judgment debt has been paid. It is the Bank's case that across 2017-18, before those judgments were obtained, D1 transferred, or caused his companies to transfer, a number of valuable assets, in the form of shares, real estate and monies, to his family members and/or companies said to be under their control and/or a trust of which they were beneficiaries, to put them beyond the reach of his creditors. In that context the Bank advances a claim under Section 423.
14. This allegation is contested by various defendants who plead, amongst other matters, and depending on the allegation, that the alleged asset transfers either did not take place at all or that they occurred for legitimate reasons such as tax planning (for example, it is said, to mitigate the impact of a publicised change to the UK inheritance tax regime which came into force on 4 April 2017).
15. The Bank identifies that the central question for the Court to determine at the upcoming trial will be: was one of D1's purposes, in doing as the Bank alleges, the defeat of his potential creditors? If it was, then the Bank's case is that the Court's powers under Section 423 to reverse those transactions will be engaged and the Court can, and should, order appropriate relief for satisfaction of the judgment debt.
16. As already noted the Bank is a stranger to the asset transfer transactions of D1 and it says it has had to piece together from public records, disclosure and explanations given by various Defendants across their statements of case, interlocutory evidence and trial evidence what has occurred and why, which it now seeks to supplement in the Proposed Amendments. For their part D2 and D6 point out (per the Schalker Table), that the Bank has long had the documentation that would have allowed it to make pleas the subject matter of the Proposed Amendments.
17. For present purposes it is important to note that in the PoC (that is the current PoC i.e. the Re-Re-Re-Re-Amended Particulars of Claim) the Bank does not anywhere allege that either Joan or Mo was party to any asset dissipation scheme devised by Ahmad; and at a hearing before Andrew Baker J in May 2022, the Bank conceded that an allegation that Ahmad's sons shared the alleged purpose of putting assets beyond the reach of his creditors should be struck out. There is therefore no existing allegation of bad faith against Joan or Mo. They are sued simply on the footing that they received Ahmad's assets. By the Proposed Amendments, however, the Bank now seeks to allege that Joan was on notice of the alleged purpose, although it does not so contend in respect of Mo.
18. The action was commenced as long ago as July 2021. It has a long procedural history that it is largely unnecessary to go into for the purpose of the Amendment Application which stands or falls on its own merits (albeit set against the backdrop of amendments to date, the time when documents were available to the Bank, and the timing of the latest amendments). The procedural history includes jurisdiction challenges, a reverse summary judgment application, security for costs applications, a preliminary issue

trial on the underlying liability of D1 to the Bank, and multiple rounds of pleadings (even before the Amendment Application the Particulars of Claim had been amended no fewer than 5 times, and some of those amendments were very substantial, in particular in the (green) Re-Amended Particulars of Claim).

19. So far as the position of D1 is concerned, he did not file or serve a defence. On 13 January 2023 default judgment was entered against him for £19.65m on the debt claims against him (the “D1 Default Judgment”). He remains a defendant to the Section 423 and beneficial interest claims. D1 failed to pay adverse costs orders arising from his interlocutory challenges. The Bank sought to examine him under Part 71. D1 failed to produce documents and attend Court. By an order of Andrew Baker J of 6 February 2023 he was made subject to a suspended committal order (of 1 month’s imprisonment) which was activated by a subsequent failure of D1 to produce documents and attend Court. On 3 March 2023 Cockerill J issued a bench warrant for D1’s arrest. D1 has continued to defend proceedings brought by the Bank against him in Canada (where he is the sole Family Defendant and the Bank considers that there are assets susceptible to enforcement without need for recourse to an action in the nature of Section 423).
20. In the forthcoming trial various Defendants (D2 and D6 in particular) rely extensively on hearsay statements of D1. Much of that is interlocutory evidence of D1 in these proceedings (with a view to explaining the purposes behind his asset transfers). On the Bank’s application, Bright J made an order on 18 April 2024 that D1 be cross-examined on that hearsay. Whether D1 will attend for such cross-examination remains to be seen.
21. I address in due course below, the Tahnoon Amendments, the Medstar Amendments, the Knowledge Amendments and the Miscellaneous Amendments which form the Proposed Amendments. It suffices at this point to identify a number of the persons / entities that feature in the Proposed Amendments. What follows is taken from the Bank’s Skeleton and as such is not necessarily agreed by the Defendants as accurate or correct. I set such matters out solely for the purpose of comprehension of the allegations sought to be advanced in the Proposed Amendments:
 - (1) “Tahnoon”. Sheikh Tahnoon bin Saeed bin Shahboot Al Nahyan, an Emirati royal.
 - (2) “Kendris”. Kendris is a Swiss family office, trust and fiduciary services provider. D1 had used its services since the late 1980s. Kendris is the owner of D7. Relevant personnel at Kendris are Ms Zweifel, Mr Escher and Mr Frey.
 - (3) “Medstar”. Medstar Holding SAL is a Lebanese holding company of long standing, of which D1 is UBO.
 - (4) “Mistar”. Mistar Investment Group Holding SAL is (or was as various Defendants say it was liquidated in 2022) a Lebanese company which was incorporated in early May 2017. D3 & D4 were the original majority shareholders (with D1 having a minority share); then in July 2017, D2 & D5 joined D3 & D4 with each having 24.9%, before in December 2017, D6 joined such that D6 had 20% and the Sons had 19.9% each. The nature of the 0.4%

held by some Lebanese lawyers at Hachem Law Firm (which the Bank says is a firm close to and used by D1 to represent his interests) is disputed.

- (5) “Ras Beirut Co”. Ras Beirut 3486 SAL is a Lebanese company incorporated in March 2018 of which D3 is 40% registered shareholder, with D4, D5 & D6 each being registered shareholders of 20%. It owns Lebanese real estate.
- (6) “Federal Co”. Federal Establishment Co was an Abu Dhabi company owned by Tahnoon but in respect of which D1 had a power of attorney. D1 used the company to facilitate business transactions in / via Abu Dhabi – it was subject to a profit-sharing agreement between D1 and Tahnoon.
- (7) “Commodore UAE” and “Tadamun UAE”. These were Abu Dhabi companies of D1 (but of which Tahnoon was majority registered shareholder) engaged primarily in construction. These companies had loan facilities with the Bank which D1 personally guaranteed. It was on those guarantees that the Bank obtained judgments against D1 in Abu Dhabi, which in turn were the basis for the D1 Default Judgment.
- (8) “Commodore Turkey”, “Commodore Netherlands” & “Commodore Belgium”. These companies, incorporated in the indicated jurisdictions, were in a corporate chain of which D1 was UBO, with Dutch and Belgian businesses engaging in African infrastructure projects.
- (9) “Marquee” and “Norton BVI”. Marquee Holdings Limited was a Jersey company which was the registered owner of two valuable London properties: 9 Hyde Park Garden Mews (“9HP”) and 18 Hyde Park Square (“18HP”). Norton Corporate Services Inc is a BVI company which serves as nominee shareholder for companies administered by Kendris. The directors of both Marquee and Norton BVI were representatives of Kendris. Norton BVI was at material times the registered shareholder of Marquee. Prior to the events subject of the Bank’s claims, it held those shares on trust for D1. Therefore, D1 had the beneficial interest in the Marquee shares (“Marquee Interest”) and was the UBO of 9HP and 18HP.
- (10) “Cardena”. Cardena Holding and Finance Limited is a BVI company, owned by D1. It owns a property in Ibiza.

C. RELEVANT LEGAL PRINCIPLES IN RELATION TO AMENDMENT

22. The relevant legal principles in relation to amendments, “late” amendments, “very late” amendments and amendments after the expiry of a limitation period are, unsurprisingly largely common ground albeit there were differences of emphasis between the parties (and there is a difference between the Bank and D2/D6 as to whether limitation matters can properly be left over to a trial in the absent of consent to such a course, a matter I address in due course below).
23. Coincidentally I have only recently had to address such principles in another case, namely *Steenbok Newco 10 Sarl v Formal Holdings Limited* [2024] EWHC 1160

(Comm) at [8] to [37]. In circumstances where I have also received submissions from the Bank and the Defendants on particular authorities, and given differences in emphasis between them, I will set out the applicable principles at some length below (rather than simply quoting and/or cross-referring to what I said in *Steenbok*).

C.1 THE DISCRETION UNDER CPR 17.3

24. CPR 17.1(2) provides that, where a statement of case has been served, “a party may amend it only (a) with the written consent of all the other parties; or (b) with the permission of the court”. CPR 17.3 contains a general discretion to grant permission.
25. The issue of whether to allow amendments involves the exercise of the Court’s discretion – see *Quah v Goldman Sachs* [2015] EWHC 759 (Comm) at [38(a)]. This discretion is subject to CPR 17.4 (as addressed below). The circumstances in which amendments may be put forward are, as it has been put, “*infinitely variable*” and each application requires the Court to take into account the particular facts of the case. Accordingly whilst previous decisions may be illustrative, they are seldom compelling – see *Vilca v Xstrata Ltd* [2017] EWHC 2096 at [22] and [25(v)]. As was stated in that case, “It is always a question of striking a balance and weighing all relevant factors”.
26. In exercising the discretion, the overriding objective is of the greatest importance (see *Quah* at [38(a)]). In this regard the Court should have regard to the list of matters in CPR 1.1(2) (see *Scipion Active Trading Fund v Vallis Group Ltd* [2020] EWHC 795 (Comm) at [63]). The principles under CPR 3.9 do not apply: *Vilca* at [22].
27. Furthering the overriding objective includes “dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party” (CPR 1.1(2)(c)). This principle was applied in *Scipion* at [92].
28. CPR 1.1(2) provides that dealing with a case justly and at proportionate cost includes “ensuring that the parties are on equal footing” (CPR 1.1(2)(a)) and “ensuring that the case is dealt with expeditiously and fairly” (CPR 1.1(2)(d)). One aspect of this is the need to take into account the impact on a party’s trial preparation. The parties need to be “on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence”. This is relevant from the position of the party that has to respond to the amendments. The equal footing principle was applied in *Scipion* at [91]. D2/D6 submit that this would not be the case here if the amendments were allowed, as it is said that the consequence would be to deny the Defendants’ legal team the time that they require to prepare properly for a trial and necessitate the adjournment of the trial (which is not an application that the Bank is making as was confirmed to me in an email immediately after the oral argument).
29. The Court has to strike a balance between the interests of the applicant and those of the other parties and litigants more generally, applying the overriding objective, having regard to the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted: *CNM Estates v Carvill-Biggs* [2023] 1 WLR 4335 at [75].

30. So far as fairness is concerned, a number of authorities recognise that amendments can be made to “catch up” with disclosure – see *Various Claimants v MGN Ltd* [2020] EWHC 553 (Ch) at [45], [48(c)], [60], [62(a)-(b)]; *Swain-Mason* at [72] and *Rose v Creativityetc Ltd* at [101] and also to provide further clarity about a generalised case – see *Various Claimants* at [42]-[49] and *Rose* [2019] EWHC 1043 at [110] in which it was stated that, “There are aspects of the proposed pleading which can readily be seen as properly permissible. Those are matters of clarification or expansion of the case already set out”. The fact that a Court will take into account if a matter has, for example, only become clear on disclosure is an incident of the fact that the reasons for the delay will be taken into account.
31. Where (as D2/D6 submit applies in the present case) most of the Proposed Amendments could have been made sooner, that is a point telling against the grant of permission – see *Various Claimants v MGN* at [45] in the context of the phrase “*catching up with disclosure*” where it is stated that the material “*could not necessarily have been pleaded before*”.
32. Permission may be granted where the pleadings bring the case in line with the witness or expert evidence. For example, in *Toucan Energy Holdings Ltd v Wirsol Energy Ltd* [2021] EWHC 895 (Comm), Henshaw J. identified at [9] (of the Annex to the judgment):

“It is relevant to have regard to the degree to which the case sought to be advanced by the amendment is one that the parties have in fact already been addressing. In *Hawksworth v Chief Constable of Staffordshire* [2012] EWCA Civ 293 (CA), the Court of Appeal stated, *obiter*, that it might appropriate to permit an amendment at trial in respect of a matter which, although not raised in the pleadings, had nevertheless been raised in some of the witness statements and experts’ reports served before trial. In *Ahmed v Ahmed* [2016] EWCA Civ 686, the claimants applied to have letters of administration revoked on the basis that the will annexed to them had not been duly executed or witnessed. At the start of the trial the claimants obtained permission to amend their particulars of claim so as to allege that the will had been forged. The Court of Appeal dismissed an appeal against that grant of permission: the amendment was no more than a formality bringing the claimants’ case into line with what had been argued for at least six months; the appellants had not been taken by surprise by the amendment and, indeed, had themselves sought at the pre-trial review permission to call a handwriting expert.”

