



Neutral Citation Number: [2024] EWHC 1314 (Comm)

Case No: LM-2023-000203

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**KING'S BENCH DIVISION**  
**LONDON CIRCUIT COMMERCIAL COURT**

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

Date: 04/06/2024

**Before :**

**HIS HONOUR JUDGE PEARCE**

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**Between :**

<b>TARIQ HAMOODI</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>LOMBARD ODIER ASSET MANAGEMENT (EUROPE) LTD</b>	<b><u>Defendant</u></b>
<b>- and -</b>	
<b>NANOCO GROUP PLC</b>	<b><u>Third Party</u></b>

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**Ben Jaffey KC** (instructed by **Seladore Legal Limited**) for the **Claimant**  
**Elizabeth Jones KC and Oliver Jones** (instructed by **Mayer Brown International LLP**) for  
the **Defendant**  
**Laurence Page** (instructed by **Reed Smith LLP**) for the **Third Party**

Hearing dates: 19 March 2024  
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**Approved Judgment**

This judgment was handed down remotely at 10.00am on 4 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## **HIS HONOUR JUDGE PEARCE:**

### **INTRODUCTION**

1. This claim is brought by the Claimant, for losses allegedly suffered as a result of trading in the shares of Nanoco Ltd, the Third Party, which losses the Claimant contends were caused by the wrongdoing of servants or agents of the Defendant.
2. By application dated 4 October 2023, the Defendant sought summary judgment on the whole claim, alternately an order striking out the claim. By application dated 12 February 2024, the Claimant sought permission to amend the Particulars of Claim. Both applications were opposed. Given that it may be relevant in considering whether a claim should be struck out or summary judgment be entered against the Claimant that the claim might be salvaged by amendment, it is appropriate to consider the amendment application at the same time as the strike out/summary judgment application, even though it was made later.
3. The Claimant relies on statements from the following witnesses:
  - a. The Claimant himself, dated 11 December 2023 and 6 March 2024;
  - b. Mr Simon Bushell, solicitor for the Claimant, dated 6 March 2024.
4. The Defendant relies on statement from the following:
  - a. Mr Alistair Graham, the Defendant's solicitor, dated 4 October 2023 and 19 February 2024;
  - b. Mr Henry Turcan, an investment manager employed by the Defendant, dated 11 March 2024.

### **THE PARTIES**

5. The Claimant is a private individual who invests in the financial services industry. At paragraph 7.1 of his witness statement, he refers to investing primarily in public companies that are engaged in or are facing litigation, for example in the field of patents.
6. The Defendant, a company incorporated in England and Wales, operates an investment and asset management business, as part of the Swiss banking group, Lombard Odier. It manages a number of funds under the brand name Volantis. Some of those funds have held substantial shareholdings in the Third Party. The team of people working under the brand Volantis ("the Volantis team") included Mr Henry Turcan and Mr Rob Giles.
7. The Third Party is an English technology company, listed on the London Stock Exchange, that has developed and patented techniques for the manufacture of quantum dots, minute semiconductors the usages of which include flat-screen televisions. Its chief executive officer at the relevant time was Mr Brian Tenner. The Chair of the Board was Chris Richards. Mr Liam Gray was Company Secretary and, from November 2021, the Chief Financial Officer.

## CHRONOLOGY

8. For the purpose of this application, the following chronology of events is either not in dispute or can be taken to be capable of proof by the Claimant and therefore to be assumed for the purpose of the application.
9. Since the Defendant has not filed a Defence, its case on certain matters is not known. However, at paragraph 37 of his first witness statement, Mr Graham states that the Defendant “*denies any wrongdoing whatsoever*” in relation to the Claimant’s complaints. The Claimant’s case includes not only the inference of wrongdoing, but a specific allegation of wrongdoing in respect of events in January 2023 set out at paragraph 25 of this judgment. Putting aside for the moment the relevance of that allegation, I assume for the purpose of the application that the allegation that Mr Giles acted in the manner set out in that paragraph has a real prospect of success albeit that in fact it is denied by the Defendant.
10. In February 2020, the Third Party commenced proceedings for patent infringement against the Samsung Group in Texas (“the Samsung litigation”). It should be noted that the Claimant asserts and the Defendant has not denied that the value of that litigation was the Third Party’s key asset.
11. In January 2021, the Claimant first acquired shares in the Third Party.
12. On 1 September 2021, Mr Turcan was appointed a non-executive director of the Third Party. As a result of that appointment, he and the rest of the Volantis team became subject to the Defendant’s policy in relation to inside information to the effect that, if any member of the team has inside information, all are treated as having inside information. The Claimant also avers that Mr Turcan also became a member of the Third Party’s litigation sub committee dealing with the Samsung Litigation. This is not denied by the Defendant and I take it to be capable of proof.
13. In early 2022, the Claimant exchanged emails with Mr Tenner, in which the Claimant provided information and his views in relation to the Samsung litigation.
14. On 23 March 2022, Mr Turcan contacted the Claimant by email stating:

*“I hope you don’t mind me contacting you direct but I sit on the board of Nanoco and have seen your correspondence with Brian (sc. Tenner) and Liam (sc. Gray). I am incredibly impressed and encouraged with the due diligence that you are doing on the (sc. Samsung) litigation case. Your knowledge is far greater than ours and we have been invested in the stock for 20 years.”*
15. The Claimant subsequently corresponded and met with Mr Turcan and Mr Giles on 25 March 2022.
16. On 12 April 2022 Nanoco released an RNS<sup>1</sup> publishing its interim results. In relation to the Samsung litigation, the Board stated:

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<sup>1</sup> RNS is an abbreviation for Regulatory News Service, the means by which the London Stock Exchange publishes information that might affect a company’s share price. “RNS” is also used as here to mean a publication of news through this route.

*“While it is not possible at this point to predict the amount of any award or settlement due to the number of variables in play, the lawsuit does have the potential to generate substantial upside for shareholders.”*

17. The Claimant also refers to a presentation in April 2020 of the interim results by the then Chief Executive of the Third Party, Dr Edelman, which presentation is allegedly available as a webcast, during which he stated that *“Nanoco’s own internal damages models for the Samsung Litigation ranged from around US\$140m and US\$280m, ‘and upwards of that number’.*<sup>2</sup>”
18. The Claimant, Mr Giles and Mr Turcan met again on 28 April 2022<sup>3</sup>. It is the Claimant’s case at [14] in the Particulars of Claim that, at that meeting, *“Mr Turcan solicited Mr Hamoodi’s views on the upcoming inter partes review decisions in the Samsung Litigation.”*
19. On 6 June 2022 the Third Party announced that it was raising £2.25m by issuing new ordinary shares and that six of its directors had participated, purchasing shares at the issue price of 37p per share. The Claimant also participated in this equity raise.
20. On 11 July 2022, one of the funds managed by the Volantis Team sold 5 million shares at the market price of 34.2p per share to a broker representing Mr Hamoodi (the “July 2022 Sale”). Mr Hamoodi still retains those shares, and it is that sale which forms the subject of his claim against the Defendant.
21. Before the sale of shares was executed in July 2022, Mr Turcan sought confirmation from Mr Tenner and Mr Richards that the former was not in possession of inside information and that he was free to deal in Nanoco shares; both individuals confirmed that the Defendant was free to deal and Mr Tenner confirmed that he was not aware of any inside information held by Nanoco or the board.
22. The Claimant purchased further shares in the Third Party in September 2022.
23. On 12 September 2022, Mr Turcan resigned from the Board of the Third Party.
24. On the morning of 6 January 2023, the Third Party announced to the market that it had agreed terms with Samsung for the settlement of the litigation and that the parties had jointly requested a stay of the trial which was due to commence that day. The shares rose sharply following this announcement, closing at 55.80p.
25. On the same day, the Claimant’s case is that he contacted Mr Giles to enquire whether the Defendant was still seeking to sell shares in the third party. Mr Giles responded that he had participated in a call with the Third Party’s senior management the previous night, that the Third Party’s advisers had encouraged settlement of the Samsung Litigation, that the board was concerned about achieving only a low settlement in light of the outcome

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<sup>2</sup> See the Claimant’s witness statement at [9.1].

