



Neutral Citation Number: [2024] EWHC 399 (Comm)

CL-2023-000170

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

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

Date: 1 March 2024

Before :

SIMON COLTON KC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Between :

Tactus Holdings Limited

Claimant /
Respondent

- and -

(1) Philip Mark Jordan

(2) William Milleret-Spencer

(3) Thomas Hindle

(4) Robert Woolley

(5) Robert Sutherland

(6) SCH Bursell Limited

(7) Simon Charles Hingston Bursell

Defendants /
Applicants

Alexander Polley KC (instructed by **Freeths LLP**) for the **Defendants / Applicants**
Stephen Cogley KC and **Sanjay Patel** (instructed by **Hill Dickinson LLP**) for the **Claimant /**
Respondent

Hearing dates: 20-21 February 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 01 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

SIMON COLTON KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Mr Simon Colton KC:

1. This is the Defendants' application (the '**Application**') for reverse summary judgment, alternatively to strike out the Claimant's claims.

Background

2. In about August 2021, the Claimant ('**Tactus**') began negotiations with the First to Fifth Defendants (the '**Sellers**') for the acquisition of Box Holdings (BHAM) Ltd, the parent company of Box Ltd, an online technology retailer (together, '**Box**'). The Sellers were assisted in the sale by the Sixth Defendant, a corporate vehicle through which the Seventh Defendant ('**Mr Bursell**') provided his services.
3. On about 29 September 2021, Tactus was provided with a 46 page Information Memorandum concerning Box. On 18 October 2021 non-binding Heads of Terms were concluded, which envisaged consideration of £32.5 million, in a mixture of cash and shares, based on a minimum 'adjusted EBITDA' of £5 million for the 12 month period to 31 October 2021.
4. A virtual data room was created to enable Tactus to perform due diligence. EY were retained to advise Tactus, and produced a due diligence report on about 24 January 2022. On 18 February 2022, a Sale and Purchase Agreement ('**SPA**') was concluded, which contained a range of warranties given by the Sellers. On 28 February 2022, the sale and purchase of Box completed.
5. Notices of alleged breach of warranty were served on 14 October 2022 and 7 December 2022, accompanied, in the latter case, by a letter of claim. The claim form in the current proceedings was issued on 28 March 2023, and served that day, with Particulars of Claim.
6. The Defendants made a Request for Further Information of the Particulars of Claim which was answered on 16 May 2023 (the '**Claimant's Response**'). Thereafter, the Defendants served a Defence and Counterclaim on 24 May 2023; a Reply and Defence to Counterclaim was served on 30 June 2023; a Reply to Defence to Counterclaim was served on 21 July 2023; and the Application was issued on 3 August 2023.

The structure of the claims advanced

7. The claim form and Particulars of Claim identify five types of claim. Against the Sellers they allege breach of warranty; and against all the Defendants they allege deceit; unlawful means conspiracy; unlawful interference with contractual relations; and the tort of procuring breach of contract.
8. The claims for breach of warranty alleged against the Sellers are of two types, namely: (i) in respect of the stock provision used in the management accounts for the 12 month period to 31 October 2021 (the '**Management Accounts**'); and (ii) in respect of other items in the Management Accounts. I refer to these latter warranty claims as the '**residual allegations**'.
9. As for the other claims, these all relate to the stock provision: the deceit claims relate to alleged misrepresentations concerning the stock provision; the unlawful means alleged in the unlawful means conspiracy is the making of those alleged fraudulent

misrepresentations; the tort of procuring breach of contract is pleaded on the basis that by failing to correct continuing false representations concerning the stock provision, each of the Defendants were procuring a breach of the SPA by each of the Sellers; and the alleged unlawful interference with contractual relations lies in the Defendants not correcting continuing false representations concerning the stock provision between execution of the SPA and Completion. So much is clear from the Claimant's Response, and from the Claimant's skeleton for this hearing.

10. The stock provision accordingly has central importance to the claim. As the Claimant's Counsel explain, uncontroversially, in their skeleton argument:

“A stock provision in financial accounts is a downward adjustment to the value of stock held by a company. This provision adjusts for losses that are likely to be incurred through obsolescence, damage, returns and/or expired shelf life of purchased stock. Additions to a stock provision during an accounting period have the effect of reducing EBITDA as the effect of the addition in the financial statements is that more turnover is being deployed to purchase comparatively less valuable stock. Conversely, reductions in the stock provision (also known as a ‘release’ of a stock provision) have the effect of increasing EBITDA.”

The summary judgment application

The law

11. The relevant legal principles when considering an application for summary judgment are well-established. The parties before me cited in particular the principles identified by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339; the summary of Picken J in *ArcelorMittal v Ravi Ruia* [2022] EWHC 1378 (Comm) at [26]-[29]; and observations of Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) at [21]-[22].
12. Of particular relevance to the present case, I remind myself that a mini-trial is not appropriate. But that does not mean that I can or should simply dismiss a well-founded application on the basis that it is all too complicated. On the contrary, “*The fact that some factual or legal questions may be in dispute does not absolve the judge from her duty to make an assessment of the claimant’s prospects of success*”: per Lewison LJ in *Calland v Financial Conduct Authority* [2015] EWCA Civ 192 at [28]-[29]. If, therefore, by way of relevant example, it is plain that representations made in writing do not have the meaning for which the claimant contends, or if such representations are undoubtedly true on the agreed facts, then it would be a dereliction of duty to refuse to so decide (always bearing in mind, however, that summary judgment can be given on a claim or an issue, but not on every factual or legal question that may arise: see *Anan Kasei Co v Neo Chemicals & Oxides (Europe) Ltd* [2021] EWHC 1035 (Ch) at [82] (Fancourt J)).