(emphasis added)

33. In this regard in *Various Airfinance Leasing Companies (“VALC”) v Saudi Arabian Airlines Corporation* [2021] EWHC 2330 (Comm), Mr MacDonald Eggers QC (sitting as a Deputy Judge of the High Court) expressed the following sentiments at [15(5)] (with which I agree):

“Particularly in complex litigation, it is not unusual for amendments to be made to the statements of case to reflect changes in the parties’ understanding of the issues and the other

party's case, the emergence of new evidence, or developments in the law. The parties may also wish to amend the statements of case to reflect the evidence that they have served for adduction [sic] at trial or to narrow or perhaps to reformulate the issues in the action. This is a consideration which the Court should take into account in deciding how to dispose of the application having regard to principles of active case management and the furtherance of the overriding objective..."

34. However, if the amendment could have been made earlier, a claimant's desire to wait and see what the defendant's witnesses say before making an amendment is a bad reason, not a good reason, it is to "put the cart before the horse" (see *Bourke v Favre* [2015] EWHC 277 (Ch) at [12]).
35. Amendments should be "properly formulated" (i.e. appropriately particularised and not an abuse of process) and "clearly formulated" (i.e. readily understandable) (see *VALC* at [15(2)] and *CIP Properties v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 at [19(d)]). However as was said in *Rose* at [50]: "The test is comprehensibility and not elegance. The drafting of almost any pleading could be improved with hindsight and the task for the judge in assessing whether this precondition has been satisfied is not to assess the stylistic qualities of the draft but to see if it sets out the amending party's case in such a way that the other party knows the allegations it has to meet". Where the particulars of the plea are "just adequate" but could be further developed, the Court may allow an amendment but on the condition that further particulars are provided (see *VALC* at [15(c)]).
36. In this regard, whilst it is "appropriate to consider whether a proposed pleading is coherent and contains properly particularised elements of the cause of action relied upon" (*CNM* at [48]), the Court should accept factual averments unless they are demonstrably untrue or unsupportable: *Garden House* at [39], *Okpabi v Royal Dutch Shell* [2021] 1 WLR 1294 (Sup Ct) at [107] and *JFC Plastics v Motan* [2019] EWHC 3959 (Comm) at [14].
37. However particular considerations arise in relation to the making of allegations of fraud (which are equally applicable to allegations of dishonesty and/or bad faith such as D2/D6 say are being sought to be advanced) and improper and/or unlawful conduct generally. There are stringent requirements in relation to the pleading of fraud – see CPR r16.4(1) which requires particulars of claim to include "(a) a concise statement of the facts on which the claimant relies" together with the matters set out in PD16 (see r.16.4(1)(e)). These matters include, at paragraph 8.2 of PD16, "(1) any allegation of fraud"; and "(5) notice or knowledge of a fact". As is well established, and as I stated in *NBT v Yurov* [2020] EWHC 100 (Comm) at [50]: "fraud or dishonesty must be distinctly alleged and distinctly proved; it must be sufficiently particularised; and it is not sufficiently particularised if the facts pleaded are consistent with innocence. This means that a claimant who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and facts, matters and circumstances which are consistent with negligence do not do so..." (emphasis added).
38. These points summarise what was said by Lord Millett in *Three Rivers District Council v Bank of England* [2003] 2 AC 1 at [185]-[186]. He went on to set out the

importance of pleading the primary facts relied on in support of an allegation of fraud or dishonesty, including, importantly, because the Defendant is entitled to know the case he has to meet. Likewise, Lord Hope stated at [55] that: “Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out.”

39. Fraud must be distinctly alleged and distinctly proved as against each defendant so that it is clear what is said against each person. Where the same plea is rolled up against multiple individuals, it will not be clear whether the particulars alleged do in fact relate to a specific defendant (which is impermissible). Likewise, where a rolled-up plea relates to multiple causes of actions, e.g. negligence and fraud, it is not clear whether a particular is said to support a case in (in this example) fraud, or merely negligence – in this regard see, for example, *McEaney v Ulster Bank* [2015] EWHC 3173 (Comm), in which it is stated that rolled up pleas in the fraud context are “impermissible” (at [65]) and “unsatisfactory” (at [82]). See also what was said by May LJ in *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340 that: “It is ambiguous and thus demurrable, if fraud is relied on, to use the common “rolled up plea” that a defendant knew or ought to have known a given fact. If it is desired to allege and plead fraud and, in the alternative, negligence based on similar contentions, then the former must be pleaded first and clearly and the relevant part of the plea confined to fraud. The allegation in negligence can then be pleaded separately and as a true alternative contention”.
40. If a proposed amendment raises a new claim, it will be refused if it does not have “a real prospect of success” (see *Toucan*, Annex, at [5(ii)]; *Quah* at [36] *Rose* at [56] and *CNM Estates* at [76]-[77]). “Real prospect of success” has the same meaning as in a summary judgment sense. Whilst this is a relatively low threshold, it is still a threshold that must be met, and there will be some contexts where this consideration is in play (for example if a claim sought to be advanced in an amendment is obviously time-barred).
41. In *Scott v Singh* [2020] EWHC 1714 (Comm) at [19] (approved in *CNM* at [77]) it was stated that, “[t]he court is not to engage in a mini-trial when considering a summary judgment application and even less is it to do so when considering whether or not to permit an amendment”. Regarding the justification for applying a merits test to new causes of action: “[t]he same consideration does not apply if the line of claim or defence is in the original pleading and will remain in issue even if the amendment is not allowed”.
42. It is stated in the White Book at [17.3.6], that “Distinction is sometimes drawn between whether the amendment: (i) introduces a new claim or alternatively (ii) provides further particulars, based on factual material, in support of an existing pleaded point. It is clear that the former will not be permitted if the new allegation carries no reasonable prospect of success. There is support for the proposition that the latter should not invite an assessment whether the particulars have a real prospect of success, these being matters for trial...”
43. In this regard the Bank identifies that an application to amend by giving further particulars based on factual material in support of an existing plea does not engage the

Court in an assessment of whether each of the various particulars has a real prospect of supporting that plea; those are matters for trial. The amendment must still have some relevance or connection to the claim, and if it is irrelevant or otherwise inappropriate it should not be allowed. But the merits test is about the cause of action itself and not about the supporting factual detail, and there is a difference of approach where the contested amendments relate to further or better particulars of an existing claim referring to what was said in *Phones 4U v EE* [2021] EWHC 2816 (Ch) at [8] & [11], a case in which it was also said that an application to amend by giving further particulars should not be turned by a side wind into a strike out or reverse summary judgment application – *Phones 4U* at [8].

44. Whilst I recognise this distinction, it would be contrary to the overriding objective to allow amendments to be made which have no real prospects of success (not least as they would be liable to be struck out) – see also in this regard *Gerko v Seal* [2023] EWHC 63 (KB) at [190]. Also, and as was said in *Toucan* at [10], “the mere fact that an issue has received some attention in the preparation of the case and the experts' reports is not necessarily sufficient to make permission to amend appropriate”.
45. A consideration of whether or not amendments are permissible is one that takes place at the date of the hearing of the amendment application – the question is not when the amendments were first foreshadowed or applied for – see *Holding* [2018] EWHC 852 (TCC) at 41(3): “Even after the application was made... where it was being opposed there was no reason, in my judgment, then for the claimant to take steps to meet the case that was being advanced in a proposed amended pleading, in respect of which no consent had been given and no permission provided by the court”. That makes clear that the correct position as a matter of law is that a responding party is not obliged to divert themselves from their trial preparation to prepare to meet a case which is the subject of a contested application for permission to amend.
46. Lateness of an amendment is a relevant factor which should be weighed in the balance. Lateness is a relative concept; an amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the opposing party to revisit any of the significant steps in the litigation (e.g. disclosure, witness statements and expert reports) - see *CIP Properties* at [19(a)]. Even if an amendment is merely “late” rather than “very late” there is a “heavy burden” on the claimant to justify – see *Nesbit Law Group v Acasta European Insurance* [2018] EWCA Civ 268 at [41].
47. An application to make substantive amendments to a statement of case in the immediate lead up to a trial is, at the very least, a late amendment, and if it threatens the trial date itself it is a very late amendment (this is so even if, in contrast to the present case, the trial is still some way off).
48. A useful statement of the applicable principles in this regard was set out by Coulson J (as he then was) in *CIP Properties*, supra, in which Coulson J stated at [19] as follows:

“(a)... An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as

disclosure or the provision of witness statements and expert's reports) ...

(b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date, even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason.

(c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise. In essence, there must be a good reason for the delay...

(e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around', to the disruption of and additional pressure on their lawyers in the run-up to trial and the duplication of cost and effort at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments.

(f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered. Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise."

(emphasis added)

49. Accordingly, in considering the impact on a trial fixture, the Court is concerned not just with the ability to complete all the necessary steps consequential on the amendments, but also with the impact on the overall ability to prepare for the trial. Where there would be additional pressure on a party in the run-up to trial, that is a substantial reason why amendments should not be permitted. In this regard in *Donovan v Grainmarket* [2019] EWHC 1023 (QB) at [27], it was stated that the need to revisit previous trial steps "in conjunction with the intense preparation already required even if there is no amendment" constituted "substantial prejudice" (see also *ADVA v Optron* at [47]). The amendments were, in that case, refused, even though (in contrast to the Defendants' stance on the Proposed Amendments before me) the trial would not need to be adjourned if the amendments were permitted.
50. There is a particular onus on a party seeking to make a very late amendment to ensure that it satisfies to the full the requirements of a proper pleading. As was stated in *Swain Mason v Mills & Reeve* [2011] 1 W.L.R. 2735 at [73]: "...if a very late amendment is to be made, it is a matter of obligation on the party amending to put forward an amended text which itself satisfies to the full the requirements of proper pleading. It should not be acceptable for the party to say that deficiencies in the pleading can be made good from the evidence to be adduced in due course, or by way of further information if requested, or as volunteered without any request. The opponent must know from the moment that the amendment is made what is the

amended case that he has to meet, with as much clarity and detail as he is entitled to under the rules” (emphasis added). In that case, the Court refused permission to amend because the pleading was “not in proper form”; which was said by the Court to be “fatal” (at [107]). See also *Galliford* at [16], referring approvingly to *Swain-Mason*: “It was also stressed that a late amendment cannot be insufficient or deficient”.

51. In *Rijckaert v El-Khoury* [2023] EWHC 409 (KB) it was stated by Soole J (at [20]): “It is an elementary principle that the later the amendment, the greater the need for particularity... it is not for the Defendants to seek further particulars. At every stage a properly pleaded case must be set out; and particularly so when the application is made at this very late date”. A similar point was made in *Wani LLP v Royal Bank of Scotland* [2015] EWHC 1181 (Ch) at [62]. The reason for this is obvious. Quite apart from the need for matters to be properly and sufficiently pleaded in the first place, any need for further elucidation would itself give rise to (further) delay, and actual or potential prejudice to the other party. That a defective pleading can be cured later is misguided in the case of late amendments.
52. The existence or absence of a good explanation for any delay is one of the factors to be considered, although there is no rule that the absence of a good explanation is fatal (see *Vilca* at [29] and *Scipion* at [77]). Where “a very late amendment” is sought (i.e. “one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost”), the correct approach is not that the amendment ought in general be allowed so that the real dispute can be adjudicated upon; instead, a heavy burden lies on a party seeking a very late amendment to justify it and to show the strength of the new case and why justice requires it (see *Quah* at [38(b)-(c)] and *Swain-Mason v Mills & Reeve LLP* [2011] 1 WLR 2735 at [72]).
53. Even if the situation is one which would not result in the adjournment of the trial if the amendment was allowed, an amendment may still be refused merely because it is late, in the sense that it could have been advanced before, or requires the revisiting of pre-trial concepts. It is for this reason that lateness is a relative concept. For example, in *Hague Plant Ltd v Hague* [2015] C.P. Rep 14, there was a new pleading over 65 pages, where, “those parts of the original Particulars of Claim which had not been crossed out appear only intermittently”. In *Hague*, no trial date had even been set, but the amendments were still considered to be late. As the Court of Appeal went on to state at [33], “Lateness is not an absolute but a relative concept”. At [42], it was noted that, “The judge’s main reason for refusing permission to amend upon proportionality grounds was, as I have sought to explain, mainly based upon his apprehensions about the further, duplicative and otherwise unnecessary work to which they would expose the defendants, and the knock-on consequences in terms of increasing the weight, cost and duration of the trial, and of further case management ahead of it”. Briggs LJ then concluded that, “It strikes me as obvious that a quintupling in the length of Particulars of Claim, all of which would need to be pleaded to in Re-Re-Amended Defences, would threaten just such increases in work, length and cost, even if significant parts of the re-pleaded material could be found within Pt 18 exchanges, existing Defences, or statements and transcripts in earlier proceedings”.
54. It is always a question of striking a balance between injustice to the applicant if the amendment is refused and injustice to the opposing party if it is permitted (*Swain-Mason* at [72]; *Quah* at [38(a)].) Prejudice to the amending party will include the

inability to advance its amended case (see *CIP* at [19(f)] as quoted above). However any prejudice caused to the claimant by a refusal of leave may be “diluted” if the amendment is late because the claimant then only has itself to blame (*CIP* at [41]). Prejudice to the opposing party will include being “mucked around”, disruption/additional pressure before trial, or the duplication of cost and effort (see *CIP* at [19(e)] and *Wani* at [62]). As noted in *Vilca* (at [26]) there is a “broad spectrum of impacts” which “may fall somewhere between the negligible to the devastating”.