<sup>3</sup> Or possibly 12 April 2022 – [14] of both the Particulars of Claim as served and the draft Amended Particulars of Claim refer to a meeting on 28 April 2022; but [23.2] of both the original and the draft amendment refer to what appears to be the same meeting and state it to have taken place on 12 April 2022. That is probably a mistaken reference to the date of the RNS. In any event, it is not apparent that anything turns on the difference.

in another recently decided patent infringement case, and that, as a result, the Claimant should temper his settlement expectations.

26. On 9 January 2023, Nanoco made a further market announcement which stated that the settlement value should be expected “*towards the lower end of the range of expectations...as previously guided by the Company.*”
27. The Nanoco share price closed down at 42.20p on 9 January 2023.
28. On 3 February 2023, Nanoco announced the final terms agreed with Samsung, which involved a \$150m cash settlement of which Nanoco stated that it expected to retain over \$90m after litigation costs. Following this announcement the Nanoco share price fell again such that the shares closed on that day at 27p.

### **THE CLAIMANT’S CASE**

29. In summary, the Claimant’s case is as follows:
  - a. As a result of his appointment to the board of the Third Party, Mr Turcan had access to inside (i.e. material and non-public) information about the litigation. Before the sale of shares to the Claimant, he knew that:
    - i. Samsung had made offers to settle that were considered derisory by the Third Party’s board. This was material because it suggested that the market’s expectations as to levels of recovery in the litigation were unrealistic, over-optimistic and of a different order to earlier guidance from the board.
    - ii. There were real concerns about the strength and reliability of the Third Party’s expert evidence in the litigation both as to liability and quantum.
    - iii. The Third Party was willing to accept a much lower offer to settle the litigation than it had previously indicated to the market.
  - b. The Defendant sold shares in the Third Party to the Claimant with the benefit of this information but without disclosing it to him.
  - c. However, the Defendant impliedly represented to the Claimant that it had no material non-public information.
  - d. The result was that the Defendant sold shares to the Claimant at a price that it would not have achieved but for the failure to disclose the inside information.
30. The Particulars of Claim, as originally framed, pleaded the case in misrepresentation, fraud, breach of duty of care and/or unlawful means conspiracy.
  - a. The misrepresentation was alleged to be an implied representation to the Claimant made before the sale of shares in July 2022 that the Defendant did not possess inside information relating to the Third Party (the so-called “No Inside Information Representation”). That representation was to be inferred from the email of 23 March 2022 set out above; the soliciting of the Claimant’s views on the prospects

of the litigation by Mr Turcan at the meeting on 28 April 2022<sup>4</sup> which would have made no sense if Mr Turcan himself knew the views of the Third Party and its professional advisers already; and the proposal of the sale of shares in July 2022 by the Defendant which (as a body regulated by the FCA, which owned a significant shareholding in the Third Party and whose employee, Mr Turcan sat on the board of the Third Party) would be anticipated to have prohibitions on dealing based on inside information and/or safeguards relating to this. The representation is said to have been made either fraudulently or negligently.

- b. The claim based on an alleged breach of a duty of care is closely allied to the claim in misrepresentation. It is asserted that the Defendant owed a duty to the Claimant to take reasonable care to ensure that the No Inside Information Representation was true.
  - c. The unlawful means conspiracy is based upon the assertion that the Defendant, Mr Turcan and/or Mr Giles combined to make a false representation to the Claimant and/or to breach Article 7 of Market Abuse Regulation and/or section 52 of the Criminal Justice Act 1993.
31. The Defendant's possession of inside information is essentially to be inferred from the sequence of events relating to the Samsung litigation referred to above and the possession by the Third Party (and therefore Mr Turcan) of knowledge about the prospects of that litigation based on the advice which the Third Party was receiving.
32. The Claimant also seeks to rely on later events in support of the assertion that the Defendant possessed and used inside information, namely the discussion between the Claimant and Mr Giles alleged to have taken place on 6 January 2023. The Claimant alleges that this amounted to the provision of inside information by Mr Giles to the Claimant and supports the inference that Mr Giles held inside information earlier in July 2022 because it shows that the Defendant did not have adequate safeguards in place to prevent the sharing of inside information and/or that Mr Turcan and Mr Giles were willing to obtain and to share inside information.
33. In the draft Amended Particulars of Claim, the Claimant seeks to assert certain further information relating to Mr Turcan's conduct and to add additional information as to the prospects of the Samsung litigation. As to the causes of action, it seeks to add an additional assertion to support the existence of the No Inside Information representation, namely that the Defendant did not ask the Claimant to give an assurance or confirmation that he accepted that the Defendant might be in possession of inside information at the time of the sale of shares in July 2022, contrary to market practice. It gives further particulars in support of the allegation that Mr Turcan and/or Mr Giles knew that the Defendant and/or Mr Giles was in possession of inside information and of the assertion that the purpose of the unlawful means conspiracy was to cause loss by selling the Defendant's shares in the Third Party to the Claimant at an overvalue. It amends the alleged breach of the Market Abuse Regulations by reference to Article 14 rather than article 7.
34. These amendments, by way of the provision of additional particulars, are of a kind that are unlikely to be problematic so long as they are not unduly disruptive of the efficient

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<sup>4</sup> Or possibly 12 April 2022 – see the previous footnote.

management of the case and result in a pleading which, if permitted, is not amenable to strike out in any event.