The misrepresentations alleged by the Sellers

13. Tactus pleads that various misrepresentations were made to it in the course of the dealings leading to acquisition of Box from the Sellers. Tactus pleads that the misrepresentations were made in seven stages.

14. First, Tactus says that various misrepresentations were contained in the Information Memorandum of September 2021. The specific language of which complaint is made is in language explaining adjustments made to forecast EBITDA for the year to October 2021. It reads: “£820k has been added to the stock provision during 2021. The provision is formally calculated at year end so mid-year movements are estimates based on forecast overall year end stock balance”.
15. Secondly, Tactus says that misrepresentations were made in the Heads of Terms of October 2021. This was a document headed ‘Strictly Private and Confidential and Subject to Contract’. Paragraph 13 states: “These Heads are a draft for discussion purposes only. They do not represent a commitment of any nature from the Buyer, the Seller, the Target or any of their connected persons to enter into any contract...”. The language of which complaint is made is in paragraph 4: “The purchase price for the Shares (**Purchase Price**) will be £32.5m, with £22.5m payable in cash on Completion, based on a minimum level of adjusted (reasonable adjustments) EBITDA of £5m for the LTM [last 12 months] to 31st October 2021”.
16. Thirdly, Tactus says that misrepresentations were made in Management Accounts, for the 12 month period up to 31 October 2021, provided to Tactus and its advisers in about December 2021 in the course of negotiating the SPA. That showed an EBITDA figure of £5.045 million, and a value of stocks of £18.6 million. The Claimant says that embedded within those numbers were, necessarily, a stock provision of £1.177 million.
17. Fourthly, Tactus says that the various representations were repeated and/or made further or discretely at a presentation attended by various Defendants and various representatives of Tactus on 16 December 2021. The slides for that presentation again show the £5.045 million EBITDA figure.
18. Fifthly, Tactus says that misrepresentations were made at the moment of entry into the SPA, in the form of the warranties contained therein. In particular, it points to a warranty at paragraph 7.1 of Schedule 4 that the Management Accounts “have been properly prepared... on a basis consistent with that employed in preparing the Management Accounts for the previous accounting year”.
19. The warranties were qualified by a Disclosure Letter provided at the moment of entry into the SPA. Tactus says that this Disclosure Letter itself contained misrepresentations. Specifically, the Disclosure Letter stated:

“7.1 ... The stock valuation includes a material stock provision (£1.177m at Oct 20 and Oct 21) is an arbitrary assessment each month and year end and varies each month to smooth profitability. Specific evidence and justification is agreed with the auditors at an October year end however the stock provision balance is generally an over-estimate compared with what is needed.”

...

“12.2 The stock has been built up and is at a higher level than in previous years however the stock provision of £1.177m is

considered sufficient to enable all stock to be sold through albeit the Buyer will have to form its own view.”

20. Seventhly, and finally, Tactus says that the SPA Representations were repeated, by not being withdrawn or corrected, throughout the period after entry into the SPA, and up to the completion of the SPA.

The warranty claim

21. I start by considering the main claim for breach of warranty.
22. The most relevant warranty is set out at paragraph 18 above. It was qualified by the disclosure given in the Disclosure Letter, set out at paragraph 19 above. By clause 7.2 of the SPA, this warranty was given both on the date of the SPA and at completion.
23. In interpreting the warranty, the usual canons of contractual construction apply. The court must have regard to the words used, in their factual and commercial context. Here, it seems to me to be at least arguable that the warranty means that the same methodology for calculating or assessing items in the Management Accounts was used as had previously been used for management accounts in prior years, in particular in October 2020.
24. I consider that, subject to the question of any disclosure given, that warranty was at least arguably false:
- (a) In prior years, a methodology had been adopted to calculate the stock provision which the Claimant now describes as the ‘days of stock in hand’ methodology – essentially, making a provision against the value of stock by reference to broad bands reflecting how long the item had been in stock. That methodology had not been used in 2021, where the stock provision used was simply the same number as in 2020, brought forward.
 - (b) The Defendants argue that although a methodology was used in the past for the assessment of the stock provision, this was highly judgmental, with different levels of provision given for stock of particular age in different years. Hence, for example, in 2019 stock which was more than 60 months old had attracted a provision of 25% against its value, while in 2020 stock of the same age attracted a provision of 35%. They say, in essence, that selecting an arbitrary number in 2021 was consistent with this methodology. In my judgment, however, it is at least arguable that – even with the element of judgement involved – the approach in 2021 of arbitrarily using the same number as 2020 is sufficiently different from the methodology in the prior year that the Management Accounts cannot be said to be "*prepared... on a basis consistent*" with that of the previous year.
25. The Defendants say that, in any event, the Disclosure Letter sufficiently disclosed the position, such that there was no breach of warranty. They point to clause 7.5 of the SPA which provides so far as material:

“The Warranties ... are qualified by the facts and circumstances Disclosed in the relevant Disclosure Letter. For this purpose **Disclosed** means disclosed, whether generally or specifically in the relevant

Disclosure Letter, in such a manner and with sufficient detail so as to enable the Buyer to identify the nature and scope of the matter disclosed and to make an informed assessment of its effect.”