55. In the present case (and as already quoted) it is the evidence of Ms Schalker that the Proposed Amendments would require further investigation, further disclosure, further factual evidence and further expert evidence which would inevitably result in the adjournment of the trial if the amendments were to be allowed, because that work cannot be done in the time that remains before trial (Schalker 6 at paragraphs 6 and 7) and that a fair trial would not be possible with the current trial date if the Proposed Amendments were to be allowed (at paragraph 41). Such matters are in issue between the parties. However, in circumstances in which the Bank has not applied for an adjournment (and indeed expressly confirmed in writing immediately after oral argument concluded before me that the Bank is not applying to adjourn the trial) with both parties stating that the existing case is trial ready, if the Proposed Amendments would necessitate the adjournment of the trial if they were granted, then such amendments should be refused if they would have that consequence.

C.2 AMENDMENTS UNDER CPR 17.4 AFTER THE END OF THE RELEVANT LIMITATION PERIOD

56. Section 35(3) of the Limitation Act provides that, except as provided by rules of court, neither the High Court nor the County Court “shall allow a new claim within subsection 1(b) above...to be made in the course of any action’ if a new action to enforce that claim would be barred by limitation. The relevant rule of court is CPR 17.4(2). CPR 17.4(2) provides that: “The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings”. Whether this test is satisfied is a question of law, not a case management decision (see *Akers v Samba* [2019] 4 WLR 54 at [41]).
57. The section 35/CPR 17.4(2) regime is engaged if the defendant has even an arguable limitation defence. What “arguable” means in this context is that the limitation defence cannot be struck out or summarily dismissed: - see *Ballinger v Mercer Ltd* [2014] 1 WLR 3587 at [27].
58. As was stated in *Geo-Minerals GT Ltd v Downing* [2023] EWCA Civ 648 at [25]:
- “25. The relevant principles in respect of amendments which are outside a statutory limitation period are governed by section 35 of the Limitation Act 1980 and CPR 17.4. There is a four stage test, as explained in *Ballinger v Mercer Ltd* [2014] EWCA Civ 996, [2014] 1 WLR 3597 at [15] and *Mulalley & Co Ltd v Martlet Homes Ltd* [2022] EWCA Civ 32 at [38]:

- (1) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?
- (2) Did the proposed amendments seek to add or substitute a new cause of action?
- (3) Does the new cause of action arise out of the same or substantially the same facts as are already an issue in the existing claim?
- (4) Should the Court exercise its discretion to allow the amendment?"

59. As was stated in *Diamandis v Wills* [2015] EWHC 312 at [48]-[49] (approved in Geo-Minerals, with citations removed):

“48. As regards Stage 2 (new cause of action) from the recent analysis of the authorities by Longmore LJ in *Berezovsky v Abramovich* §§59 to 69, the following principles arise:

- (1) The “cause of action” is that combination of facts which gives rise to a legal right; (it is the "factual situation" rather than a form of action used as a convenient description of a particular category of factual situation...
- (2) Where a claim is based on a breach of duty, whether arising in contract or tort, the question whether an amendment pleads a new cause of action requires comparison of the unamended and amended pleading to determine (a) whether a different duty is pleaded (b) whether the breaches pleaded differ substantially and (c) where appropriate the nature and extent of the damage of which complaint is made... (Where it is the same duty and same breach, new or different loss will not be new cause of action. But where it is a different duty or a different breach, then it is likely to be a new cause of action).
- (3) The cause of action is every fact which is material to be proved to entitle the claimant to succeed. Only those facts which are material to be proved are to be taken into account; the pleading of unnecessary allegations or the addition of further instances does not amount to a distinct cause of action. At this stage, the selection of the material facts to define the cause of action must be made at the highest level of abstraction...
- (4) In identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading...
- (5) The addition or substitution of a new loss is by no means necessarily the addition of a new cause of action: *Berezovsky* §64

and Aldi §26. Nor is the addition of a new remedy, particularly where the amendment does not add to the "factual situation" already pleaded.”

49. As regards Stage 3, (“arising out of the same or substantially the same facts”) a number of points emerge, particularly from Ballinger at [34] to [38]:

- (1) “Same or substantially the same” is not synonymous with “similar”.
- (2) Whilst in borderline cases, the answer to this question is or may be substantially a “matter of impression”, in others, it must be a question of analysis.
- (3) The purpose of the requirement at Stage 3 is to avoid placing the defendant in a position where he will be obliged, after the expiration of the limitation period, to investigate facts and obtain evidence of matters completely outside the ambit of and unrelated to the facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.
- (4) It is thus necessary to consider the extent to which the defendants would be required to embark upon an investigation of facts which they would not previously have been concerned to investigate: Ballinger §38. At Stage 3 the court is concerned at a much less abstract level than at Stage 2; it is a matter of considering the whole range of facts which are likely to be adduced at trial...
- (5) Finally, in considering what the relevant facts are in the original pleading a material consideration are the factual matters raised in the defence...”

60. The phrase “same facts’ in CPR 17.4(2) means just that. If, therefore, the new claim pleads a single new fact, it does not arise out of the same facts. Thus, the “the basic test is whether the plea introduces new facts” – see *Society of Lloyd’s v Henderson* [2008] 1 WLR 2255, [53].

61. The phrase ‘substantially the same facts’ is a narrow extension of this basic test. As already quoted above, and as the Bank accepts, it does not mean “similar” and it goes “no further than minor differences likely to be the subject of inquiry but not involving any major investigation...” (*Henderson* at [54]).

62. In order to determine what is “already in issue” in the existing claim, the pleadings ‘will be the primary, and probably the only, source of material for deciding the question’ - see *Akers* at [52].

63. In addition, as explained in *Aldi Stores Limited v Holmes Buildings Plc* [2005] PNLR 9 at [21], “a claim for damages is a new claim, even if in the same amount as originally claimed, if the claimant seeks, by amendment, to justify it on a different

factual basis from that originally pleaded. But it is not, even if made for the first time, if it does not involve the addition or substitution of an allegation of new facts constituting such a new cause of action”.

64. To similar effect see *Savings & Investment Bank Ltd (In Liquidation)* [2001] EWCA Civ 1639. A claim in fraudulent misrepresentation was held not to be a new claim, but only on the basis that the very same representation was relied on: see [35]. Where a new representation is pleaded this will be a new cause of action.
65. As explained in *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 “It is incontrovertible that an amendment to make a new allegation of intentional wrongdoing ...where previously no intentional wrongdoing has been alleged constitutes the introduction of a new cause of action.” It is therefore clear that where a person is accused of wrongdoing for the first time, this is a new cause of action.

C.3 POSTPONEMENT OF THE START OF THE LIMITATION PERIOD

66. Section 32 of the Limitation Act 1980 provides as follows:

“32 Postponement of limitation period in case of fraud, concealment or mistake.

(1) ... where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. References in this subsection to the defendant include references to the defendant’s agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.”

67. Section 38(5) provides that, “a person shall be treated as claiming through another person if he became entitled by, through, under, or by the act of that other person to the right claimed...”, and any person whose estate or interest might have been barred by a person entitled to an entailed interest in possession shall be treated as claiming through the person so entitled.
68. As I stated in *The Libyan Investment Authority v J.P.Morgan* [2019] EWHC 1452 (Comm) at [28], a claimant wishing to avail itself of the extension of the limitation period under section 32 bears the burden of proving that it could not with reasonable

diligence have discovered the concealed fraud more than 6 years before issuing its claim (see *Paragon v Thakerar* [1999] 1 All ER 400 (CA) per Millett LJ at 418).

C.4 LIMITATION PERIODS AND SECTION 423

69. The limitation period applicable to a section 423 claim is either 12 years under s.8, Limitation Act 1980 (claim to set aside a transaction and recover an asset) or 6 years under s.9 of the 1980 Act (if the essential nature of the s.423 claim is for payment of a sum of money) – see *Hill v Spread* [2007] 1 WLR 2404 and *Hunt v Fielding* [2019] Bus LR 2878 at [509]–[512].
70. Time can only start to run when the claimant becomes a “victim” of the transaction (a “victim” has standing to apply for an order under s.423 (s.424(1)(c)) and a “victim” is a person who is capable of being prejudiced by the transaction (s.423(5)), see *Hill v Spread*, per Arden LJ at [125]–[128], and Sir Martin Nourse at [149], and *Giles v Rhind* at [56] per Arden LJ.
71. I address the question of the postponement of the start of the limitation period under s.32(1)(b) & (2) in the context of a claim under Section 423 in Section D below, as section 32 is relied upon by the Bank in respect of the Tahnoon Amendments and the Medstar Amendments.

C.4 CAN THE LIMITATION ISSUES BE LEFT TO TRIAL, AND IF SO SHOULD THEY BE LEFT TO TRIAL?

72. D2/D6 raise limitation arguments (in respect of the Tahnoon Amendments and the Medstar Amendments). In its Skeleton Argument the Bank proposes that rather than address the limitation issues on the amendment application (per the application of the 4 stage test in *Geo-Minerals* as above) it would be open to the Court to permit the amendments conditionally in a manner which preserves the Defendants’ arguments on limitation (including the operation of “relation-back”) for trial, referring, in this regard, to *Blue Tropic v Chkhartishvili* [2016] EWCA Civ 1259 at [26], it being submitted that such an approach caters for circumstances where there are material issues that cannot be decided before trial.
73. There is a dispute between the parties as to whether it is open to a claimant simply to avoid the section 35/CPR 17.4 issue by deferring it to trial as suggested by the Bank. The Bank submits that, even if Joan and Mo have an arguable limitation defence, such that the section 35 regime is engaged, leave to amend should be granted “conditionally”, deferring all limitation issues (including the application of section 35) to trial (see Bank Skeleton at [30(a)]).
74. D2/D6 submit that, absent an agreement between the parties (as parties can always consent to amendments on such terms as they agree as part of a consent amendment) such an approach is unsound and is not an available option to the Court being, it is said, contrary to the language of section 35 and existing appellate authority. In any event, even if such an option is available, D2/D6 submit that it is not an approach that the Court should adopt on the facts of the present case, given that it would involve putting Joan and Mo to trouble and expense in the limited time available before trial (and would imperil/derail the trial) in circumstances where the amendment should not be allowed in the first place applying the 4 stage test. As such it would require Joan

and Mo to do something that would be a waste of time and costs, and with the consequences they identify.

75. D2/D6's argument proceeds as follows. Section 35(2)(a) defines a "new claim" as "any claim involving the addition...of a new cause of action'. Section 35(1)(b) states that "any" new claim made in the course of an action "shall be deemed to have been commenced...on the same date as the original action" (which is known as the "doctrine of relation back"). It is clear that this arises by virtue of a statutory provision, as opposed to any order of the court. On the language of section 35(1)(b), relation back applies automatically in every case to which section 35(1)(b) applies as a matter of construction, and it is a function (and consequence) of the statutory language itself. Absent agreement of the parties, there is accordingly no scope for the Court to "disapply" section 35(1)(b), any more than it could disapply any other legislation that is applicable as a matter of construction, whether under its case management powers or otherwise.
76. No one is prejudiced by the automatic relation back rule in circumstances where the statute prohibits the Court from allowing "a new claim within subsection 1(b)" to be made by amendment save where the rules of court permit it (see section 35(3)). The relation back rule in section 35(1)(b) and the statutory prohibition on giving leave to amend in section 35(3) therefore work together.
77. D2/D6 submit that, as was observed by the Supreme Court in *Roberts v Gill* [2011] 1 AC 240 at [32], sections 35(1) and 35(3) "lay down binding rules". In this regard it was said by the Court of Appeal in *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 1 WLR 1409 at 1411, that section 35(3) is "not a provision which creates a defence, but a mandatory direction to a court dealing with an application to amend...". The Claimant accordingly says that the applicable regime is accordingly a statutory one in which Parliament has defined when a claim may be made after the expiry of a relevant limitation period, and the consequences of the same.
78. D2/D6 submits that the effect of sections 35(1)(b), 35(2) and 35(3) is therefore that relation back applies automatically to every claim made by amendment that involves the addition of a new cause of action (see sections 35(1)(b) and 35(2)(a)) and the Court "shall not" allow such a claim to be made by amendment if the limitation period has arguably expired, unless the rules of court are satisfied (see section 35(3)).
79. They refer to the fact that in *Chandra v Brooke* [2013] EWCA Civ 1559 at [66]-[67] Jackson LJ identified that there are "two options" when a defendant objects to an amendment on limitation grounds. The first option is to "deal with the matter as a conventional amendment application" and the second is to direct "that the question of limitation be determined as a preliminary issue". He observed at [67] that "[i]f, as is usually the case, the court adopts the first option, it will not descend into factual issues which are seriously in dispute" because it is sufficient for the defendant to establish that his limitation defence is arguable. D2/D6 point out that no third option, as suggested by the Bank, is posited.
80. *Chandra* was quoted with approval in *Cameron Taylor Consulting Ltd v BDW Trading Ltd* [2022] PNLR 11 with Coulson LJ stating (at [38]) that, "if a defendant can show that it is reasonably arguable that the new claim introduced by the amendments is statute barred, then leave to amend should not be given" (see also, in

this regard *Various Claimants v G4S plc* [2021] 4 WLR 46, [18] (a decision of Mann J)).