## THE RELEVANT LAW

### (1) STRIKE OUT AND SUMMARY JUDGMENT

35. The power to strike out a statement of case is set out in CPR Part 3:

*“3.4(2) The court may strike out a statement of case if it appears to the court:*

*(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;*

*(b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or*

*(c) that there has been a failure to comply with a rule, practice direction or court order.”*

36. Dealing with the first of these, Ms Jones KC and Mr Jones for the Defendant cite the decision of HHJ Parfitt in Gerko v Seal [2023] EWHC 63 (KB), dealing with the proper role of pleadings in particular where dishonesty or fraud are alleged, summarising it as follows in their skeleton argument:

*“46.1. A pleading serves three purposes: first, to enable the other side to know the case it has to meet; secondly, to ensure that the parties can properly prepare for trial; and thirdly, as a ‘critical audit’ for the claimant and its legal team that it has a complete cause of action.*

*46.2. Particulars of Claim, in particular, should generally aim to set out the essential facts which go to make up each essential element of the cause of action.*

*46.3. There are further requirements where fraud or dishonest conspiracy are alleged. In particular: (i) the allegation of fraud or dishonesty must be supported by particulars and, if it is not, it may be struck out; and (ii) the allegation must be sufficiently particularised: particulars which are consistent with honesty are not sufficient, and the claimant must also identify the primary facts which it wishes to use to justify any inference of dishonesty. What is required is some primary fact which ‘tilts the balance’ in favour of a potential finding of fraud.*

*46.4. If the primary facts relied upon to justify the allegation of dishonesty or fraud are not pleaded or if, taken at face value and in the round, they do not point towards there being a realistic prospect of the allegations being made out at trial, then the pleading fails and the interests of justice do not require the claim to proceed any further.”*

37. The power to grant summary judgment is contained in CPR 24.3:

*“The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if:*

- (a) *it considers that the party has no real prospect of succeeding on the claim, defence or issue; and*
- (b) *there is no other compelling reason why the case or issue should be disposed of at a trial.”*

38. The law in this field is well trodden. As it is put in the White Book at [24.3.2]:

*“The following principles applicable to applications for summary judgment were formulated by Lewison J in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098:*

- i) The court must consider whether the claimant has a ‘realistic’ as opposed to a ‘fanciful’ prospect of success: Swain v Hillman [2001] 1 All ER 91;*
- ii) A ‘realistic’ claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*
- iii) In reaching its conclusion the court must not conduct a ‘mini-trial’: Swain v Hillman;*
- iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];*
- v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550;*
- vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 3. On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it...”*

39. My attention is drawn to the judgment of Asplin LJ in Elite Property Holdings Ltd v Barclays Bank plc [2019] EWCA Civ 204, where she said of the need to show that the claim has a real as opposed to a fanciful prospect of success:

*“[41] ... A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a*



*prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: Three Rivers District Council v Bank of England (No. 3) [2003] 2 AC 1.*

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

## (2) AMENDMENT

40. The Court has a wide power under CPR Part 17 to permit the amendment of a statement of case, in particular where there is no question of the amendment having the effect of adding a cause of action to the claim after the expiry of any relevant limitation period.
41. In Kawasaki Kisen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33, Popplewell LJ considered the extent of this power where (as here) the adequacy of the pleaded case was in issue). He said:

*“16. It was common ground that on an application to serve a claim on a defendant out of the jurisdiction, a claimant needs to establish a serious issue to be tried, which means a case which has a real as opposed to fanciful prospect of success, the same test as applies to applications for summary judgment: Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804 per Lord Collins JSC.*

*17. The Court will apply the same test when considering an application to amend a statement of case, and will also refuse permission to amend to raise a case which does not have a real prospect of success.*

*18. In both these contexts:*

*(1) It is not enough that the claim is merely arguable; it must carry some degree of conviction: ED & F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472 at [8]; Global Asset Capital Inc. v Aabar Block SARL [2017] 4 WLR 164 at [27(1)].*

*(2) The pleading must be coherent and properly particularised: Elite Property Holdings Ltd v Barclays Bank Plc [2019] EWCA Civ 204 at [42].*

*(3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: Elite Property at [41].”*

42. In Portland Stone Firms v Barclays Bank [2018] EWHC 2341 (QB), Stuart-Smith J, as he then was, considered the particularity needed when pleading fraud. His judgment is of assistance generally when dealing with the proper pleading of fraud but particularly to the context where (as here) an issue arises as to the extent that the Claimant asserts a lack of knowledge as to the facts underlying the fraud:

*“25. Where, as here, a Claimant wishes to amend to plead fraud and the application is opposed, it is material to bear in mind the approach that the Court routinely takes to proving fraud in civil litigation. A sufficient summary for*

*present purposes is provided by Fiona Trust & Holding Corp v Privalov [2010] EWHC 3199 (Comm) at [1438]-[1439] per Andrew Smith J:*

*‘It is well established that “cogent evidence is required to justify a finding of fraud or other discreditable conduct”: per Moore-Bick LJ in Jafari-Fini v Skillglass Ltd, [2007] EWCA Civ 261 at [73]. This principle reflects the court’s conventional perception that it is generally not likely that people will engage in such conduct: “where a claimant seeks to prove a case of dishonesty, its inherent improbability means that, even on the civil burden of proof, the evidence needed to prove it must be all the stronger”, per Rix LJ in Markel v Higgins [2009] EWCA 790 at [50]. The question remains one of the balance of probability, although typically, as Ungood-Thomas J put it in In re Dellow’s Will Trusts [1964] 1 WLR 415,455 (cited by Lord Nicholls in In re H [1996] AC 563 at p.586H), “The more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it”.’*

...

26. *This summary is consistent with many other decisions of high authority which establish that pleadings of fraud should be subjected to close scrutiny and that it is not possible to infer dishonesty from facts that are equally consistent with honesty: see, for example, Mukhtar v Saleem [2018] EWHC 1729 (QB); Elite Property Holdings Ltd v Barclays Bank [2017] EWHC 2030 (QB); Three Rivers DC v The Governor and Company of Barclays of England (No 3) [2003] 2 AC 1 at [186] per Lord Millett – see below.*

27. *One of the features of claims involving fraud or deceit is the prospect that the Defendant will, if the underlying allegation is true, have tried to shroud his conduct in secrecy. This has routinely been addressed in cases involving allegations that a defendant has engaged in anti-competitive arrangements. In such cases, the Court adopts what is called a generous approach to pleadings. The approach was summarised by Flaux J in Bord Na Mona Horticultural Ltd & Anr v British Polythene Industries Plc [2012] EWHC 3346 (Comm) at [29] ff. Flaux J set out the principles in play as described by Sales J in Nokia Corporation v AU Optronics Corporation [2012] EWHC 731 (Ch) at [62]-[67], which included the existence of a tension between (a) the impulse to ensure that claims are fully and clearly pleaded, and (b) the impulse to ensure that justice is done and a claimant is not prevented by overly strict and demanding rules of pleading from introducing a claim which may prove to be properly made out at trial but may be shut out by the law of limitation if the claimant is to be forced to wait until he has full particulars before launching a claim. Sales J indicated that this tension was to be resolved by “allowing a measure of generosity in favour of a claimant.” Flaux J continued at [31]:*

*‘This generous approach to the pleadings in cartel claims has been endorsed by the Court of Appeal, not only in Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland [2010] EWCA Civ 864 but most recently by Etherton LJ in KME Yorkshire Ltd v Toshiba Carrier UK Ltd [2012] EWCA Civ 1190 at [32]: “As was stated by the Court of Appeal in Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland Inc [2010] EWCA Civ 864 at paragraph [43], however, it is in the nature of anti-competitive arrangements that they are shrouded in secrecy and so it is difficult until after disclosure of documents fairly*

*to assess the strength or otherwise of an allegation that a defendant was a party to, or aware of, the proven anti-competitive conduct of members of the same group of companies. That same generous approach was for the same reason taken by Sales J in Nokia Corporation v AU Optronics Corporation [2012] EWHC 731 in dismissing an application to strike out or to grant summary judgment against the claimant in proceedings for damages for infringement of Article 101. That approach is appropriate in the present case prior to disclosure of documents.*