26. The Defendants draw attention to the helpful summary of principles concerning the construction of disclosure clauses of this sort in *Triumph Controls UK Ltd v Primus International Holding Company* [2019] EWHC 565 (TCC) (O’Farrell J) at [335]:

- “i) The commercial purpose of such disclosure clauses is to exonerate the seller from its breach of warranty by fairly disclosing the matters giving rise to the breach.
- ii) The disclosure requirements of the contract in question must be construed applying the usual rules of contractual interpretation, by reference to the express words used, the relevant factual matrix and the above commercial purpose.
- iii) The adequacy of disclosure must be considered by careful analysis of the contents of the disclosure letter, including any references in the disclosure letter to other sources of information, against the contractual requirements.
- iv) A disclosure letter which purports to disclose specific matters merely by referring to other documents as a source of information will generally not be adequate to fairly disclose with sufficient detail the nature and scope of those matters. For that reason, disclosure by omission will rarely be adequate.
- v) However, it is open to the parties to agree the form and extent of any disclosure that will be deemed to be adequate against the warranty. That could include an agreement that disclosure may be given by reference to documents other than the disclosure letter, such as by list or in a data room.
- vi) Where disclosure is by reference to documents other than the disclosure letter, only matters that can be ascertained directly from such documents will be treated as disclosed.”

27. The Defendants make two essential points concerning the disclosure given in the Disclosure Letter.

- (a) First, they point to the statement that the same number is being used in the Management Accounts in 2020 and 2021, and the description of this as an “*arbitrary assessment*”. They say this shows that the 2021 Management Accounts were not prepared consistently with the 2020 accounts, since otherwise it would not have led to the same number being used. The difficulty with this argument, as it seems to me, is that the statement in the Disclosure Letter, taken in isolation, gives the impression that the 2020 number was also arbitrary. In other words, the reasonable reader of this document in isolation would not know that the 2021 number had been prepared on an inconsistent basis; they might think that the number had been assessed – arbitrarily, but consistently – in both years as £1.177m.

- (b) Alternatively, the Defendants say that disclosures given by the Disclosure Letter are not limited to the specific disclosures given, but also to the general disclosures. In principle, it seems to me they are correct in this: clause 7.5 does refer to matters disclosed “*whether generally or specifically in the relevant Disclosure Letter*”, and paragraph 2 of the Disclosure Letter does disclose documents and information “*by way of general disclosure*”. However, it is at least arguable that there are no relevant documents and information which assist the Defendants here. The Defendants seek to rely on answers and explanations given by them to EY which are to be found in the virtual data room, but it is at least arguable that those documents were not disclosed by way of general disclosure in the Disclosure Letter. Paragraph 2.1.2 of the Disclosure Letter refers to the “*First Disclosure Documents*”, a bundle of documents which “*can be accessed within the data room*”, but there is no evidence before me as to whether the various answers and explanations were in that bundle.
28. It follows that, in my judgment, it is at least arguable that the warranty in paragraph 7.1 of Schedule 4 to the SPA was false. It matters not for this purpose whether Tactus, through EY, in fact knew from prior communications, including those in the virtual data room, that the stock provision in the Management Accounts had been assessed in a different manner to the stock provision used in the prior year’s accounts: clause 7.6 of the SPA provides that subject to clause 7.5 (the Disclosure Letter) and paragraph 8 of Schedule 5 (actual knowledge of three identified individuals, or existing contemplation of a claim), “*no knowledge relating to any Group Company or the Shares (actual, constructive or imputed) shall prevent or limit a claim made*”, and “*the Sellers may not invoke the Buyer’s knowledge (actual, constructive or imputed) of a fact or circumstances as a defence to a claim*” for breach of warranty.
29. In these circumstances, it seems to me that the warranty claim is arguable, and I decline to give reverse summary judgment on it.

The deceit claim

30. The deceit claim raises different issues. In particular, as set out further below: (i) it is common ground that the correct interpretation of representations depends upon the cumulative effect of representations made, and not the interpretation of a single statement in isolation; and (ii) the Defendants’ state of mind is relevant, and they say I can decide summarily that they were not even arguably dishonest in making the representations they made.

My approach to the summary judgment application on deceit

31. It is common ground that, in the circumstances of this case, the relevant time for testing whether a deliberately false representation was made by the Defendants is at the time when the Sellers and Tactus entered into the SPA. The Claimant does not claim to have suffered loss as a result of relying on representations at any earlier time, but also does not suggest that the Defendants learned anything in the period between then and completion which might affect the analysis.
32. It is also common ground that in determining the effect of a representation made, I can and should adopt the approach summarised by Cockerill J in *Loreley Financing (Jersey) No.30 Ltd v Credit Suisse Securities (Europe) Ltd* [2023] EWHC 2759 (Comm) at [291]:

“Express representations are the most straightforward form. While these are less in issue in this case, it is worth noting (for the purposes of read across into implied representations) the uncontroversial propositions that:

- i) In determining whether there has been an express representation, and to what effect, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used: *IFE Fund v Goldman Sachs* [2007] 1 Lloyd’s Rep 264 at [50], *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank* [2011] EWHC 484 (Comm) at [215].
- ii) A representation is to be understood in the light of the full terms of the relevant document and, where a series of representations are made, regard is to be had to their cumulative effect: representations may in combination convey a meaning which no single one imparts: See *Spice Girls v Aprilia* [63]; *Autonomy v Lynch* [2022] EWHC 1178 (Ch) at [506].”