81. The only authority identified by the Bank in which leave to amend was given conditionally is *Blue Tropic*. However, it is clear from the judgment of Peter Smith J that the parties consented to a conditional order, as is also made clear by Henderson LJ in the Court of Appeal ([2016] EWCA Civ 1259 at [26]). It does not appear, therefore, that there was any consideration whether such a course was permissible absent agreement (and none of *Chandra*, *Welsh Development* or *Roberts* were cited in that case). Of course, as already noted, parties can always consent to an amendment (and without any involvement of the court).
82. Whilst I consider that there is much force in the submissions of D2/D6 which are based on the statutory language and the rules of court, I am not convinced that the Court can never depart from the statutory language in its approach to an amendment. It is not uncommon, for example, where a claimant could (or probably could) issue a fresh claim form, for the Court to order that an amendment only takes effect on the date of the amendment (often referred to as a “*Mastercard*” amendment after the approach adopted by Field J in *Willim Morrison v Mastercard* [2013] EWHC 3271 (Comm), and see, in this regard, *Mastercard v Deutsche Bank* [2017] EWCA Civ 272 at [4] per Sales LJ). To do so saves the trouble and expense of the issue of a further claim form, although again, this often arises in the context of an agreement between the parties to such effect which the court is prepared to adopt/endorse.
83. However, I do not consider that it is necessary for me to determine the point as to whether it would be open to me to give leave to amend conditionally, as the Bank proposes, as I am in no doubt whatsoever that it would not be appropriate to adopt such a course on the facts of the present case. I consider that the amendments, and the consequences of the amendments, should be grappled with at this time. The Defendants should not be put to the trouble and expense of pleading, and thereafter responding back (with disclosure, factual witness statements and/or expert evidence), to such amendments unless permission to amend can and should be granted, at this time, and in the circumstances of this case.

D THE AMENDMENTS AND THEIR DETERMINATION

D1. OVERARCHING CONCLUSIONS

84. For the reasons identified in due course below, both individually as to particular amendments and collectively as to the Proposed Amendments as a whole, and whilst there are specific (and fundamental) reasons why particular amendments should not be allowed in any event (all as addressed in due course below), the overarching point which transcends all such individual points, and is independent of all such individual points, is that the Proposed Amendments are made very late (within the meaning of the authorities) and it would simply be impossible to complete all that would need to be done before trial, and so as to ensure a fair trial (based on the evidence before me of Ms Schalker which I accept), with the result that both the impossibility of matters being prepared for trial, and the unfair burden that would be upon the Defendants, are overwhelming reasons why the Proposed Amendments should be refused.

85. In this regard, and on the evidence before me, the steps that would need to be undertaken so as to allow the Proposed Amendments to be fairly tried, simply cannot possibly be undertaken before trial and any suggestion to the contrary is simply not credible and does not bear examination. As will appear, there would need to be the taking of instructions and the obtaining of factual and expert evidence (on Lebanese and UAE law as well as in certain cases property valuation) all of which would be needed before the Defendants could plead back to the amendments (as such matters are matters which would need to be pleaded), following which there would need to be disclosure by reference to the crystallised pleaded issues (after not only an Amended Defence but also an Amended Reply), including the agreement of new disclosure issues (assuming such issues could be agreed without Court assistance), followed by disclosure searches (quite apart from a review of existing disclosure). As will appear it is also possible that applications could be made in the Lebanon to obtain documentation (which would itself be time-consuming). This would be followed by further factual witness statements (as the Bank accepts), followed by expert evidence on Lebanese and UAE law. None of this could be done before trial (or in reality for many weeks if not months thereafter), and as such this is an “overwhelming reason to refuse the amendments” (in the apt words of Coulson J in *CIP Properties* at [19(e)]), in circumstances where the introduction of the amendments would be devastating, and would prevent the trial going ahead.
86. The Proposed Amendments are also very late in the sense that they could, without exception, have been advanced very much earlier (see *CIP Properties* at [19(a)]), as is readily apparent from the Schalker Table. Indeed the vast majority of them could have been pleaded in 2021 or 2022 (as the Bank had the requisite documentation to do so at that time) with the result that they could have been made at the time of the much earlier amendment hearings before Andrew Baker J in 2022 or indeed even earlier. What is more, even in those instances where it is said that documents were only disclosed later (for example Kendris file notes in the context of the Marquee Amendments disclosed on 20 October 2023), this was still many months (indeed over 6 months) before the Proposed Amendments and all in circumstances where the Bank was well aware of the fixed trial date. This is a further, and independent, reason why it would not be appropriate to grant the Proposed Amendments.
87. Yet further the Bank has not discharged the heavy burden upon it (for late or very late amendments) to justify the Proposed Amendments or show the strength of the amendments or that justice requires them (see *Quah* at [38(b)-[c)] and *Swain-Mason* at [72]). Indeed the very lateness of proposed amendments dilutes the inherent prejudice suffered by a claimant in such amendments not being allowed, as the claimant, in such circumstances, only has itself to blame (*CIP* at [41]).
88. There are also further (and free standing) reasons why particular amendments should not be allowed, as addressed in due course below, including those amendments that do not stand a real prospect of success (including those that are arguably time-barred – namely the Tahnoon Amendments and the Medstar Amendments), or are not properly pleaded and/or not properly particularised (as they must be at this late stage on the authorities identified above).
89. Given that the Proposed Amendments could not be allowed without an adjournment of the trial (which is an overwhelming reason not to allow the amendments, not least given that no one is seeking an adjournment, and an adjournment would not, in any

event, be appropriate, given the unchallenged evidence that any adjournment would have been highly detrimental to particular Defendants) the specific objections to particular amendments, and the specific reasons why it would not in any event have been appropriate to grant permission in respect of such amendments is somewhat academic. However, as the matters have been fully argued before me, and as such matters are free-standing reasons as to why particular amendments should not be allowed, I address each such category of amendment in detail below. As will be seen, there are further free-standing reasons why it would not be appropriate to give permission to amend to advance each such amendment.

90. Before turning to the amendments it is convenient to note at this point that, running throughout the Bank's submissions, is a constant theme that the Bank's legal team have been "piecing the jigsaw puzzle together", "fighting the case half-blindfolded given the limited visibility it has as to D1's transactions" and the Bank says that it has had to stand back (now) and evaluate the accretion of evidence in the round upon the claim it is advancing.
91. In this regard the Bank submits that my observations in *Lakatamia Shipping v Su* [2023] EWHC 1874 (Ch) (in the context of conspiracy claims), are pertinent to the present case:

"[102]: "... The nature of circumstantial evidence is that its effect is cumulative, and the essence of a successful case based on circumstantial evidence is that the whole is stronger than individual parts ..."

[153]: "... this is an inferential case, as claims in conspiracy often are. There is an asymmetric relationship because by definition the claimant is not likely to have much by way of documents itself or direct evidence, quite often all it can do is raise inferences from the documents which it has. In such cases it is necessary to stand ... back and consider ... the effects of the implications of the facts ... found in the round"

92. Whilst I accept that the Bank's case is in many respects inferential, I do not consider the analogy with a conspiracy claim to be particularly apt or that aspects of the inferential case can only now be pleaded, or that the Bank could not have stepped back and seen the (alleged) picture long ago, and raised the inferences it now seeks to raise from the documents it has already had for a considerable period of time. The Bank has long pleaded specific matters, on particular topics, in relation to its Section 423 claim. What is more, and as will appear (and as is clear from the Schalker Table) the Bank has long had the documents on the basis of which it now seeks to make the Proposed Amendments (in many cases since 2021 or 2022), and it has not discharged the heavy burden upon it to explain why the Proposed Amendments are made very late, and could not have been made a very long time ago.
93. To the extent that the Bank's "jigsaw" analogy is apposite (and, at most, it is the Bank's analogy not anyone else's), I am satisfied that the position is not only that the Bank had all the jigsaw pieces to advance its pleas a long time ago, it also had the picture (and could plead the picture) a long time ago, and in not making the amendments earlier it has simply not put particular (alleged) pieces of the jigsaw onto

the canvas of its pleaded case. However, ultimately I do not consider the jigsaw analogy to be a particularly apposite one. The refusal of the Proposed Amendments does not leave the Bank with missing pieces of a jigsaw, but an existing, and long pleaded, Section 423 case, that is ready for trial, and on the basis of which, all parties have prepared for trial.

D.2 THE TAHNOON AMENDMENTS

94. The Tahnoon Amendments are resisted on the grounds that they are (1) time-barred, (2) very late or late and (3) in some instances, defectively pleaded.
95. Before considering such objections, it is necessary to consider what the existing pleaded case is, and what the differences are that it is proposed be introduced.
96. The allegation on which all of the Bank's claims depend is that D1 transferred each relevant asset for the purpose of prejudicing the interests of a person "*who is making, or may at some time make, a claim against him*" (Section 423(3)). The existence of a claim or potential claim by such a person and the debtor's purpose of prejudicing such a claim are essential elements of Section 423. A claimant invoking Section 423 must therefore plead which claim or potential claim of which person it says the debtor intended to prejudice, at least by class (e.g. claims of future creditors of a risky business the debtor is about to embark upon).
97. As it was recently put in *Hinton v Wotherspoon* [2022] EWHC 2083 (Ch), [117]:
- "It is not enough to assert that the debtor wished to protect assets and that this would have the result of adversely affecting any creditors in the future because it would inevitably diminish Mr Wotherspoon's [the debtor] assets. There had to be, and there had to be in Mr Wotherspoon's mind, creditors to whom he would in the future be unable to make payment and who may at some time make a claim."
- (emphasis added)
98. This central allegation is pleaded by the Bank at PoC at [106], where the Bank alleges that D1 acted for the purpose specified in section 423(3), which it defines as "the Alleged Purpose". The Bank alleges that the Alleged Purpose is to be inferred from three matters:
- (1) the existence of potential claims against D1: see at [106(i)], cross-referring to [17], [23], [44] to [47].
 - (2) D1's alleged interest in each of the assets which are the subject of the Bank's claim: see at [106(ii)], cross-referring to Section C(3); and
 - (3) the timing of the transfer of those assets and certain other assets: see at [106(iii)].
99. For present purpose the only one that matters is the first of these, because it is this plea that identifies the claims or potential claims, for the purposes of section 423(3),

that the Bank alleges D1 intended to prejudice by transferring his assets. Those claims or potential claims are identified by cross-reference to [17], [23], [44]-[47].

100. As to these:

- (1) [17] and [23] plead the Bank's own claims against Tadamun and Commodore, whose liabilities D1 had guaranteed, and assert that those companies were experiencing financial difficulties in the second half of 2016 and in 2017. In the interests of clarity these have been referred to, in argument, as the "Category 1 claims".
- (2) [44]-[47] refer to third party claims against D1, i.e. claims against D1 by entities other than the Bank. [44] is concerned with criminal proceedings against D1 in Germany, [45]-[46] are concerned with a claim against D1 by Sheikh Tahnoon and [47] is concerned with a claim by Doha Bank in 2020 on a guarantee given by D1. These have been referred to, in argument as the "Category 2 claims".

101. All that is currently pleaded about Sheikh Tahnoon is as follows (in what are narrow and specific pleas):

- (1) Sheikh Tahnoon held 51% of the shares in D1's companies, Tadamun and Commodore, but held those as nominee for D1: PoC [14], [19].
- (2) "In **2017 and thereafter** Sheikh Tahnoon has considered and pursued legal action to recover substantial sums of money from [D1]" (PoC, [45]) (emphasis added), which refers to the minutes of a meeting on 5 December 2017 between the Bank and an associate of Sheikh Tahnoon.
- (3) On 9 January 2019, Sheikh Tahnoon brought proceedings in the Dubai Court of First Instance alleging a misappropriation of funds by D1 (PoC).