*[32] In the case of applications for summary judgment, it is well established that the court should not engage in a mini-trial where there is any conflict of evidence. The dangers of too wide a use of the summary judgment procedure were emphasised by Mummery LJ at [4-18] of his judgment in Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical [2006] EWCA Civ 661. [5] and [18] of that judgment seem to me particularly apposite to the present case:*

*"5. Although the test [whether the claim has a real prospect of success] can be stated simply, its application in practice can be difficult. In my experience there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment (or on an application for permission to appeal, where a similar test is applicable) than in trying the case in its entirety (or, in the case of an appeal, hearing the substantive appeal). The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials...18. In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."*

*[33] The same point was made by Lewison J (as he then was) in Federal Republic of Nigeria v Santolina Investment Corporation [2007] EWHC 437 (Ch), at [4(vi)] citing the Doncaster Pharmaceuticals case: "Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case".'*

*28. These are salutary warnings and necessary protections for the Claimants, which I bear in mind. It is, however, to be remembered that the Court's concern in these passages was in large measure based upon a lack of knowledge on the part of the Claimant before disclosure had been given. In the present case, the Defendants have given disclosure based upon wide-ranging search terms*

*relating to multiple custodians. Although the Claimants submit that the Defendants' disclosure is not complete, they have not identified any specific omissions or areas of default that would justify the Court in treating the Claimants as if they were still materially excluded from access to relevant disclosure for present purposes.*

*29. In any event, if a case alleging fraud or deceit (or other intention) rests upon the drawing of inferences about a Defendant's state of mind from other facts, those other facts must be clearly pleaded and must be such as could support the finding for which the Claimant contends. This is clear from numerous authorities: see Three Rivers District Council v The Governor and Company of Barclays of England (No 3) [2003] 2 AC 1 at [55] per Lord Hope and [186] per Lord Millett. I endorse and adopt the statement of Flaux J in JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm) at [20] that:*

*'The Claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence.*

*As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty." At the interlocutory stage ... the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge'."*

43. It is significant to note that Stuart-Smith LJ in that case was dealing with both claims in breach of contract and claims in conspiracy against the bankers and accountants/financial advisers in respect of their dealing with a group of companies in which the Claimants alleged a deliberate attempt to bring that group to destruction. Thus the context of the case was some way out of the scope of the cartel claims which he cited in support of the argument that the court might take a "generous" approach to the particularity of pleadings where a Claimant was of necessity dealing with matters outside of its own knowledge.

### **(3) INSIDER DEALING**

44. Regulation 596/2014 of the European Parliament and of the Council of 16 April 2014 on Market Abuse (generally known as the Market Abuse Regulation) is "retained EU law" within the meaning of European Union (Withdrawal) Act 2018 and accordingly continues to have force in English law.
45. Inside information is defined in Article 7(1):

*"For the purposes of this Regulation, inside information shall comprise the following types of information:*

*(a) information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments ..."*

46. Insider dealing is defined by Article 8(1):

*“For the purposes of this Regulation, insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relate....”*

47. Recital 24 refers to a presumption of the use of inside information by a person in possession of the information in the following terms:

*“Where a legal or natural person in possession of inside information acquires or disposes of, or attempts to acquire or dispose of, for his own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates, it should be implied that that person has used that information. That presumption is without prejudice to the rights of the defence. The question whether a person has infringed the prohibition on insider dealing or has attempted to commit insider dealing should be analysed in the light of the purpose of this Regulation, which is to protect the integrity of the financial market and to enhance investor confidence, which is based, in turn, on the assurance that investors will be placed on an equal footing and protected from the misuse of inside information.”*

48. Article 14 deals with the prohibition on insider dealing:

*“A person shall not:*

- (a) engage or attempt to engage in insider dealing;*
- (b) recommend that another person engage in insider dealing or induce another person to engage in insider dealing; or*
- (c) unlawfully disclose inside information.”*

49. Article 9 however sets out what is called “Legitimate Behaviour,” that is to say behaviour which is not sufficient to give rise to a presumption of insider dealing. For example, at [1] it states:

*“For the purposes of Articles 8 and 14, it shall not be deemed from the mere fact that a legal person is or has been in possession of inside information that that person has used that information and has thus engaged in insider dealing on the basis of an acquisition or disposal, where that legal person:*

- (a) has established, implemented and maintained adequate and effective internal arrangements and procedures that effectively ensure that neither the natural person who made the decision on its behalf to acquire or dispose of financial instruments to which the information relates, nor another natural person who may have had an influence on that decision, was in possession of the inside information; and*
- (b) has not encouraged, made a recommendation to, induced or otherwise influenced the natural person who, on behalf of the legal person, acquired or disposed of financial instruments to which the information relates.”*

50. Section 53 of the Criminal Justice Act 1993 prohibits insider dealing in the following terms:

*“(1) An individual who has information as an insider is guilty of insider dealing if, in the circumstances mentioned in subsection (3), he deals in securities that are price-affected securities in relation to the information.*

*(2) An individual who has information as an insider is also guilty of insider dealing if—*

*(a) he encourages another person to deal in securities that are (whether or not that other knows it) price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in the circumstances mentioned in subsection (3); or*

*(b) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.*

*(3) The circumstances referred to above are that the acquisition or disposal in question occurs on a regulated market, or that the person dealing relies on a professional intermediary or is himself acting as a professional intermediary.”*

#### **(4) MISREPRESENTATION**

51. Whether the claim is put in fraud, deceit, negligent misrepresentation, as liability pursuant to Section 2(1) of the Misrepresentation Act 1967 or in a claim for breach of duty to take reasonable care in making a representation, a central question that arises on this application is whether the implied representation pleaded in the Particulars of Claim as served and/or in the draft Amended Particulars of Claim can in fact be made out as a matter of law. The principles concerning implied representations were considered in Marme Inversiones 2007 v NatWest Markets plc [2019] EWHC 366 (Comm), where, having summarised the authorities, Picken J drew out the following principles at [123]:

*“(1) First, it is possible for a representation to be made expressly or impliedly through words or conduct. For a representation to be implied, silence or mere assumption is not usually enough as there is no general duty of disclosure. It is necessary to view the words or conduct objectively to determine whether an implied representation has been made, although the natural assumptions of the reasonable representee will be helpful in assessing whether an implied representation has been made through the conduct of the representor.*

*(2) Secondly, whether or not a representation is implied is ultimately a question of fact to be determined in the circumstances of the particular case: see also Deutsche Bank AG v Unitech Global Ltd [2013] EWCA Civ 1372 per Longmore LJ at [25].*

*(3) Thirdly, more may be required, in terms of words or conduct, for a representation which is wide in meaning or complex to be implied.*

*(4) Fourthly, it is less likely that a representation that is vague, uncertain or ambiguous would be objectively understood to have been made from words or conduct.”*

## **AMENDMENT**

### **Submissions**

52. Within its skeleton argument, the Defendant sensibly deals with the strikeout and the summary judgment applications both on the basis of the original Particulars of Claim and on the basis of the draft Amended Particulars of Claim. In essence, the Defendant says that the claim is bad for the purpose of the strikeout and/or summary judgment application is whether one looks at the original pleading or the amendment.
53. In those circumstances, the Defendant does not separately argue that amendment should be refused but simply says that, even in the amended form, the claim is not sustainable. Similarly, the Claimant does not deal with the application to amend in any great detail.