33. As for the pleaded representations, while pleaded differently in different places, in summary the Claimant’s case – based largely on the language in the Disclosure Letter, set out at paragraph 19 above – is that as at the time of the SPA the Sellers were representing:

- (a) First, that the approach to stock provision in the Management Accounts was “*consistent with*” that employed in October 2020 (the ‘**consistency representation**’);
- (b) Second, that in both years – including, therefore, in October 2020 – that approach was an “*arbitrary assessment*” (the ‘**arbitrariness representation**’); and
- (c) Third, that the Sellers believed that the stock provision of £1.177m was sufficient to enable all stock to be sold through (the ‘**sufficiency representation**’).

34. The questions for me on the summary judgment application, in respect of the deceit claim, are therefore: (i) is it arguable that these representations (or some version of them) were made; (ii) if so, is it arguable that such representations were false; (iii) if so, is it arguable that the Defendants knew, or were reckless, as to such falsity? The Defendants cannot succeed on their summary judgment application unless, for each of the three representations alleged, they can knock out the deceit allegation on the basis that one of these hurdles cannot even arguably be cleared.

The representations made

The facts

35. Many of the relevant communications are relied upon by Tactus in the Particulars of Claim, and are set out in paragraphs 14 to 19 above. However, the other communications relating to the stock provision crossing the line between the Sellers and Tactus must also be considered in order to assess the cumulative effect of such representations, on the

reasonable person, by the time of execution of the SPA. Three such communications have been identified.

36. First, EY asked a number of Financial Due Diligence questions, in spreadsheet form, to which the Sellers provided responses (the '**Q&A document**').

(a) Question 33 sought, under the heading 'Balance sheet and net debt' information on: "*Roll forward of provisions for the Historical Period, detailing the amounts provided for, utilised and released in the Historical Period (e.g. bonus provision, bad debt provision)*". The Sellers replied:

"Detailed stock provision calculations provided for Oct 19 (file 33.1) and Oct 20 (file 33.2). Oct 21 is to follow.. We don't utilise the provision as such as we don't write off stock for scrap. Stock, if required, is discounted until it is sold, following which it will no longer appear on the subsequent provision calculation."

(b) Question 38 sought "*Details of any significant/material judgemental areas within the financial statements*". The Sellers replied:

"Stock provision is produced using a detailed calculation based on stock turn during the year. However, judgement is still exercised over certain areas such as returns stock which carry a higher risk due to variability in condition"

(c) Question 39, sought:

"Description of month end and year end close processes including: 1) How the process differs between month end and year end (e.g. which balances / accruals are only updated for year-end). 2) The typical timings of key processes (e.g. reporting cycle, completion of close processes, review etc.). 3) Who is responsible for the execution of these processes. 4) Key issues/limitations identified/addressed in the systems and processes used. 5) The systems used"

(d) The Sellers responded to question 39 with a document prepared by the Fifth Defendant ('**Mr Sutherland**'), headed '*Description of month and year end processes – FDD Q39*', uploaded to the virtual data room on 21 November 2021. This began:

"Main difference between month end and year end is the calculation of the stock provision which is only formally calculated in October. It is possible that the provision will be increased during the year (as has happened in 2021) if I feel that the stock levels at year end will be higher than in previous years, although this is based on estimates and gut feel rather than data. This is a tool to smooth profit in the management accounts over the course of the year, although of course any over/under provision will always be corrected at year end once the formal calculation has been prepared."

37. Second, EY asked questions about the £820,000 release of the stock provision which, in the Information Memorandum, the Sellers had indicated they intended to make to adjust the reported EBITDA.

(a) Specifically, EY asked:

“(i) Please provide background to the write off and supporting workings;
(ii) Which period did the stock relate to (iii) Is this write off in addition to the general stock provision (iv) Were there similar write offs in FY19A and FY20A ”

(b) The Sellers replied in a document uploaded to the data room on 2 December 2021:

“The £820k relates to additions to the stock provision in FY21. It has been written back to the P&L towards the end of FY21 so that the full year management accounts that have been presented for due diligence include no net movement in the provision year on year. This is so that we can clearly demonstrate the underlying EBITDA of the business.

It should be said that the October 2020 provision of £1,117k remains in place as at October 2021. It has not been utilised at all during the year and management believes that this is more than adequate to cover any discounting that may be required over the coming year. We may add to this provision for the purposes of the audited FY21 accounts, but this is a mathematical formula-based calculation using our provisioning policy and in our view is a separate discussion to the conversation about underlying EBITDA.”

38. Third, on 10 December 2021, Mr Bursell emailed EY attaching a spreadsheet answering questions relating to EBITDA adjustments.