102. I consider the first sentence of [45] to be key. It is expressly pleaded that Sheikh Tahnoon not only pursued but even "considered" legal action against D1 only "**in 2017 and thereafter**". Accordingly:

- (1) The Bank does not allege that Sheikh Tahnoon even considered (still less pursued) any legal action against D1 before 2017.
- (2) The Bank does not allege that D1 knew or believed that Sheikh Tahnoon was considering legal action against him, whether before 2017 or thereafter (there is in fact no allegation at all about D1's knowledge or belief in the PoC (see at [45]-[46])).
- (3) The Bank does not allege that Sheikh Tahnoon actually brought any claim against D1 except the claim referred to in PoC, [46], which was brought in 2019.

103. Thus, on the Bank's pleaded case about Sheikh Tahnoon, it would not be able to contend at trial that D1 intended to prejudice anything other than the 2019 claim (if that).

104. The Defendants submit that the fact that the PoC says so little about Sheikh Tahnoon reflects the fact that this case has always revolved around the Category 1 claims (i.e. the Bank's own claims), which the Bank has consistently alleged D1 was concerned about and wished to prejudice, so much so that the Bank chose not even to seek disclosure in respect of such at the CMC in 2023, even though it formulated no fewer than 63 separate issues for disclosure and did seek disclosure for other Category 2 claims, such as the claim by Doha Bank.
105. I am satisfied that the case that the Bank now seeks to advance is a new and much broader case. At the heart of this new case is an inference that, "from late 2016, Ahmad was concerned" about the risk of unspecified future litigation either brought by Sheikh Tahnoon personally or procured by him to be brought by companies under his control or by unconnected third parties, including UAE criminal authorities; and/or unspecified other action taken by Sheikh Tahnoon in relation to D1's companies which would expose D1 to third party claims (see para 45H). This inference is then relied upon in support of the Alleged Purpose. Thus, the case that the Bank now seeks to run is that D1 transferred the relevant assets in order to prejudice unspecified civil or criminal claims which he thought from late 2016 might be brought by Sheikh Tahnoon or third parties at the behest of Sheikh Tahnoon. Those are the "claims" on which it now relies for the purposes of section 423(3).
106. The primary facts from which the inference at [45H] is derived are (as the Defendants submit) somewhat unclear but include at least the following: (1) Sheikh Tahnoon was "politically and economically influential in the UAE" and perceived to be so by all the defendants ([45A.1]); (2) litigation previously commenced by Sheikh Tahnoon against other business partners ([45A.2]); (3) Sheikh Tahnoon's ownership and alleged ultimate control of a company called Federal which D1 used to conduct business through a contract and a power of attorney ([45A.3]); and (4) Sheikh Tahnoon's majority shareholding in Commodore and Tadamun: ([45A.4]).
107. It is readily apparent, therefore, that there are no fewer than 3 principal differences between the claim currently pleaded and the claim sought to be advanced through the Tahnoon Amendments, namely:
- (1) The case currently pleaded in relation to Sheikh Tahnoon refers only to a specific claim actually made by him against D1 in 2019. It does not include (i) any other claims actually made or (ii) the possibility of claims being made (least of all by unidentified third parties acting at the behest of Sheikh Tahnoon), whereas the new case does.
 - (2) The case currently pleaded alleges that Sheikh Tahnoon "considered" claims against D1 only "in 2017 and thereafter". It does not allege that D1 knew or believed that Sheikh Tahnoon would or might bring any claims (whether in 2017 or thereafter). By contrast, the new case alleges that D1 was "*from late 2016*" concerned about claims by Sheikh Tahnoon or unidentified third parties at Sheikh Tahnoon's behest.
 - (3) The case currently pleaded does not depend, as the new case does, upon any status or power that Sheikh Tahnoon had by virtue of (i) his membership of the UAE royal family (ii) ownership of shares in Commodore and Tadamun or

(iii) his alleged control of Federal. It depends, instead, solely on the legal action he actually commenced.

108. In such circumstances the first objection to the Tahnoon Amendments is that they are time barred. Section 35(2)(a) defines a “new claim” as “any claim involving the addition...of a new cause of action”.
109. As David Richards J explained in *HMRC v Begum* [2010] EWHC 1799 (Ch) at [30], the word “claim” in this provision is a reference to the remedy sought by the claimant; and the words “cause of action” are a reference to the factual basis on which that remedy is sought. Accordingly, an amendment to seek a new remedy on the same factual basis is not a new cause of action for the purposes of section 35(2)(a); but an amendment to seek the same remedy on a new factual basis is.
110. This proposition is well illustrated by the case of *Co-operative Group Ltd v Birse Developments* [2013] EWCA Civ 474 in which the claimant sued the main contractor for the construction of a distribution centre in Rugby. The breaches originally pleaded included alleged defects in the concrete floor slabs in the warehouse. The claimant then sought to amend to plead further defects in the slabs (structural inadequacies) which were alleged to constitute a breach of the same contractual obligation on which the original plea was based. This was resisted on limitation grounds. Tomlinson LJ cited with approval the principles set out by David Richards J in *Begum* (above) (see at [21]). Applying those principles, he concluded that the amendment constituted a new cause of action even though it alleged further defects in the same concrete slabs by reference to the same contractual obligation. This was because the amendment changed the “essential features of the factual basis” previously relied upon (see at [24], [26]).
111. I am satisfied that the Tahnoon Amendments amount to a new cause of action. As identified above, the claim or potential claim of a person which the debtor intended to prejudice is an essential element of section 423 and must be pleaded. So far as Sheikh Tahnoon is concerned, the only claim or potential claim that the Bank alleges that D1 intended to prejudice is the 2019 claim referred to in the PoC (at [46]) or, at most, the claim considered in 2017, referred to at [45].
112. But what the Bank now seeks to allege is that D1 transferred his assets not for the purpose of prejudicing those two specific claims, but any claim Sheikh Tahnoon or third parties acting at his behest might in the future bring against D1. That constitutes a new cause of action because it is a new factual basis for the assertion that D1 acted with the statutory purpose. Indeed, as the Defendants point out, the Bank itself comes very close to accepting this at [28(a)] of the Bank’s Skeleton Argument, in which it is said that the Bank is “expanding the factual basis for its existing pleas” by advancing the Tahnoon Amendments. The Bank is accordingly now identifying a different claim or potential claim as the relevant “claim” for the purposes of section 423(3). I am satisfied that in such circumstances the Tahnoon Amendments do indeed constitute a new cause of action for the purposes of section 35(2)(a) of the Limitation Act.
113. The next question is whether Joan and Mo have an arguable limitation defence. I am satisfied that they do. Section 9 of the Limitation Act applies if the “substance or essential nature” of the section 423 claim is to recover a sum of money – see *BTA Bank v Ablyazov* [2016] EWHC 3701 (Comm) at [152]-[155]. The primary (and

indeed in some instances only) relief sought against Joan and Mo is monetary – see PoC at [146] (payment from Joan), at [152.4] (payment from Joan), at [165.2] (payment from Mo), at [175] (payment), and at [175G] (payment). It is true that the Bank also seeks (often in the alternative) non-monetary relief but I am satisfied that this does not change the “substance or essential nature” of its claim - the Bank wants money. I am satisfied that it is at least arguable that the limitation period is 6 years. All of the relevant transactions occurred, on the Bank’s own pleaded case, in 2017 or early 2018, i.e. well before 16 May 2018; and the Bank itself pleads that it was a victim on the date of each transaction by reason of D1’s potential liability under his guarantee at [107.1]. There is therefore at least an arguable limitation defence to all the claims.

114. The Bank seeks to argue that the operation of the limitation period is postponed by section 32 of the Limitation Act in relation to the Medstar Amendments and (if as I have found the Tahnoon Amendments give rise to new causes of action) the Tahnoon Amendments. However I am satisfied that such argument does not assist the Bank for on an amendment application it would have to show that the limitation defence is unarguable (in circumstances where “arguable” in this context means that the limitation defence cannot be struck out or summarily dismissed (see *Ballinger v Mercer* at [27]), as already addressed above). But section 32 is almost always unsuitable for summary determination because it raises disputes of law and fact which can only be determined at trial (see Mann J in *Various Claimants v G4S plc* [2021] 4 WLR 46 at [21]-[22]).
115. As to the factual position, when the claimant could with reasonable diligence have discovered the facts, it is the Bank that bears the burden of proof as to when it could with reasonable diligence have discovered the relevant fact, and it has not led any evidence about what facts it alleges were concealed and when it says it could with reasonable diligence have discovered them (as to which see what I said in *Libyan Investment Bank v JP Morgan* at [28] as already quoted above) – not even in the witness statements of Mr Mascarenhas including the very latest Mascarenhas 20 (which actually responds to other aspects of the D2/D6 Skeleton Argument), which would leave the Defendants with an arguable limitation defence even if the Bank was right about everything else it submitted on section 32 (which D2/D6 submits it is not). In this regard there is, in fact, also some evidence that the Bank did know of some asset transfers before May 2018 (see the applications bundle at 2833).
116. That, therefore, leaves the Defendants with an arguable limitation defence. But the same is also the case on a more detailed consideration of section 32. In this regard the Bank relies upon what was said by David Richards J in *Giles v Rhind* [2007] EWHC 687 (Ch) (in particular at [41]). The starting point is to analyse section 32(2) itself. It contains 3 different elements. The first is that there must be the commission of a breach of duty (requirement one), that must be deliberate (which is requirement two) and it must have happened in circumstances in which it was unlikely to be discovered for some time (requirement three).
117. The Bank submits that whenever a claim under Section 423 succeeds there is automatically a deliberate commission of a breach of duty (which is what the Bank submits David Richards J decided in that case). The Defendants say that David Richards J did not decide that (because he was not there formulating a legal proposition, he was saying that in that case establishing liability under Section 423

would satisfy the requirement of deliberateness), but that if he did that cannot survive what was said by the Supreme Court in *Potter v Canada Square Operations Limited* [2023] 3 WLR 963. I am satisfied that it is clear from *Potter* (see, in particular, at [124]) that in order to get within section 32(2) you have to establish that when the defendant transferred its asset for the purpose of prejudicing his creditors, he knew subjectively that that was an actionable wrong, and it is not enough that he did something which objectively engaged liability under Section 423. He must know that what he did amounted to a breach of duty. The Bank does not even attempt to prove this.

118. That the Bank's "deemed deliberate concealment thesis" (that it also seeks to deploy in relation to the Medstar Amendments) is flawed is also shown by what is said by the editors of McGee on Limitation Periods (9th edn) at [17.061] which refers to *Giles v Rhind* but states that section 32(2) is available, "on appropriate facts", to extend the limitation period in Section 423 claims. The words "on appropriate facts" are inconsistent with the Bank's "deemed deliberate concealment" thesis, and although the Supreme Court cited *Giles v Rhind* without disapproval in *Potter*, it did so in relation to a different point, namely whether liability under s 423 constitutes a "breach of duty" under section 32(2), not what "deliberate" means.
119. The new claims are accordingly arguably time-barred. For the purposes of CPR 17.4(2), there are significant differences between the claim currently pleaded and the claim the Tahnoon Amendments seek to advance (as identified above). Specifically, these differences include numerous new facts, such as the litigation against John Kent, Sheikh Tahnoon's alleged control of Federal, Commodore and Tadamun, and his alleged political and economic influence in the UAE etc. In such circumstances I am satisfied that the amendments do not arise out of the same facts or substantially the same facts for the purposes of CPR 17.4(2).
120. In such circumstances the Tahnoon Amendments stand to be rejected on the ground that they are all barred by section 35(3) of the Limitation Act (and so do not stand a reasonable prospect of success).
121. In any event, and whether that is so or not, it is clear that the Tahnoon Amendments would, if permitted, result in the loss of the trial date and accordingly constitute very late amendments which ought not to be permitted, not least in circumstances where the Bank has not been able to justify why it did not plead such matters back in 2021 or 2022 (as evidenced by the entries in the Schalker Table). Whilst the Mascarenhas Table also refers to documents disclosed in these proceedings on 27 February 2024 following permission of the Canadian court, the Bank itself (and indeed the Bank's lawyers) knew of such documentation from the time of the Canadian Proceedings themselves, and were quite able to request permission from the Canadian court to use such documentation when it suited the Bank. Nor can they pray in aid any confidentiality imposed by the Canadian court in the context of its disclosure obligations in this action – see, in this regard, *Tugushev v Orlov* [2021] EWHC 1514 (Comm) at [28]-[31] and *Bank Mellat v Her Majesty's Treasury* [2019] EWCA Civ 449 at [63].
122. In relation to the impossibility of dealing with the Tahnoon Amendments and maintaining the trial date, the amendments raise a large number of issues of fact, and of UAE law and UAE business practices. They would require a further disclosure

exercise, further witness evidence and expert evidence on UAE law and business practices.