### **Discussion**

54. This is an application to amend at an early stage of the litigation. As will be noted below, I consider the amendment not to be sufficient to allow certain aspects of the claim to survive. However, were the pleading otherwise adequate, the early stage of the pleading and the fact that the Defendant can adequately be compensated in costs for the consequence of the amendment would lead me to the conclusion that permission to amend should be granted.
55. I therefore focus on the strikeout and summary judgment applications. Insofar as they are not successful, I will permit the amendment sought.

## **STRIKE OUT**

### **Submissions**

56. The Defendant's application to strike out the Particulars of Claim is made on five grounds:
- a. That the allegation of an implied representation is unsustainable;
  - b. That the pleas are of deceit and unlawful means conspiracy are defective and improperly advanced;
  - c. That the alternative claim under Section 2(1) of the Misrepresentation Act 1967 is unsustainable and defective;
  - d. That the claim in negligence is defective;
  - e. That the Claimant has failed to comply with Practice Directions to the Civil Procedure Rules.
57. Dealing first with the alleged implied representation, within the body of paragraph 23 of the Particulars of Claim, the implied representation that the Defendant in general and Mr Giles in particular did not possess inside information regarding the Third Party is pleaded as follows:

*“23.1. It was a necessary implication of Mr Turcan’s email pleaded at Paragraph 12 that he did not possess inside information regarding Nanoco in general and the Samsung Litigation in particular. If he had, it would have been false to assert that Mr Hamoodi’s knowledge of Nanoco was greater than LOAM’s as he did.*

*23.2. Mr Turcan’s soliciting Mr Hamoodi’s views on likely outcomes in the Samsung Litigation at the meeting on 12 April 2022, as pleaded at Paragraph 14 above, would have been incoherent if Mr Turcan had access to Nanoco’s own views, and in particular, Nanoco’s own professional advice on the same matters.*

*23.3. LOAM’s conduct gave rise to this implied representation in proposing the July 2022 Sale, in circumstances in which (i) LOAM is an FCA-regulated entity, which Mr Hamoodi would reasonably have anticipated would appreciate the prohibitions on dealing based on inside information; (ii) given LOAM’s significant investment and Mr Turcan’s seat on the board, it was reasonably to be expected that it and/or Mr Giles would have received inside information unless it took appropriate safeguards to prevent the same.”*

58. As to the first basis for the finding of an implied representation, the email referred to in [23.1] is that of 23 March 2022 from Mr Turcan to the Claimant. The Defendant notes that, within the body of that email, it is pointed out by Mr Turcan that he is on the board of the Third Party. He would inevitably have inside information about the Samsung Litigation as a result. In any event, the Defendant says, the words are too vague to give rise to an implied representation, applying the principles in Marme Inversiones 2007 v NatWest referred to above. Further there would be no inconsistency in the Claimant having generally greater knowledge than Mr Turcan about the Samsung Litigation but Mr Turcan being aware of specific pieces of information.
59. The second basis of the misrepresentation, that the discussion in the meeting on 28 (or possibly 12) April 2022 was only consistent with the implied assertion that Mr Turcan did not hold inside information is again, on the Defendant’s case, incapable of giving rise to the implied representation. Assuming for the moment that Mr Turcan did indeed seek out Mr Hamoodi’s views on the Samsung Litigation, there would be nothing inconsistent with his doing so from a position of himself having inside information about that litigation. The Claimant was clearly a knowledgeable investor whose views might have been of great interest to Mr Turcan. That did not mean that Mr Turcan himself could not have had relevant information.
60. On the third basis of the allegation of the implied representation, the Defendant points to the fact that it is permissible in certain circumstances for the person whilst in possession of inside information to deal (see the reference to Article 9 of the Market Abuse Regulations above). If it is possible for a person to deal notwithstanding their possession of inside information, there is no basis for finding that their willingness to deal carries with it an implied representation that they do not possess inside information.
61. The draft amended Particulars of Claim raises a further basis for the finding of the implied representation: *“LOAM did not (as is market practice) ask Mr Hamoodi to give an assurance or confirmation he accepted that LOAM might be in possession of inside information but that he wished to proceed with the July 2022 Sale in any event.”*
62. The Defendant argues that this is no more capable of giving rise to the implied representation than any of the other three arguments. Given that the Claimant knew that



Mr Turcan was on the board of the Third Party (and therefore likely to be in possession of inside information) and given that it is in fact permissible in certain circumstances for a person to deal whilst in possession of inside information, the mere fact that the Defendant did not ask the Claimant to confirm that he accepted that the Defendant might be in position of inside information could not possibly give rise to a representation that it was not in possession of such inside information.

63. Finally on the issue of the implied representation, the Defendant draws attention to the fact that this argument was not even raised in pre-action correspondence. The pre-action correspondence rather argued a contractual claim.
64. The Defendant goes on to criticise the adequacy of the Claimant's pleading (both in the original Particulars of Claim and in the draft amendment) both as to the nature of the inside information that it is alleged was held by the Defendant the use of which was potentially illegal and of the allegations of deceit and unlawful means conspiracy.
65. On the issue of inside information, the Claimant's pleading of the alleged inside information is at paragraph 21 of the Particulars of Claim (and the same paragraph in the draft amended Particulars of Claim) as follows:
  - a. At paragraph 21.1, the alleged fact of offers made by Samsung which were not in the public domain but which were considered "derisory" by the board of the Third Party;
  - b. At paragraph 21.2, the advice received by the Third Party from its own lawyers and expert advisors as to the prospects of success in the Samsung Litigation;
  - c. At paragraph 21.3, the range of settlement offers that the board of the Third Party would have considered acceptable in the Samsung litigation;
  - d. At paragraph 21.4. the Third Party's entry into the UK's Patent Box Regime.
66. The Defendant complains that the pleading of the alleged Inside Information is vague and ill-particularised. It also raises the argument that some of this material is not inside information at all.
67. The Defendant repeats the assertion that the pleading is inadmissibly vague in its argument on the issues of dishonesty and/or unlawful means conspiracy. It is said that the Particulars of Claim do not contain a proper plea of the alleged falsity of the representation but further do not contain averments of primary fact to support the allegation that the Defendant's employees knew that they possessed inside information and/or that they knew that the shares in the Third Party were worth less than they were trading for at the time of the sale in July 2022. Equally, the claim in unlawful means conspiracy is not properly particularised in particular in respect of the necessary element of the claim that the Defendant must be shown to have intentionally caused loss. These criticisms are said to apply with equal force to the claim under the Misrepresentation Act 1967.
68. As to the alleged negligent failure to take reasonable care to ensure that the No Inside Information Representation was true, the Defendant complains that the Claimant makes a bare assertion that a duty of care arises from the alleged making of the representation.

Nor is there any allegation of a breach of that duty, the bare assertion being at paragraph 29 of the Particulars of Claim that “*the No Inside Information Representation was false and therefore LOAM is liable to Mr Hamoodi in negligence.*”

69. Finally, the Defendant contends that the Claimant is in breach of the Rules of Court and Practice Directions in three respects:
- a. Failing to comply with the pre-action protocol, in that the case now being advanced is not one that was set out in correspondence;
  - b. Failing to comply with PD 16 as to the proper contents of the Particulars of Claim insofar as it raises allegations of fraud and/or illegality;
  - c. Failing to comply with PD 32 as to identifying sources of information within a witness statement.