(a) The spreadsheet contained the following question and answer:

“3. In general, there is £3.4m of stock held at Oct21 which is over 6 months old. Please can you help us get comfortable that a £1.2m stock provision is adequate for this aged stock? Stock provision will not be needed if all stock is being supported by manufactures to make sure stock is sold through. This total figure of £1.177m is one driven by tax considerations. It is, and was, viewed by the management team as being more than adequate at 31.10.20 and 31.10.21.”

(b) In the covering email, Mr Bursell wrote:

“There is one answer that talks to the sufficiency of the £1.177m starting and finishing balance for provisions in 20-21. Our detailed conversation on a prior call remain relevant. The view of the team is that the provision is more than sufficient.”

(c) While the reference to the “*detailed conversation on a prior call*” demonstrates that EY had turned their minds to the question of the stock provision, neither side pleads that this conversation affects the representations made by the Sellers.

Analysis of the representations made

39. In my judgment the Sellers did make clear to Tactus that the assessment of the 2020 stock provision had involved some calculation.
- (a) This was the cumulative effect of: the statement in the Information Memorandum that the provision is “*formally calculated at year end*”; the response to question 33 of the Q&A document which not only stated there were “*Detailed stock provision calculations*” but actually provided them in tabular form, so that the process could be readily understood; the response to question 38 of the same document which referred to “*using a detailed calculation*”; the document responding to question 39 which referred to “*calculation of the stock provision*”; and the document uploaded on 2 December 2021 which referred to “*a mathematical formula-based calculating using our provisioning policy*”.
 - (b) Taken cumulatively, it is in my judgment not realistic for Tactus to contend that it was not told by the Sellers that the stock provision calculation in October 2020 was the product of some calculation methodology. Indeed, the methodology itself could be observed from the spreadsheets uploaded in response to question 33. It does not seem to me to be relevant, contrary to a submission made by the Claimant, that the actual formulae were not shown; the structure of the methodology was made clear.
 - (c) I accept that the final statement, in the Disclosure Letter, could in isolation give the impression that both October 2020 and October 2021 were no more than “*arbitrary assessments*”, and that – all other things being equal – as the final statement, the reasonable person might have given more weight to that statement than to earlier statements. But the few words in the Disclosure Letter do not, in my view, outweigh the repeated and detailed statements about the calculation of the October 2020 number.
40. It follows that there is, in my judgment, no arguable case that the arbitrariness representation was made. The reasonable reader of the various representations made by the Sellers between September 2021 and February 2022 could not and would not have understood it to be represented that the October 2020 figure had been purely arbitrary, as opposed to the product of some calculation methodology (even one including an element of judgement).
41. It follows further, that there is, in my judgment, no arguable case that the consistency representation was made. The difference between the approach taken in October 2020 (one involving some calculation) and October 2021 (simply re-using the October 2020 figure) was made plain. The Sellers always made clear that this is what they were doing. The Information Memorandum showed the £820,000 of additional stock provision accruing during 2020/1 being stripped out; the Sellers’ response to EY’s questions about this explained the position clearly; and the Disclosure Letter showed the identical stock provision being taken.
42. I conclude, therefore, that there is no arguable case that, by the time of the execution or completion of the SPA, the Sellers were representing that the October 2021 stock provision was assessed on the same basis as the October 2020 stock provision; nor that the approach in October 2020 was an arbitrary assessment, involving no calculation or similar methodology. While the Claimant’s case on the arbitrariness representation and/or

the consistency representation may be justified by looking at the Disclosure Letter in isolation, which is why a warranty claim is arguable, such an interpretation is, in my judgment, not arguable once the effect of all pleaded communications is taken into account.

43. I do not consider that any utility would be served by allowing this issue to go forward to trial. My judgment is the result of an analysis of all the relevant communications, which are in documentary form. There is no pleaded case, nor argument from the Claimant, that some additional factual matrix needs to be taken into consideration in order objectively to interpret the representations made. It is not suggested that any witness, nor any further disclosure, could cast a light on the meaning of these written statements. I consider that I can grasp the nettle and decide now that the written communications, properly construed, do not constitute the express arbitrariness or consistency representations for which Tactus contends.
44. That leaves the sufficiency representation. Here, I consider the Claimant's case that the representation was made is plainly arguable. The Sellers repeatedly represented that they believed that the £1.177m stock provision was sufficient in 2021: see paragraphs 19, 37(b) and 38(a) above. However, taking the representations cumulatively, I do not consider it arguable that the Defendants were representing anything more than that they honestly believed the £1.177m stock provision to be sufficient.
45. Mr Cogley KC submitted that it is at least arguable that the sufficiency representation also carried with it an implied representation "*that there was a legitimate or reasonable basis for those statements*", citing *Barings plc (in liquidation) v Coopers & Lybrand* [2002] EWHC 461 (Ch) at [44]-[52] (Evans-Lombe J) and *Rosser v Pacifico* [2023] EWHC 1018 (Ch) at [30]-[38] (Zacaroli J). While these two authorities relate to very different factual contexts, I accept of course that statements of opinion can, in appropriate circumstances, carry with them such an implied representation.
46. In *Loreley Financing* at [293]-[296], Cockerill J observed that the exercise of determining whether an implied representation has been made – and, if so, to what effect – is essentially the same as that conducted for express representations, "*except the question is what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context*". This involves construing the statement in the context in which it was given, having regard to "*the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee*". The relevant context will include contractual and other documentation passing between the parties. Moreover (at [297]):

"That context may have a significant impact when it comes to the question assessing the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee. It is said to be so here. There will be cases where statements are accompanied by qualifications or explanations which indicate that the putative representor was not assuming responsibility for the accuracy or completeness of the statement or was saying that no reliance can be placed on it: see Hamblen J in *CRSM* [222] (citing Christopher Clarke J in *Raiffeisen* [86]).