123. The Bank seeks to counteract this by submitting that what matters is not some objective fact but D1's state of mind in 2017 and therefore that evidence as to the objective fact is irrelevant - see, for example the Bank's skeleton at [52], [54(b)], 56(a), 56(b) (what was referred to before me as the "State of Mind Point"). I am satisfied, however, that the Defendants are correct in their submission that the State of Mind Point is a fallacy. It is a fallacy because the objective fact is often relevant evidentially to someone's perception of it. For example, if someone believes that a claim against him is hopeless, he is less likely to wish to prejudice it than if he believes it to be a strong claim. Thus, it is established by authority (contrary to what the Bank contends) that the objective merits of claims are evidentially relevant to the debtor's state of mind - see *Morina v McAleavey* [2023] EWHC 1234 (Ch) [119]-[120]. The Bank also seeks to submit that evidence or disclosure, even if relevant, would be disproportionate, but the litmus test to this is that it cannot be seriously suggested that if the amendments had been pleaded at the outset additional evidence and disclosure, as sought by Joan and Mo. would not be allowed.
124. But at a more granular level it is absolutely plain that the Tahnoon Amendments would give rise to a great deal of additional work that could not be done (still less done fairly) before trial, as addressed in Schalker 6 at [19]-[21]. Thus, by way of example, paras 45A.3 and 45H.2 allege that Sheikh Tahnoon was the "ultimate controller" of Federal and that D1 was concerned, from late 2016, that Sheikh Tahnoon might procure Federal to bring claims against him. On any view this would require further disclosure, (not least to locate the Powers of Attorney (PoA) referred to in [45A.3]), and both Mo and D3 may possess relevant documents. It would also require expert evidence of UAE law to determine the extent of Sheikh Tahnoon's powers to terminate the PoAs and D1's remedies if he were to do so. As Professor Slim explains at [17]-[24] of his letter report Article 955 of the UAE Civil Transactions Code and duties of good faith in UAE law may have prevented Sheikh Tahnoon from revoking D1's PoA, contrary to what the Bank alleges at para 45A.3(c).
125. Whilst the Bank disputes this in its Skeleton Argument, on the basis that Sheikh Tahnoon could have prevented D1 from operating Federal irrespective of whether that was lawful, that is not the Bank's pleaded case - what [45A.3(c)] pleads is that Sheikh Tahnoon "had the power to revoke" the PoAs, i.e. to do so lawfully (the words "power to revoke" not being apt to describe an unlawful revocation. But even if the Bank were to confine its case to unlawful revocation, which it has not, the need for expert evidence would not disappear because I consider the Defendants to be correct when they submit that what matters is whether D1 subjectively believed that the PoAs would be revoked, even if unlawfully. As an experienced businessman his subjective perceptions of the risks to his position in early 2017 are likely to have been influenced by UAE law and UAE business practices as he understood them.
126. Another example is paragraphs 45A.4 and 45H.3. These allege that D1 was concerned from late 2016 that Sheikh Tahnoon might use his shareholding in Commodore and Tadamun to procure those companies to bring claims against him. This will require further disclosure in respect of the extent of Sheikh Tahnoon's alleged control over Commodore and Tadamun. As Professor Slim explains at [4]-[10], there was UAE

legislation between 2016 and 2018 which prohibited a non-Emirati citizen from owning more than 49% of a UAE company. This is why an Emirati citizen had to be majority owner. But the degree of control actually exercised by the majority shareholder “*would have depended on the situation of each company*” and in particular on the existence of side agreements or ‘*an implicit agreement*’ between the shareholders. It is therefore a fact-specific issue. The Bank will have important disclosure to give in respect of this issue because it provided banking services to Commodore and Tadamun, dealing both with D1 and with Sheikh Tahnoon’s representatives (see Schalker 6 at [21(7)(a)]). In this regard when it gave disclosure, the Bank decided not to search two of the three data sources identified in its section 2 DRD, including the documents of its employee, Mr Nsouli, who led discussions between the Bank and representatives of Tahnoon concerning the liabilities of Commodore and Tadamun (see Schalker 6, [21(7)(b)]), but were the amendments to be permitted, Sheikh Tahnoon’s influence over Commodore and Tadamun could not fairly be determined without a search of Mr Nsouli’s documents.

127. In relation to such pleas, Mo may also have disclosure to give in respect of this issue because he ran a company, Lotus Lab, of which Tahnoon was the majority owner (see Schalker 6 at [21(7)(a)]). These issues would also require expert evidence of UAE law. This is because Sheikh Tahnoon’s majority shareholding in both companies was held as nominee for D1, who ran the companies under a PoA. These amendments therefore engage the same issues of UAE law as those in relation to the Federal PoA.
128. Another example is paragraph 45A.1 which alleges that Sheikh Tahnoon was “politically and economically influential in the UAE” and paragraphs 45H.3 and 45H.4 which allege that D1 was concerned that Sheikh Tahnoon might use this influence to procure Commodore, Tadamun or unidentified third parties, “including UAE headquartered banks” and UAE criminal authorities, to bring claims against D1. This would require further disclosure from the Bank, in particular of its interactions with Sheikh Tahnoon because they go to whether, as the Bank alleges, Sheikh Tahnoon was “politically and economically influential in the UAE” and capable of influencing “UAE headquartered banks”, such as the Bank. In this regard the Defendants refer to the fact that it would appear that the Bank’s Chairman is Sheikh Tahnoon’s relative by marriage, such that he would be the obvious conduit for any such interactions (such that nil returns would of itself be probative and undermine the Bank’s case as to Sheikh Tahnoon’s influence) (see Schalker 6 at [21(8)]). It would also require further witness evidence from Mo and Joan, who dispute that Sheikh Tahnoon was “politically and economically influential in the UAE” (see Schalker 6 at [21(1)]).
129. Paragraph 45H.1 alleges that D1 was concerned from late 2016 that Sheikh Tahnoon might bring claims against him personally. This would require disclosure and expert evidence of UAE law as to possible personal claims by Sheikh Tahnoon and their strength. Para 45D concerns the timing of the breakdown of D1’s relationship with Sheikh Tahnoon. D1’s evidence in these proceedings was that it took place in March/April 2017; and that is consistent with Mo and Joan’s recollection of the circumstances of their departure from the UAE. But the Bank now alleges that it took place in 2016. This is disputed, and is important as many of the impugned asset transfers took place in early 2017. It would require a further disclosure exercise (with a new issue) concerning the timing of the breakdown. It is identified that D3 and D4

in particular may possess important documents going to this issue because they worked for Federal prior to the breakdown; and it is said that Joan and Mo might also wish to lead evidence on this (see Schalker 3, [21(5)]) (D3 has recently disclosed a new PoA granted to him by Sheikh Tahnoon in relation to Federal as late as 24 April 2017).

130. Paragraph 45A.5 alleges that D1 had “asset protection concerns” in relation to Sheikh Tahnoon’s majority holding in Commodore. The Defendants submit that this would require expert evidence as to UAE law and business practices as to the possible risks for non-Emirati minority owners of UAE companies under the arrangements, because such evidence is relevant to what the expression “asset protection” is likely to have meant in this context. The purpose of expert evidence on this particular issue would not be to ascertain whether such concerns were well-founded, but their content. Certainly, objection could not be taken if the Defendants had chosen to lead expert evidence on such matters.
131. It is self-evident that all such work could not conceivably be done by trial (with all the associated pleading, disclosure and factual and expert evidence) – nor indeed was that even suggested by the Bank. The Tahnoon Amendments, if allowed, would therefore have resulted in the loss of the trial date (and therefore stand to be refused for this further (and overarching) reason), and would also have prejudiced D2 and D6’s preparations for trial (a further reason for refusal).
132. I have already addressed the lack of any justification for the delay in advancing such pleas. As already noted it is clear from the Schalker Table that many of them were in fact known even before these proceedings commenced or were introduced by D1 in autumn 2021, whilst nearly all the primary facts on which the Tahnoon Amendments are based were known to the Bank by February 2022 at the latest (the only exception is a document disclosed by the Bank in October 2023 that is not necessary for the Bank’s new case, and in any event was available over 6 months before the application was issued). This is a further reason why permission to amend should not be granted.
133. A yet further reason for refusal of this amendment is that the Tahnoon Amendments are, in material respects not properly pleaded (as they were obliged to be not least as late amendments). The plea at paragraph 5A.2 refers to unrelated litigation between Sheikh Tahnoon and his former business partner, John Kent. It alleges that D1 and D3 “were aware” of this litigation. It then alleges that D1 and D3 “were aware” at all material times that “Sheikh Tahnoon would not hesitate to issue, or procure to be issued, legal claims against a business partner or friend, such as [D1], in the event of a breakdown and/or serious disagreement in relation to their personal or commercial relationship”.
134. I am satisfied that this plea is, as D2 and D6 submit, defective. First, it is unclear whether [45A.2] is pleading only that D1 and D3 “were aware” that Sheikh Tahnoon would not hesitate to sue a business partner in the circumstances described or that Shiekh Tahnoon would not, in fact, hesitate to sue a business in the circumstances described. If the Bank is not advancing the latter allegation, then the former has no real prospect of success because an allegation that someone was “aware of” a particular fact is defective unless the fact itself is alleged. Even if the Bank intends implicitly to allege the underlying fact, not merely D1’s awareness of it, the plea is unsatisfactory.

135. Secondly, and in any event, there is an ambiguity as to exactly what underlying fact the Bank is alleging. There are two possibilities. The first is that Sheikh Tahnoon would not hesitate to bring claims against a business partner even if he did not honestly believe those claims to be legitimate. The second is that Sheikh Tahnoon would not hesitate to bring claims against a business partner if he thought he had legitimate claims to bring. It seems from the words “*serious disagreement in relation to their personal or commercial relationship*” that the Bank intends to allege the former because a breakdown in a personal relationship would not merely by virtue of that fact usually give rise (or be thought to give rise) to any legitimate claims.
136. However, as the Defendants point out, if that is what the Bank is alleging, it is a very serious allegation against a non-party which ought to be pleaded clearly and unequivocally. It is not; nor is it clearly alleged that D1 believed that Sheikh Tahnoon would bring claims he knew to be illegitimate. In any event, any such allegation has no real prospect of success. The Bank seeks to infer it from the first two sentences of 45A.2, which alleges that Sheikh Tahnoon issued hostile litigation against John Kent in England. But the Bank does not allege that Sheikh Tahnoon did so despite having no honest belief that he had legitimate claims against Mr Kent: what is pleaded is the bare fact of the claim. That bare fact, even if true, could not justify an inference that Sheikh Tahnoon “would not hesitate” to bring such claims even if he had no honest belief that they were legitimate claims. If, by contrast, the Bank is intending to allege only that Sheikh Tahnoon would not hesitate to bring claims which he thought to be legitimate, then [45A.2] as drafted is not so confined.
137. The shortcomings of the pleas in the Tahnoon Amendments is a further reason why permission to amend to make the Tahnoon Amendments is to be refused.
138. Ultimately, however, and as with all the Proposed Amendments, the overarching reason why the Proposed Amendments stand to be refused is because if allowed they would have derailed the trial, and stand to be refused for that overarching reason.

D.2 THE MEDSTAR AMENDMENTS

139. The Medstar Amendments seek to make amendments to the Medstar claim at paragraphs [167]-[175]. I am satisfied that the Medstar Amendments should be refused for a number of reasons. First as regards Joan, the amendments amount to a new cause of action (as the Bank accepts) raising a new \$15m claim against Joan which is time barred by section 35(3) of the Limitation Act. Secondly some of the amendments are internally inconsistent or otherwise embarrassing. Thirdly (and once again fundamentally) the Medstar Amendments are very late and would have necessitated the adjournment of the trial (both individually and cumulatively with other proposed amendments).
140. Once again it is first necessary to identify what the existing Medstar claim consists of, and then compare that claim to what the Bank now seeks to plead by way of amendment.
141. The Bank alleges that there was, on 17 May 2017, a failed attempt to transfer \$15m from the Byblos Bank account of Medstar Holding SAL to the First National Bank account of Mistar Investment Group Holding SAL. The Bank says that Medstar was at the time owned and controlled by Ahmad and that Mistar was owned and controlled

by Ds3-4 (see PoC at [8A]). FNB have in fact confirmed that there was no transfer of \$15 million or any similar sum between the two accounts, whether on 17 May 2017 or at all.