Taking these together, the Claimant’s claim should be struck out.

70. The Claimant contends that at its heart this case is a simple but obvious example of the misuse of inside information. Whilst the Defendant’s representatives were publicly confident in the likely outcome of the Samsung Litigation and its value, in fact Mr Turcan, as a member of the Third Party’s board knew that there were considerable doubts about the prospects for the litigation. The July 2022 sale of shares by the Defendant to the Claimant was at a time when it is probable that Mr Turcan knew of those misgivings, but that information was not shared with the Claimant. The willingness of the Defendant to use inside information was apparent from the conversation between the Claimant and Mr Giles on 6 January 2023 referred to at [25] above. The Claimant notes in particular the concession in footnote 10 of the Defendant’s skeleton argument that the contents of this conversation are a matter of one person’s word against another and that this is not a matter that can be determined on the current application since it would involve the court engaging in a “mini trial”.
71. The Claimant contends that the evidence served by the Defendant has in no way undermined the natural inferences to be drawn from the evidence that the Defendant was in possession of inside information at the time of the July 2022 sale. In particular, Mr Turcan’s witness statement is a bare denial of the facts alleged without for example explaining how it could be that Mr Turcan was a member of the board and of the litigation subcommittee formed by the Third Party to deal with the Samsung Litigation yet was unaware of the considerable doubts about the likely proceeds of litigation.
72. Turning to the particular issues raised by the Defendant, the Claimant says that the implied representation argument is a matter of fact not law which ought to be considered at trial, not on an application of this kind. The Claimant has the argument for the existence of such implied representation on the matters set out at [26] of his skeleton argument. In particular, the Claimant lays emphasis on the fact that the Defendant was engaged in selling its shares in the Third Party to the Claimant through a team and a member of which was on the board of the Third Party. In those circumstances, it was extremely important for the Claimant to know whether the Defendant was in possession of inside information. The failure to disclose that it was gives rise to the representation.

73. The Claimant responds to the assertion that the alleged inside information is inadequately pleaded by saying that the fundamental issue is clear – there was an emerging picture, of which the Third Party’s board and therefore Mr Turcan was aware, that the Samsung Litigation was less valuable than had previously been thought. This led to a situation in which the market had higher expectations for the outcome of the litigation (and therefore of the value of the Third Party) than was justified on the emerging material. In particular, the material in the amended version of [21.2] of the Particulars of Claim, the advice that the Third Party was receiving from its own lawyers and expert advisers, falls within the meaning of “inside information.”
74. As to the adequacy of the pleading of fraud, the Claimant refers to the particulars at [25] of the Amended Particulars of Claim. He places particular emphasis on the willingness of Mr Giles to share inside information with the Claimant in January 2023. If he was willing to allow others to use inside information then, it is plausible that the Defendant more generally was willing knowingly to use inside information in its own knowledge and for its own benefit at the time of the July 2022 sale. By the second sentence of [25] the Claimant raises the possibility that further particulars may become available during the litigation process. He relies on the generous approach to inadequacies of pleading which may arise in circumstances where facts are known to one party but not the other – see the passage from the judgment of Andrew Smith J in Fiona Trust & Holding Corp v Privalov cited by Stuart-Smith J in Portland Stone Firms v Barclays Bank referred to above.
75. On the question of the pleading of unlawful means conspiracy, the Claimant asserts:
- a. The acts in combination of Mr Turcan, Mr Giles and the Defendant are fully pleaded in that they combined to sell to the Claimant shares when they were in possession of inside information from Mr Turcan;
  - b. It is pleaded that this amounts to use of unlawful means by reference to breaches of article 14 of the Market Abuse Regulation and/or section 52 of the Criminal Justice Act 1993;
  - c. The intention to cause loss is pleaded at [32.3] of the Amended Particulars of Claim.
76. As to the issue of a claim in negligence, the Claimant says that it is unnecessary to plead law and that the pleading of an existence of a duty of care at [29] in the Particulars of Claim is therefore adequate. As to breach, that is said to be properly pleaded at [25(9)] in the Amended Particulars of Claim, where it is said, “*The steps taken by Mr Turcan to consult Nanoco were not reasonable or sufficient. No reasonable professional person in the position of Mr Turcan or Mr Giles would have considered that an email exchange with directors without a compliance or legal review in the circumstances and knowing the facts set out in Paragraph 21 was an adequate means of avoiding trading whilst in receipt of inside information.*”

## **Discussion**

77. I deal first with the argument that the implied No Inside Information Representation averred by the Claimant is a cause of action that cannot succeed and that therefore the Particulars of Claim disclose no reasonable grounds for bringing the claim. There are

considerable difficulties for the Claimant in respect of this alleged representation. As the Defendant points out, the circumstances of the case would be liable if anything to point in the direction of the Defendant being in possession of inside information, since, as the Claimant knew, one of its senior employees dealing with the sale of the shares was on the board of the Third Party. If the evidence points towards a probability that inside information was in the Defendant's possession, it is difficult to see how, taken objectively, silence can be taken to be an implied representation to the opposite effect.

78. I see little in the witness statement of the Claimant to meet this fairly obvious weakness in the argument. He does raise the issue of senior officers of the Third Party subscribing to the equity raise in June 2022, asserting that this was done in order to further market confidence in the Third Party and in particular in the likely outcome of the Samsung Litigation. It is arguable that this fact might tend to lead the person in the position of the Claimant at the time of the July 2022 to believe that the board of the Third Party was not in possession of inside information relevant to the value of the shares. However, that argument is weak given that Mr Hamoodi's own analysis of the reason for the directors engaging in the fund raise was to promote that sense of confidence rather than to reflect a real belief in the value of the litigation (see [13] of his second witness statement). If he is able to reach that analysis now, one would think it would equally have been in his mind at the time of the July 2022 sale. Clearly the analysis that he now engages in reflects the outcome of the Samsung Litigation and its effect on the Third Party share price, a matter that he did not know at the time of the July 2022 sale, but the possibility that this was the explanation for the directors' behaviour would be likely, one might think, to have gone through the Claimant's mind at the time of buying the shares.
79. However, as Picken J pointed out in Marme Inversiones 2007 v NatWest Markets plc , the existence of an implied representation is a question of fact not law. It is therefore a matter which the court should be cautious about determining on a strike out or summary judgment application. It may be that a careful analysis of the discussions involving the Claimant on the one hand and representatives of the Defendant on the other would lead to the conclusion that representation was impliedly made. For this reason, notwithstanding my doubt about the strength of the argument, I would not strike out this aspect of the claim.
80. Turning to the adequacy of the pleading of the possession of inside information by the Defendant, in my judgment, that which is pleaded in the Amended Particulars of Claim, particularly at [21.2] is capable of amounting to inside information for the purpose of the relevant regulatory regime. Whilst certain other aspects of the pleading of inside information are unsatisfactory, particularly the reference to the board of the Third Party considering the offers by Samsung to be "derisory" (which, as identified by the Defendant in its skeleton argument, cannot sensibly amount to inside information), it would not in my judgment be appropriate to strike out parts of the pleading. To do so would create a confusing document and would not be consistent with the Overriding Objective. A trial judge would be well capable of determining what was and was not capable of amounting to inside information.
81. Since the Claimant adequately pleads the falsity of the implied representation and no issue is taken as to whether the Claimant can prove reliance upon the representation, it follows from my conclusion on the first two issues above that the claim pursuant to Section 2 of the Misrepresentation Act 1967 ought not to be struck out. I deal separately below with the point about summary judgment on that issue.