‘It is necessary for the statement relied on to have the character of a statement upon which the representee was intended, and entitled, to rely. In some cases, for example, the statement in question may have been accompanied by other statements by way of qualification or explanation which would indicate to a reasonable person that the putative representor was not assuming a responsibility for the accuracy or completeness of the statement or was saying that no reliance can be placed upon it. Thus the representor may qualify what might otherwise have been an outright statement of fact by saying that it is only a statement of belief, that it may not be accurate, that he has not verified its accuracy or completeness, or that it is not to be relied on.’”

47. In *Loreley* at [303], Cockerill J added:

“The necessity to keep this latter part of the equation (the need for clear words or conduct) in mind is illustrated by the cautions in the other authorities. Those as to context have already been given. But in addition:

- i) The Courts should be cautious, such that implied representations should not be “*too easily found*”: see *Raiffeisen* [85] quoting Rix J in *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297; followed in *SK Shipping v Capital VLCC 3 “The C Challenger”* [2022] 2 All ER (Comm) 784 (“*SK Shipping (CA)*”) [38];
- ii) The more vague, uncertain, imprecise or “elastic” the meaning of the implied representation, the less likely it is that it will be implied and the more that would be required in terms of words or conduct: see *Raiffeisen* [111]; *Innovatorone* [911]; *Ceylon Petroleum* [562]; *Marme* [123(3)-(4)] and [139]; *Pisante v Logothetis* [2022] EWHC 161 (Comm) [6(4)(b)].”

48. In my judgment neither the pleaded facts, nor the evidence, support the implication that the Sellers had some objectively reasonable basis for their belief in the sufficiency of the £1.177m provision, as distinct from merely honestly believing in its sufficiency. In particular:

- (a) The implied representation for which the Claimant contends (in the Particulars of Claim, that the provision was “*appropriate*”; in its skeleton argument, that there was “*a legitimate or reasonable basis*” for the statement) is vague and imprecise.
- (b) Tactus had retained EY to perform due diligence on Box, and EY had discussed the stock provision with the Sellers and done significant work in testing the stock provision. This was not, therefore, a case where the Sellers were in a much stronger position than Tactus to ascertain the relevant facts.
- (c) The Sellers had made clear in response to question 39 (see paragraph 36(d) above) that the assessment of the correct stock provision, as distinct from the one used for accounting purposes, was a matter of “*gut feel*” rather than data. This is inconsistent with a representation that any assessment of stock provision could be objectively justified.

- (d) The statement in the Disclosure Letter, the final relevant statement made, that the £1.17m stock provision was considered sufficient “*albeit the Buyer will have to form its own view*” is inconsistent with any representation that the £1.177m was objectively justifiable. This is a significant qualification added to the representation made, with the representor saying that reliance should not be placed upon it because (implicitly) it may not be right.
49. In my judgment, there is no pleaded context which would make it necessary for some factual investigation at trial that could impact on the conclusions I have reached. Accordingly, I can ‘grasp the nettle’ and decide that:
- (a) The arbitrariness and consistency representations were not made; and
- (b) The sufficiency representation was made, limited to the representation that the Sellers honestly believed that £1.177m was a sufficient stock provision.

Falsity

50. Since I do not consider it even arguable that the arbitrariness or consistency representations were made, I need not consider the question of falsity in that regard.
51. As for the sufficiency representation, I turn to consider whether this was arguably false. Since I have determined that the representation meant no more than that the Defendants honestly believed that the £1.177m provision was sufficient, the question of falsity and the Defendants’ honesty is effectively the same question: I must consider whether it is arguable that the Defendants did not honestly believe in the sufficiency of this number.
52. For the reasons set out below, I do not consider it arguable that the Defendants did not honestly believe this. There is, in my judgment, nothing in the pleaded case or in the evidence to support that contention.

The evidence

53. From the Particulars of Claim, and the evidence served and submissions made on this Application, I set out below the documents – other than those passing between the Defendants and Tactus, which I have already dealt with – which most clearly relate to the Defendants’ knowledge and understanding of the stock provision, and which might therefore be expected to provide the greatest support to the Claimant’s case.
54. A consistent theme of the documents is that the Defendants distinguished between the reported EBITDA, and the ‘underlying’ or ‘adjusted’ EBITDA. The stock provision used in the former number was relevant for the auditor, or for tax purposes, and in the prior year had been calculated using the methodology discussed earlier; the latter was supposed to reflect the ‘real’ development of the business and be the basis on which EBITDA was to be assessed for the purposes of the acquisition. This is apparent both from documents crossing the line between the parties (see paragraphs 15, 19, 37(b) and 38(a) above), and from internal documents (see paragraphs 55(a), 55(b), 56, and 57 below).
55. Tactus relies on notes from a board meeting on 17 June 2021. These pre-date the opening of negotiations with Tactus.
- (a) The notes include:

“• The forecast outturn for EBITDA to Oct-21 is £4.25m (reported EBITDA) and £5m (underlying EBITDA)

• Stock has risen from £8m to £17m inclusive of a stock provision increase of £0.75m (stock provision on same basis as last year but pro-rata for growth)”

(b) The board pack supporting this shows a bridge from reported EBITDA to ‘underlying’ EBITDA – which includes releasing a £760,000 stock provision.