142. The Bank applied for leave to amend to plead an inference that Ahmad nevertheless had intended to, and at some point eventually did, transfer this money to D2-5 (but not Joan) in equal shares. The Bank's current Medstar claim is therefore that over one or more unspecified dates after 17 May 2017, \$3.75m was transferred to each of Mo, D3, D4 and D5 or to companies in which each had a financial interest. Giving leave to amend on 13 May 2022, Andrew Baker J held, [101], that he was "just persuaded, on balance, to consider that there is a serious issue to be tried to that effect rather than pure speculation by the Bank". The current pleading therefore, only just cleared the (low) hurdle to advance even the present claim. The Defendants point out that the Bank initially failed to disclose documents produced to it by Ahmad in Canadian proceedings (that it was therefore aware of, as were its lawyers) and which it should have disclosed (as a matter of its disclosure obligations in the English action). It was forced to disclose them on 27 February 2024 after Joan and Mo issued an application for disclosure.
143. These documents reveal that US\$15,255,640 was transferred on 2 June 2017 from Medstar's Byblos Bank account to a different Medstar account with First National Bank; and that \$7.15m of this was subsequently placed in a collateral deposit account in FNB in Ahmad's name – i.e. it would appear that the money was not sent by D1 to his sons, but apparently offered by Ahmad as collateral for his debts to FNB (which the Defendants say undermines the inference on which the whole Medstar claim depends, namely that Ahmad intended in May 2017 to transfer the money to the benefit of his sons, and acted on that intention thereafter).
144. The proposed Medstar Amendments involve the Bank now seeking to amend the Medstar claim to plead new and different inferences namely (1) that Joan, not just the sons, was a recipient of the US\$15m (see [168.3] and prayer 9D), and (2) that the \$15m was applied by Ahmad almost a year later to the benefit of a different Lebanese company, Ras Beirut.
145. As to (2), Ras Beirut purchased Lebanese property from Ahmad in March 2018 for \$15 million; and the Bank now infers that it did so by application of the Medstar Transaction Monies (i.e. the \$15m). Joan and Ds3, 4 and 5 are shareholders in Ras Beirut, but Mo is not. The Bank nevertheless seeks to infer firstly that an unspecified part of the Medstar Transaction Monies may have been routed to Ras Beirut via Mo; and that D3 may in fact hold half his shareholding in Ras Beirut on trust for Mo (draft PoC at [168A(h)]). This is all in circumstances where there is no documentary evidence for any such monies being routed via Mo, for D3 being the trustee of any trust, or for the application of any part of the \$15 million to the benefit of Ras Beirut.
146. As will appear below, and for good measure, the Bank has long had the documentation (in the Canadian proceedings) that it now seeks to rely on to advance its new pleas, and the Bank and its lawyers knew of such documentation. The reality is that it could have sought to amend to plead such a claim (if necessary applying to the Canadian courts for permission to do so, as it did in relation to other documentation) a very long time ago.

147. However, the first, and key point to note, is that it is common ground that the proposed claim against Joan constitutes a “new claim” for the purposes of section 35(2)(a) and CPR 17.4(2) (see Bank Skeleton at [43(a)] and as confirmed in oral argument). The issues that arise therefore, are whether Joan has an arguable limitation defence to the Medstar claim and if so, can the Bank satisfy the requirements of CPR 17.4(2). I am satisfied that the answers to these questions are clearly yes, and no, respectively. These questions are addressed in turn below.
148. The new claim against Joan is advanced under section 423. The limitation period for such claims is either 6 or 12 years, depending on whether the claimant seeks a sum of money or a non-monetary remedy. In the former case, the claim constitutes, for the purposes of section 9 of the Limitation Act, an “action to recover any sum recoverable by virtue of any enactment” (here section 423); and the limitation period for such claims is six years from the date the cause of action accrued (see *Burnden Holdings (UK) Ltd* [2019] Bus LR 2878, [512]). The transaction challenged by the Medstar claim is an alleged payment of money (US\$15m); and the remedy sought against Joan is also a payment of money (see prayer 9D). Accordingly, the limitation period is six years; and if Joan received the alleged US\$15m before 16 May 2018, the claim is time barred.
149. Neither of the arguments advanced by the Bank as to why the claim is not arguably time-barred bears examination. The first is again (as with the Tahnoon Amendments) to seek to rely on section 32 of the Limitation Act, and argue that the operation of the limitation period is postponed by section 32. Once again, I do not consider that this argument flies on an amendment application. This is because it is necessary for the Bank to demonstrate that Joan’s limitation defence is unarguable (as addressed above), but the contention that the primary limitation period is postponed by section 32 is likely to be unsuitable for summary determination because it raises disputed questions of fact (as already addressed above in the context of the Tahnoon Amendments).
150. As to the factual position and when the claimant could with reasonable diligence have discovered the facts, it is the Bank that bears the burden of proof as to when it could with reasonable diligence have discovered the relevant fact, and it has not led any evidence about what facts it alleges were concealed and when it says it could with reasonable diligence have discovered them (again see *Libyan Investment Bank v JP Morgan* at [28] as already quoted above) – not even in the witness statements of Mr Mascarenhas including the very latest Mascarenhas 20 (which actually responds to other aspects of the D2/D6 Skeleton Argument), which would leave the Defendants with an arguable limitation defence even if the Bank was right about everything else it submitted on section 32 (which D2/D6 submits it was not).
151. In any event, as the Supreme Court explained in *Potter*, section 32(2) does not apply unless the defendant not only committed a breach of duty but subjectively knew that what he did amounted to a breach of duty. The Bank would therefore need to prove, on this amendment application, that D1 – a Lebanese businessman – knew that a transfer by Medstar of US\$15m for the purpose of prejudicing D1’s creditors amounted to a breach of duty by D1; and the Bank would need to prove that to the summary judgment standard. It has not even attempted to do so, and its assertion that there is a “deemed deliberate concealment” under section 32(2) in every successful Section 423 claim, irrespective of the debtor’s subjective knowledge (by reference to

what was said in *Giles v Rhind*) is not consistent with what was said in *Potter* (as has already been addressed in the context of the Tahnoon Amendments).

152. However, I am satisfied that there is also a further flaw in the Bank's case in the context of the Medstar Amendments. Section 32 is available only if Joan "claims through" the defendant who committed the relevant fraud or deliberate concealment. On the Bank's case, Joan claims through Medstar, not D1, because it is Medstar which the Bank alleges transferred the US\$15m to Joan - see the words "by Medstar" in [168.3]. But the Bank has not pleaded any case of fraud or deliberate concealment by Medstar or even that it acted with the s 423(3) purpose (in fact the Bank's Section 423 claim would not work if the transferor is Medstar rather than D1, since it is D1, not Medstar, who is alleged to owe money to the Bank). I am satisfied that it follows that section 32 does not apply to the claim against Joan even if it would apply to D1.
153. The Bank's second argument (which is a factual argument) is to submit that Joan has no arguable limitation defence because she cannot "identify a date by which the transaction occurred", but it is for the Bank to establish that it is not arguable that the transaction, if it occurred, occurred before 16 May 2018. It is not for Joan to establish the opposite. On the Bank's own case, which derives from an attempted transfer by Medstar on 17 May 2017, it is arguable that the Medstar transaction, if it occurred, occurred before 16 May 2018.
154. In such circumstances I am satisfied that Joan has (at the very least) an arguable limitation defence. Equally I am satisfied that the Bank cannot satisfy the test under CPR 17.4(2). I have already addressed the applicable principles in Section C above, including that the phrase "same facts" in CPR 17.4(2) means just that. If, therefore, the new claim pleads a single new fact, it does not arise out of the same facts. Thus, the "the basic test is whether the plea introduces new facts" - *Society of Lloyd's v Henderson* at [53], whilst the phrase "substantially the same facts", does not mean "similar" and it goes "no further than minor differences likely to be the subject of inquiry but not involving any major investigation..." (*Henderson* at [54]). As already noted, in order to determine what is "already in issue" in the existing claim, the pleadings "*will be the primary, and probably the only, source of material for deciding the question*" (*Akers* at [52]).
155. I consider it clear beyond peradventure that the new Medstar claim against Joan does not arise out of the same facts or substantially the same facts in circumstances where the Bank pleads numerous new facts including that Joan received the benefit and control of US\$15m or its value (at [168]), that Joan had an account with First National Bank into which it is to be inferred that some of the US\$15m may have been transferred (at [168.2D]), that making Joan a shareholder of Mistar would lack utility unless D1's intention was that she should receive US\$15m via Mistar (at [168.3(b)]), that Mistar held its assets as nominee for its shareholders: (at [168.4(a)]), that the Ras Beirut Assets (as defined) were acquired by Joan "by application, directly or indirectly", of the US\$15m at [168A], and that at the time of "these transfers and transactions", Joan knew that one of D1's purposes was the statutory purpose (at [171A]). .
156. Each and every one of these is a new fact, not currently pleaded, and they are not the same or substantially the same facts, indeed they are, by definition, not the "same" facts, nor could it be said that they go "no further than minor differences" from those

facts such as to be “substantially similar” to them. Indeed many of them might be thought to be “substantially different facts” (perhaps most obviously that Joan received US\$15 million).

157. In such circumstances the Medstar Amendments stand to be refused on the basis that Joan has an arguable limitation defence and the Bank cannot satisfy the test under CPR 17.4(2) (which would also result in the associated consequential pleas falling away).
158. A further basis for refusal of the Medstar Amendments is that, they too, are not properly particularised (or indeed properly pleaded). What the Bank has sought to do is plead a large number of possible scenarios while failing to advance a positive case in respect of any of them which is less than satisfactory. As addressed below, the result, is that it is not possible to discern what is actually alleged against which defendant. The Bank has form in this regard. A previous iteration was described by Andrew Baker J as “*poorly structured and difficult at best*” containing passages that were “*embarrassing*” and “*may be incoherent*”. As addressed in Section B, where an amendment is made shortly before trial “[t]he opponent must know from the moment that the amendment is made what is the amended case that he has to meet...” *Swain-Mason v Mills*, supra at [73]).
159. Turning to the deficiencies themselves, paragraph 49A.2 summarises certain averments made in the defendants’ pleadings, without indicating the Bank’s case in relation to them. Para 49C then pleads an inference “on the basis that the averments at para 49A.2 are true”, but without indicating whether the Bank contends that those averments (and its inference) are true or whether 49C is contingent upon the Court finding those averments to be true. I agree that this is contrary to CPR 16.4(1)(a), which states that the PoC must include a “statement of the facts on which the claimant relies” (and paragraph 49C does not do this because it does not state whether the Bank relies on the fact that the defendants have made certain averments or alleges that those averments are true).
160. Then at paragraph 169 the Bank pleads a set of six possibilities, including different hypothetical combinations by which Ds2-6 or companies in which they had shares might have been a conduit for or benefited from unspecified parts of the Medstar Transaction Monies before they were applied to the benefit of Ras Beirut. The pleaded approach is unsatisfactory:
 - (1) Paragraphs 169.1-169.4 plead the proportions of the Medstar Transaction Monies as may have been transferred to Ras Beirut via Mistar which Ds2-6 would have received under different hypotheses. For example, at [169.2] the Bank pleads “insofar as the Medstar Transaction Monies ... were transferred to Mistar after 31 July 2017 but before 7 December 2017” which it then uses to introduce an allegation as to how certain defendants “will have received” a benefit from that hypothetical transfer. But the Bank does not plead what monies were routed via Mistar: at most paragraph 168A(e) seems to be (a somewhat circular) plea that some of the Medstar Transaction Monies were so routed, whilst paragraph 168A(f)(i) alleges that Mistar was one of a number of possible entities through which the Medstar Transaction Monies may have been routed (itself an unsatisfactory and unparticularized plea). In

consequence it is not possible to discern what the Bank alleges was actually transferred to Mistar.