82. Turning to the claim in fraud, the Claimant himself acknowledges that amendment may be required following disclosure and the provision of witness statements. On the face of it many of the particulars of [25] of the Amended Particulars of Claim are as consistent with the July 2022 share sale having been conducted without any material knowledge of inside information as they are with the Claimant's case in court. However, events in January 2023 as alleged by the Claimant are striking. If his account is proved correct, it may be that Mr Giles was indeed encouraging him to trade in the Third Party's shares with knowledge of matters that amount to inside information. It is of course the Claimant's case that Mr Giles was one of the people with whom he was dealing at the Defendant and was part of the Volantis team.
83. Given that the Claimant is highly unlikely to have direct knowledge of any attempt to deceive him relating to inside information, the court should in my judgment be cautious about taking too harsh an approach to the particularisation of the claim when the process of disclosure and exchange of witness statements has not taken place. Of course, the mere fact that the Claimant does not have access to material that may prove fraud cannot of itself excuse failure to provide the best particulars that he can of that fraud. But in my judgment, the material that he pleads relating to events in January 2023 is sufficient at this stage to justify the order in respect of early events. Accordingly I would not strike out the claim in fraud.
84. As to the claim for unlawful means conspiracy, I share the Defendant's concern about the adequacy of the pleading of the combination. The pleading at [32] of the Particulars of Claim is a bare assertion of a combination. There is nothing in the acts of the Defendant or its representatives alleged within the Particulars of Claim that mean that Mr Turcan, Mr Giles and/or the Defendant more generally must have combined to procure the sale by breaching their duties in respect of inside information. Even if one accepts that it must have been apparent to the Defendants' representatives that the alleged implied representation was untrue, it does not follow that they joined together in the knowledge of that untruth to achieve the July 2022 sale.
85. Given that the Claimant can be forgiven for not knowing the actual facts of any combination between the Defendant's representatives, since such a combination would of necessity suppose that those involved wished him not to be aware of it, it was incumbent upon him to plead facts from which the combination could be inferred. The closest I can find to this is the pleading of fraud/negligence in [25] of the Amended Particulars of Claim. But on my reading of that paragraph and indeed the pleading more generally, there is nothing leading to the conclusion that there is a cogent argument that the sale of the shares in July 2022 was carried out in circumstances where those acting for the Defendant must have had knowledge of the inside information alleged by the Claimant and must have been trying to offload the shares whilst the price remained high. The sale of the shares is explicable by reason of the circumstances set out in Mr Graham's first statement at [13]. There is no cogent basis for concluding that the Defendant's representatives were combining deliberately to withhold information that they knew they ought to disclose.
86. Again I bear in mind the generosity that might be extended to a pleading in such circumstances. However in this case it seems to me that the Claimant's pleading does no more than raise a possibility of a combination between the Defendant's representatives of a type that is capable of amounting to an unlawful means conspiracy. To permit that claim to continue would set the bar of what is a permissible pleading of dishonest conduct

at too low a level, permitting such a serious allegation to be made without any primary facts from which the influence of such conduct could properly be drawn.

87. In those circumstances, I agree that the claim in unlawful means conspiracy is insufficiently particularised and is liable to strike out. I have considered whether the Claimant ought to be permitted a further attempt to amend to plead this cause of action. No draft amendment is available. I bear in mind that this and other claims were not foreshadowed by the Claimant in the pre-action protocol period and that therefore the Claimant's own actions have deprived him of a lengthier opportunity to know what the Defendant is saying and to prepare his case in the knowledge of that. Given that the Claimant has already sought to amend the Particulars of Claim in the knowledge that the Defendant was raising this issue but, without putting this issue right, I am not persuaded that I should give a further opportunity to amend at this stage since this will delay the proceedings in circumstances where the Claimant should have got his house in order already. Any further attempt to amend to plead the cause of action will require fresh application.
88. The final subject of the strikeout application is the claim in negligence. As I have noted, the Claimant says that it is not necessary to plead points of law. Whilst that is correct, it is necessary for the party alleging the existence of a duty of care to plead those facts from which the duty of care arises. Where a statement is alleged to have been negligently made, it is easy to see that the existence of a duty to take care in the making of the statement may readily be inferred from the circumstances in which the statement was made. If the Defendant had expressly represented that it had no inside information, that would probably therefore suffice as a pleading of facts which gave rise to the existence of the duty of care. However that does not take into account the particular feature of this case, namely that the representation on which the Claimant relies is an implied representation. The existence of the duty of care alleged by the Claimant would therefore be dependent on showing that the circumstances of the Defendant's silence on the issue of the possession of inside information was such as to give rise to such a duty. However, the Claimant's case as currently formulated does not permit either the Defendant or the Court to understand how and why that duty is said to arise. The current pleading is inadequate on the issue.
89. I have again considered whether the Claimant should be given the opportunity at this stage to formulate an amendment on this issue. The failure to formulate such a claim as yet, notwithstanding this issue having been raised by the Claimant on the application, leads me to the conclusion that I should not simply stand over the point to allow the Claimant to seek to formulate the claim but rather should leave it to the Claimant to determine whether he wishes to apply to amend in this regard.
90. I have finally considered whether the Claimant's non-compliance with the pre action protocol and/or non-compliance with the proper rules of pleading and/or evidence should lead to a broader order for strike out. Any party that does not properly comply with a relevant pre action protocol can expect the court to take an unfavourable view of their conduct. But this is not a case where lasting harm has been done to the Defendant's ability to defend the claim by reason of such non-compliance. This argument for strike out on this ground was not pressed before me. On the issue of non-compliance with the rules of pleading, I have reflected that in my conclusion on the strike out of two of the four causes of action. The causes of action that survive the strike out application are adequately pleaded. On the issue of non compliance with [18.2] of PD32, I deal with that below in

respect of the summary judgment application but, in brief, I am not satisfied that the Claimant's conduct here is a breach of the requirements of the Practice Direction on the facts of this case. Accordingly I do not strike out the claim on this ground.