56. On 1 December 2021, at 3.15am, Mr Sutherland emailed Mr Bursell and the First Defendant (**‘Mr Jordan’**) with the subject *‘2021 Management accounts and supporting schedules’* attaching numerous spreadsheets. The email began:

“Finally got there.

Attached is most of what we need for the 2021 accounts. I haven’t put fixed assets in as I want to check a couple of things still with Tom. I know also there are some other questions, some of which we will cover off in the call hopefully.

Some key points perhaps for us to discuss tomorrow:

• £5m EBITDA achieved. As discussed, this removes all 2021 additions to the stock provision but still leaves £1.17m b/f from 2020. Most of the release is in October, hence the artificially high gross margin in October. The audited accounts will include a recalculated provision but these accounts are intended to show the underlying position.

...

Not sure how they will take my approach of storing up provisions/accruals and then releasing at year end. Normally there would be a stock provision recalc so it wouldn’t usually be this dramatic. We did of course disclose the £820k in the initial figures we gave Tactus. I think we need to bear in mind that these accounts are for Mark and the bank. I usually do the accounts to give to the bank, then Mark and I have a conversation about what the “real” figure is, so it is kept between ourselves and not usually laid bare like this. I accept we may need to change this approach post-acquisition.”

57. On 9 December 2021, Mr Sutherland emailed Mr Bursell and Mr Jordan with the EBITDA adjustments sheet described at paragraph 38 above. The email read, so far as material:

“See attached EBITDA adjustments sheet with detailed explanations for each one. I have written some further notes below re the stock provision adjustment (not included on the file for submission) as I think we all need to be on the same page with this as they seem to get over-excited by it. In reality, the mathematical calculation of a provision policy that

the auditor and HMRC are happy with is a completely different discussion as to what the underlying provision should be. Happy to have a discussion on this before it is submitted into the data room.

As mentioned elsewhere, the formal stock provision is only calculated at year end. The provision is based on a specific formula that is applied to each SKU held at year end, using stock turn for the previous 12 months. It usually arrives at around 8-9% of the stock value so throughout the year I attempt to spread the increase or decrease in the provision as even as possible across the months. Obviously this involves estimation as there is no way to know exactly what stock levels will be at year end, but in a period of high growth as we have experienced it was reasonable to assume that stock levels in Oct-21 will be higher than in Oct-20.

Hence I provided an additional £820k during FY21 in anticipation. There are no workings behind this (these are prepared at the end of the year and are subject to a full statutory audit), it is an estimate which enables profit to be smoothed through the course of the year in the management accounts, and I believe gives a prudent view to the bank. As I have stated previously, I would much rather have a release at the end of the year than a large charge, as the latter would cause the bank to question our accounts and may jeopardise our banking facilities.

Had the due diligence commenced in January with year end complete, the FY21 provision would have been calculated and reported EBITDA would likely be lower than the £5m you have seen. For example, 9% of the year end stock balance of £18,599k would equate to a provision of £1,674k, or an additional charge of £557k on top of the b/f provision of £1,117k, giving a reported EBITDA of around £4.5m. The release in the October accounts would therefore be around £260k which would appear to be far less dramatic. The conversation would then turn to what the real level of provision needs to be and how much of the FY21 charge we should add back in order to arrive at the underlying EBITDA figure on which to base the company valuation. Either way, we would need to talk about it, but I decided rightly or wrongly to remove the provision movement from the reported accounts so the full year picture is as clean as possible.”

58. Tactus also relies on an email of 9 February 2022 from Mr Bursell to Mr Jordan. Mr Bursell forwarded a chain of emails he had had with Tactus concerning the accounting policies to be adopted in preparing the completion accounts. No specific policy was proposed regarding stock provision, and Mr Bursell wrote:

“I will explain my reasoning for not including commentary on stock provision when we next chat. Basically if it isn't in as a specific policy, *if* there is no set Accounts based policy (it changed at 2021 but not at 2020), then the SPA rules default to IFRS/ GAAP which says there should be no general provisions. We would then have a strong argument for agreeing the actual stock provision necessary which would be lower than £1.17m.

This is an important point so I am keen that you are fully happy before signing and I would also want to discuss it with Rob as there may be an argument that there is a policy used up to 2020 which would inflate stock provision, and lower stock value to our detriment!!”