- (2) Paragraphs 169.5-169.6 plead the benefit which would have been received by Ds2-6 under different hypotheses. It is unclear whether this is pleaded as an alternative to paras 169.1-169.4 or as an independent allegation. I am satisfied that it infringes CPR 16.4(1)(a). It is also unclear whether paragraphs 169.5 and 169.6 are alternative or independent allegations (in which case the “benefit” which the Bank identifies as having been received from the Medstar Transaction Monies could be several times larger than their total sum).
 - (3) Paragraph 169.6 pleads that Ds 2-6 will have benefitted “as pleaded at paragraph 168A above”, but it is not clear from paragraph 168A what benefits are alleged (and against whom).
 - (4) The pleas in relation to Mo (D2) are unsatisfactory and, in respects, internally inconsistent. It is common ground that Mo is not a shareholder in Ras Beirut. This presents obvious difficulties for the Bank’s new inferential case against Mo that the Medstar monies were used to fund shareholder loans to Ras Beirut. The Bank pleads an inference at paragraph 168(h)(i) that the Medstar monies or some part thereof were transferred to Mo other than via his shareholding in Mistar and then used by Mo to fund half of D3’s shareholder loan to Ras Beirut. But that is inconsistent with **paragraph 168A(f-g)**, which alleges that all of the Medstar monies were transferred to Mistar, Ds3-6 or Ras Beirut (but not to Mo). The pleas are simply inconsistent.
161. The inadequacies of the pleas, in relation to what are very late proposed amendments is a further reason to refuse the amendments.
 162. Yet further, and once again the delay in making the pleas that are now sought to be advanced is an overarching ground for refusal. They are very late pleas raising a substantial cause of action against Joan, impossibly close to trial and which would render an adjournment inevitable (had an adjournment been appropriate, which it would not have been on the facts). This is, in and of itself, and regardless of other reasons, an overwhelming reason for refusal.
 163. As for the pleas which would necessitate an adjournment, a few examples will suffice (further examples are given in Schalker 6 at [31]). At paragraph 49(C) it is pleaded that the defendants obtained, by 22 October 2018, what are referred to as the “Ras Beirut Assets” which include “shares in Ras Beirut Co, the value of which reflected 20% of the value of the properties (i.e. US\$3 million)...” In relation to this plea, it will be necessary to investigate the valuation of Ras Beirut and its assets (both in 2018 and at today’s date) and potentially obtain expert evidence. The Bank submits that only the 2018 valuation matters for Section 423 purposes (Skeleton, [57(a)]), but as D2/D6 point out, that is so only for ascertaining whether there was a transaction at an undervalue, and any subsequent fluctuation in the value of the assets is relevant to the question of remedy (see *4Eng v Harper* [2010] BCC 746 at [14]). The Bank also asserts that “no D has ever suggested that those assets were not worth what was paid for them”, but the Bank itself pleads the value of the properties to be around US\$4.5m less than the price paid for them (while claiming for the higher amount) (at [48.2] and

[49C]). On any view the Defendants would be entitled to obtain valuation evidence which would itself take time (even before the points could be pleaded back to).

164. In paragraph 168.4(a) it is asserted that Mistar held its assets “as nominee for the Shareholders”, whilst in paragraph 168A(h)(ii) it is asserted D3 may hold half of his shares for Mo. However, D2 and D6 say that this is misconceived as a matter of Lebanese law because Lebanese law does not recognise the concept of a trust or nominee ownership (and there is initial expert evidence from Professor Hadi Slim before me in relation to this). Whether or not D2 and D6 have previously pleaded points of Lebanese law (a point taken by the Bank), it cannot possibly be suggested that they should be shut out from seeking to do so if so advised (and they would have got permission to do so, as they would if, for example, the Bank’s plea had been timely (such as at a CMC)).
165. Paragraph 168A(h) pleads an inference that such proportion of the Medstar Transaction Monies as was received by Mo was used to fund half of D3’s shareholder loan to Ras Beirut and a consequential further inference that D3 holds half of his Ras Beirut shareholding on trust for Mo. This plea would therefore have required witness evidence from D3 and expert evidence of Lebanese law.
166. D6 also identifies that Joan might need to seek disclosure of documents from Lebanon properly to defend the new claim against her. The evidence of Professor Slim confirms that there are procedures in Lebanese law that would enable her to seek such disclosure. Fairness would have dictated that she had an opportunity to do so (not least in circumstances where she was facing a claim of some \$15 million for the very first time, she never having faced any such claim before).
167. The Bank candidly acknowledges (at [46(a)] of the Bank Skeleton Argument), that the Medstar Amendments more generally will require further witness statements from both Joan and Mo, not least because the Bank now alleges that Joan had knowledge of the Alleged Purpose. The steps involved, pleadings, disclosure, witness statements and expert reports could not possibly have been done in the time available, still less fairly in tandem with trial preparation.
168. The Medstar Amendments are not only very late due to the proximity of the trial, they are also very late because they could, and should, have been pleaded (if at all) long ago. Indeed, the Medstar Amendments are a particularly egregious example of lateness, as the documents they rely upon (and on which so much emphasis was placed in oral argument and as the basis for making the Medstar Amendments) have long been known to the Bank and its lawyers, and indeed available to the Bank in the Canadian proceedings (in respect of which a release could have been sought as the Bank did in relation to other documents on which it wished to rely).
169. Bar one document (which would not have prevented an earlier plea) every single document on which the Medstar Amendments inferences are based were known to the Bank’s solicitors by 2 March 2022 at the latest when they were used by the Bank at a deposition of D1 in the Canadian proceedings, having been disclosed by him beforehand. Such documentation was therefore known by the Bank and its Canadian lawyers (the deposition also being attended by the Bank’s English solicitors). In this regard the documents were described at the deposition as “evidence of the Medstar transaction” by Ms Cara Cameron, the Bank’s own Canadian lawyer. The Bank

therefore knew of the relevance of the documents to the Medstar claim and could at any time have sought a release to use such documents (as it did in relation to other documents). If there was a failure to appreciate the (alleged) significance of documents that cannot be prayed in aid as a reason justifying a late amendment (see *CIP* at [30], where it was noted that “*an avoidable mistake by the amending party*” is not a good reason (and the same would be true of any failure to appreciate the significance of a document by those acting on behalf of the Bank or its solicitor).

170. The very lateness of the Medstar Amendments is an independent, and overarching, reason for the refusal of the Medstar Amendments.

D.3 THE KNOWLEDGE AMENDMENTS

171. There are also a series of amendments by which the Bank seeks to allege that Joan was on notice of D1’s alleged purpose, principally at paras 142A, 148B, 171A and 175CA. A preliminary point is that in circumstances where the Tahnoon Amendments are refused (as I have done) the Knowledge Amendments must fall away because they are all parasitic upon the Tahnoon Amendments (see, for example, paragraph 148B, which cross-refers to paragraph 45I).
172. In any event, I am satisfied that such amendments are variously not properly particularised and/or stand no real prospect of success, and in any event (and as an overarching ground for refusal) they are made very late and could not be addressed in advance of trial, fairly or at all.
173. First, paragraphs 148B and 175CA are embarrassing and they would also infringe the rules for pleading dishonesty (if such a plea was being advanced). They contain the following allegation: “it is to be inferred that the purported divorce agreement between Ahmad and Joan was subsequently devised by Ahmad to further the Alleged Purpose” (emphasis added). Subsequent to the circulation of the judgment in draft (on Day 2 of the PTR), it was confirmed by the Bank that no such plea of dishonesty was being advanced.
174. It is unclear whether this sentence is intended to be an allegation that (i) the divorce agreement is a forgery; (ii) the divorce agreement, although not forged, is a sham; or (iii) the divorce agreement, although authentic and enforceable in accordance with its terms, was entered into (“subsequently devised by”) for the purpose of prejudicing Ahmad’s creditors. It is not possible to discern from 148B which of these three contentions is actually advanced (itself a reason to refuse leave to amend).
175. But I consider that the Defendants are right to say that all three allegations (if made) do not bear examination and are inappropriate pleas. If what the Bank alleges is (i) or (ii) (i.e. forgery or sham), there are two reasons why such a plea is not open to the Bank. First CPR 32.19 provides that “a party shall be deemed to admit the authenticity of a document disclosed to him” unless a notice to prove authenticity is served by the latest date for serving witness statements, in this case 1 March 2024. The Bank did not serve a notice to prove in respect of the divorce agreement until two weeks after that deadline, and absent a successful application for relief from sanctions (no such application having been made) the Bank is deemed by CPR 32.19 to have admitted the authenticity of the divorce agreement. If any application were made, it would have faced significant potential difficulties, including the fact that the Bank has

itself relied on the contents of the divorce agreement in its statements of case (which it could not do unless it accepts that the document is authentic), and in any event it would not be permissible for the Bank to advance a case of forgery or sham without pleading that expressly or unequivocally.

176. However even were the Bank to be released from its CPR 32.19 admission, I am satisfied that paragraph 148B infringes the strict rules applicable to pleading allegations of serious wrongdoing, as a plea that a document is a sham constitutes an allegation of dishonesty, as a sham requires a common intention to mislead (see *NatWest v Jones* [2001] 1 BCLC 98 at [40] and [59]). In this regard all the primary facts relied upon in support of an inference of dishonesty must be pleaded and identified in the pleading as the primary facts relied upon for this purpose (what has been described by Edwin Johnson J in *Crypton Digital Assets Ltd v Blockchain Luxembourg SA* [2021] EWHC 3194 (Ch) at [52] and [54(2)] as “the identification requirement”). Further, those primary facts must sufficiently particularise the inference of dishonesty. They are sufficient only if, on the assumption that they are true, an inference of dishonesty is more likely than not. This was described as “the sufficiency requirement” in *Crypton*, (at [50(2)]).
177. Further, paragraph 148B does not plead any primary facts in support of the “inference” that the purported divorce agreement was devised by D1 to further the Alleged Purpose. It therefore infringes the identification requirement. Further, since it does not plead any primary facts, there are, by definition, no primary facts which, if true, would make the pleaded inference of sham more likely than not. It therefore infringes the sufficiency requirement as well. Nor even does paragraph 148B clearly or unequivocally allege dishonesty or an intention to mislead (in particular by Joan).
178. If, however, the Bank were not alleging in paragraph 148 that the divorce agreement was a forgery or sham (notwithstanding the words “purported” and “devised”), but rather that it was entered into for the section 423 purpose, the words “purported” and “devised” should not have been pleaded. But equally, if the Bank is not making such allegations, then the plea would make no sense. The divorce agreement is not one of the transactions that the Bank has sought to challenge under Section 423. If, therefore, the divorce agreement is neither a forgery nor a sham, it follows that it was effective in accordance with its terms (because it cannot be set aside under Section 423), with the consequence that the Bank cannot attack any payment or transfer made pursuant to the divorce agreement, because money paid in satisfaction of a contractual obligation cannot have been paid for the purpose of prejudicing creditors, unless the contract itself was entered into for that purpose. To allege that the divorce agreement was “devised to further the Alleged Purpose” makes no sense absent a challenge to the divorce agreement as a Section 423 transaction, no such plea having been advanced. and no such plea has been advanced.
179. In the above circumstances such pleas are embarrassing and not properly particularised, and they do not stand a real prospect of success, and as such they ought not to be allowed.
180. Equally paragraph 171A is not a proper plea and stands no real prospect of success. It alleges that “at the time of these transfers and transactions, ... Joan ... had the knowledge identified at paragraph 45I above. In the premises, Joan ... [was] on notice that at least one of Ahmad’s purposes in relation to these transfers and transactions

was the Alleged Purpose” (emphasis added). The phrase “these transfers and transactions” is also embarrassing as it fails to identify (specifically and individually) the transactions of which it contends Joan was on notice (the plea also being contrary to PD16, para 8.2(5), which requires that the claimant must “specifically set out in the particulars of claim” any allegation of notice or knowledge of a fact).

181. A further valid criticism of the plea is that the Bank does not plead that Joan had knowledge of the fact of any such “transfers or transactions” (which remain unidentified), yet a person cannot know of the purpose of a transaction unless they know of the fact of it. Without a plea that Joan knew of the fact of each of these transfers or transactions, paragraph 171A has no real prospect of success.
182. In such circumstances the Knowledge Amendments stand to be refused.
183. In any event, and once again as an overarching ground of refusal, I am satisfied that all the Knowledge Amendments are very late, and would (as the Bank accepts) require Joan and Mo to plead Amended Defences and serve further statements once the claims were properly pleaded and particularised (for example in relation to paragraph 45A.1 and the first sentence of 45I.5), none of which could fairly be done before trial concurrently with existing trial preparation.
184. The Knowledge Amendments are also very late not only due to the proximity to the trial, but also as is apparent from the Schalker Table, nearly all the Knowledge Amendments rely on primary facts that the Bank was able to plead by October 2023 over 6 months ago and long before the trial. Such delay has never been properly explained still less has the Bank discharged the “heavy” onus upon it to justify such a late amendment.
185. In the above circumstances, permission to make the Knowledge Amendments is also refused.

D.4 OTHER AMENDMENTS

186. The Bank also puts forward an identical amendment at paragraph 103.1 to one it sought to advance on 23 May 2022 but chose to withdraw on 23 June 2022, asserting that “we are confident that our client’s case will succeed at trial” without it. It is not clear whether this amendment is pursued in the light of recent developments, but if it is there is no good reason for it not having been pleaded long ago, and the Bank has not discharged the “heavy burden” upon it to justify that late plea. Accordingly it would stand to be refused.

F. CONCLUSION

187. For all of these reasons the Application is dismissed in relation to the Proposed Amendments and each of them.
188. I will give directions in the PTR in relation to those amendments that have been consented to, and those amendments which relate to D7 (which it was agreed would await this judgment) and which are believed to be capable of agreement.