## SUMMARY JUDGMENT

### Submissions

91. The Defendant argues that, insofar as the strikeout application fails, the court should give summary judgment on the same issues since:
- a. The Claimant's case is not properly particularised for the reasons set out in the strike out application and referred to above;
  - b. In his witness statement in response to the summary judgment application, the Claimant says at [64], "*I have personally received information from confidential and reliable sources with first-hand knowledge of the facts I set out below. I do not intend to disclose the identity of the sources at present. I consider it would be wrong to do so as they have disclosed evidence of wrongdoing. But I have provided full details to my lawyers in a full version of this statement, including the names of my sources, which I have signed and confirmed as correct. Ultimately, I expect it will be unnecessary to identify the sources because each of the facts below ought to be admitted by LOAM in its Defence when it is served, or proven by its disclosure. However, if necessary, I intend to serve a witness statement or formal hearsay statement proving these facts in due course.*" He goes on to detail what he says are flaws in the expert evidence being relied on by the Third Party in the Samsung Litigation, the result of which was to mean that the Third Party's board, including Mr Turcan, was aware that the ultimate valuation of the litigation was likely to be much less than they were asserting. However, the Defendant points to Practice Direction 32 of the CPR, and in particular [18.2] which states, "*A witness statement must indicate:(1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and (2) the source for any matters of information or belief.*" The failure of the Claimant's witness statement to comply with this requirement leaves the Defendant in a position in which it cannot properly investigate the claim being made against it. Indeed, it is not even clear that the Claimant's lawyers have in their possession statements from the sources to which the Claimant is referring. This renders the evidence inherently unsatisfactory and unreliable. It certainly cannot be said that there is cogent evidence to support the Claimant's case.
  - c. As noted at paragraph 21 above, Mr Turcan, Mr Tenner and Mr Richards considered whether they had inside information and concluded that they had not. It is inherently unlikely that they were in possession of inside information in such circumstances and the evidence relied upon by the Claimant goes nowhere near meeting the Defendant's case on this issue. Accordingly, the Claimant's case is one that lacks the degree of conviction necessary to survive a summary judgment application.
  - d. There is reason to believe that Claimant is seeking to rely on communications which are privileged.

92. On the issue of the adequacy of the pleading, the Claimant repeats the submission made above.
93. On the question of the identification of sources, the Claimant relies on the judgment of the Court of Appeal in Consolidated Contractors v Masri [2010] EWHC 2640. The court there was dealing with very different circumstances from those here, but in his judgment, Aikens LJ referred to the obligation in [4.2]<sup>5</sup> of PD32A and said:

*“[32] ... in my view the aim of that paragraph of the Practice Direction is to ensure that a person against whom serious allegations are being made can identify the source of any information or belief that is not within the deponent’s own knowledge so that the facts deposed to on the basis of information or belief can be investigated. That is only fair to the person against whom the evidence in the affidavit is directed. Therefore, I would interpret the phrase “...must indicate...the source for any matters of information or belief” as meaning that, save in exceptional cases, the deponent must identify the source of the relevant information or belief. If the source is a person, that person must, save in exceptional cases, be identified with sufficient certainty to enable the person against whom the affidavit is directed to investigate the information or belief in accordance with the rules of court or other relevant legal principles.”*

*[33] I recognise that there may be particular occasions where the “source” must not be specifically identified, e.g. where confidentiality is in issue; and there may be other circumstances which I will not attempt to define. In such cases the wording of the Practice Direction is sufficiently flexible, by using the word “indicate,” to ensure that justice can be done.”*

94. The Claimant contends that such circumstances arise here where, for reasons dealt with in the Claimant’s statement, the sources of some of the Claimant’s information and belief which their confidentiality to be protected.
95. On the question of privilege, the Claimant contends that, in so far as any material on which he wishes to rely is properly the subject of a claim of privilege by the Third Party (which is as yet unclear), that privilege will not apply either because of the so-called iniquity exception or because of the shareholder principle.
96. The Third Party appeared on this issue and, through Mr Page, indicated that it would claim privilege in respect of certain material but stated that, *“Based on the level of information provided by the Claimant to date, Nanoco has no reason to believe that privileged documents or communications are in the possession of the Claimant.”* It did not accept that the Claimant was entitled to avoid any privilege that could be claimed, whether under the iniquity exception or under the shareholder principle but at this stage those arguments are purely academic given that the Third Party is not persuaded that any question of breach of privilege arises.

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<sup>5</sup> [4.2] is in the same terms as [18.2] but in the context of an affidavit rather than a witness statement.



## Discussion

97. The issue as the inadequate particularisation of the claim have been dealt with on the strike out application. They do not raise any additional matters for consideration on the summary judgment application.
98. In terms of the Defendant's argument that in so far as the Claimant's case rests on the credibility of material that has not been properly placed before the court because of the failure to identify sources of knowledge and belief, I am unclear at this stage to what extent the Claimant's case can be said to rely on such material. There are significant parts of the Claimant's case that are within his own knowledge, in particular in terms of his dealings with representatives of the Defendant, including the alleged conversation with Mr Giles in January 2023. I am not persuaded that the failure to identify sources of information at this stage should prevent the Claimant from relying on material from sources that are currently anonymous, nor that I should treat this as a breach of the Practice Direction relating to witness statements. It is arguable, at least at the stage of an interlocutory hearing of this kind, that the Claimant can invoke the potential witnesses' desire for confidentiality to protect those sources of information. I have considerable doubt that the court would place much weight at trial on hearsay evidence where the source of that evidence is not identified and it may be in due course that, as a matter of case management, the court will rule that such evidence is only admissible if it is either the subject of a witness statement from the person with first hand knowledge or at the very least a hearsay notice that identifies the source of the knowledge. But the failure to provide that information as this stage should not on the facts of this case lead to strike out or summary judgment.
99. I note the Defendant's case that, given the statement of Mr Turcan, it is inherently improbable that he was in possession of inside information. It may well be that in due course the Defendant is able to persuade the court that any suspicion that Mr Turcan acted improperly is misconceived. However, in my judgment that is not a conclusion that the court can reach now for the following reasons:
- a. It would involve accepting at face value Mr Turcan's word without allowing the Claimant the opportunity to explore it. In my judgment, to accept that assertion at this stage would be to engage in a mini-trial in a manner which is not appropriate.
  - b. For reasons that I have identified above, the Claimant is able to show some evidence to support the argument that Mr Giles shared inside information with him in January 2023. The exploration of that issue is necessary in order to reach an informed judgement on the issue of the earlier allegation of the failure to disclose inside information.
  - c. In any event, whilst the role of Mr Turcan may be central to the Claimant's case against the Defendant, it is at least possible that his claim could succeed without showing that Mr Turcan personally was involved in misusing inside information. Whilst of course the Defendant, no doubt sensibly, treated all of the Volantis Team in the same way for the purpose of its insider information policy, that is not the same as saying that each member of the team is equally to blame if in fact inside information is misused.

100. In my judgment, these are matters that could only properly be explored at trial and should not be the basis of giving summary judgment against the Claimant.
101. Given the position of the Third Party on the issue of privilege, namely that it does not appear that the Claimant is in possession of privileged material, I do not consider that there is any basis to give summary judgment on the basis of misuse of such information. It may be that, in due course, the questions of privilege will need to be revisited in order to consider whether the action can fairly be tried without the use of material in respect of which the Third Party raises privilege arguments. Whether the Third Party is entitled to claim privilege and whether such a claim of privilege risks rendering a trial unfair are matters that will have to be considered in due course when the position of the parties on this issue is more fully established.

## **CONCLUSION**

102. It follows from my conclusions above that the Claimant's claims for unlawful means conspiracy and in negligence are struck out but the claims under the Misrepresentation Act 1967 and in fraud stand. The application for summary judgment is refused. In so far as the draft Amended Particulars of Claim go to the causes of action that survive this application, I grant permission to amend.
103. I invite the parties to agree an order consequent upon this judgment. I leave it in the first instance to them to consider whether a new version of the Amended Particulars of Claim should be produced before the order consequent upon this judgment is finalised.