Analysis

59. In my judgment, there is, in the materials placed before the court, no arguable basis for the allegation that the sufficiency representation was false. On the contrary, such evidence as there is supports the contention that the Defendants’ genuine belief was that £1.17m was a sufficient stock provision.
60. In particular, the 9 February 2022 email (set out at paragraph 58 above) – sent only 9 days before execution of the SPA – shows that Mr Bursell understood that that the “*actual stock provision*” would be “*lower than £1.17m*”. Mr Cogley KC submitted that the last sentence of the first paragraph should be read as meaning that there was a “*strong argument*” that the actual stock provision would be less than £1.17m, but I do not think that is the natural reading of the sentence: Mr Bursell is saying that if there is no applicable policy, then there is a strong argument that the appropriate course would be to use the actual stock provision necessary – and that would (in his understanding) be lower than £1.17m. But, in any event, even if Mr Bursell were saying only that there would be a strong argument that the actual stock provision would be lower than £1.17 million, that is inconsistent with an allegation that the Sellers had no honest belief in the sufficiency of the £1.17 million provision.
61. The Claimant relies on the 9 December 2021 email (see paragraph 57 above), but I do not consider that email lends weight to the Claimant’s case. Mr Sutherland is here explaining, internally, his approach to the EBITDA adjustments for stock provision, and why there would need to be a conversation with EY as to what the real level of provision should be. That is reflected in what he said to EY. But Mr Sutherland was not expressing the view that the real level of stock provision could not be £1.17 million or less.
62. Separately to the emails it has identified, Tactus places great weight on the allegation that Mr Sutherland, on 14 November 2021: performed a calculation of the stock provision on a consistent basis to the approach used in October 2020; concluded that the stock provision using that methodology was £2,196,808; but then closed the spreadsheet without saving his work. I accept that it is arguable that this is what occurred: the metadata shows that Mr Sutherland did access and modify the relevant spreadsheet on that date, but the last saved version is a few steps short of completing the calculations – from which a judge might infer at trial that Tactus’ theory is correct. However, taking this point at its highest, all it would show is that Mr Sutherland knew, but chose not to disclose to Tactus, that an application of the prior year’s methodology would lead to a large stock provision. It would provide a motive for Mr Sutherland to encourage EY and Tactus to focus on the ‘real’ stock provision, rather than the stock provision which would be calculated using the prior year’s methodology. But such knowledge or motive does not lend any support to the argument that Mr Sutherland (or anyone else) knew that £1.17 million was insufficient to reflect the real extent to which the value of the stock might be impaired.
63. There are other emails between the Defendants which are mentioned in the Particulars of Claim, or relied on by the Claimant in the evidence or submissions in this Application,

but none of them, in my judgment, lend any weight to the proposition that the Defendants did not honestly believe that £1.177m was a sufficient stock provision.

- (a) There are inevitable discussions as to how best to present Box, and its finances, to Tactus and to EY, but no hint, in my judgment, of any intention on the part of the Defendants to act improperly. Emails discussing how Tactus or EY would react to the £1.17m provision say nothing about the correctness or otherwise of the provision – this is an attempt by one side of negotiations to foresee how negotiations might play out.
 - (b) In the usual way, there are emails which are incautiously phrased – “*we can probably fudge a commentary*” or “*we may need to be creative*” – but none of these emails suggest any impropriety, as distinct from (for example) sellers of a company who have never before had a fixed asset register having to create one. Similarly, there are discussions as to what level of detail to volunteer to EY or Tactus, and Mr Bursell seeking to ensure that responses to information requests are all go via himself and Mr Jordan. None of this is remotely suspicious and none of these emails, in any event, relate to the stock provision.
64. It seems to me to be relevant that EY’s analysis, set out in the due diligence report it provided to Tactus, was that the £1.177m stock provision “*appears to provide headroom to cover unsaleable stock*”. EY said it “*appears to provide sufficient coverage for obsolescent items based on the analysis we have performed*”, noting that this was equal to 6% of stock held, and that EY had considered the levels of stock cover held at October 2021 on an individual SKU basis; sample tested SKUs aged over 6 months; and performed a sell through analysis, which demonstrated that approximately 70% of stock aged over 6 months at March 2021 had been sold through by January 2022. While the Defendants would not have known what EY was advising its client, this conclusion further undermines any inferential case by the Claimant as to the Defendants’ alleged dishonesty in making the sufficiency representation.
65. The Claimant makes some play of the argument that the documents suggests that Tactus were only willing to buy Box if it had an EBITDA of over £5 million, and Mr Sutherland was working to achieve that outcome. There is certainly some support for that in the documents: see, for example, paragraphs 56 and 57 above. But in my judgment the existence of a motive to make a false representation so as to improve the prospects of a successful deal (a motive which will exist in almost every transaction) cannot convert an unarguable case of false representation into an arguable one.
66. The Claimant suggests (inevitably, for a party in its position) that more evidence may be discovered on disclosure, which could support its case. But that is an unusually weak argument here: the Sellers communicated among themselves (and with Mr Bursell) using their work emails, and the Claimant, having acquired Box, has already gained access to those emails, and reviewed them for the purposes of pleading its claim. While Tactus argues that the Sellers might also have communicated using personal emails or on personal devices (using WhatsApp, text messages, or the like) there is no hint in the emails that the Sellers did so in any systematic way or for nefarious purposes. Equally, while it is conceivable that Mr Bursell will have relevant disclosure to give, it is speculative to believe that anything significant will not already have been captured in his emails with the Sellers which the Claimant has already had the opportunity to review. There are occasional references in the emails to conversations having taken place, but

none of these references hint at a deliberate decision to prevent a record being kept on Box's servers, as opposed to the sender of the email recognising that complicated issues might be best explained through a conversation: see, for example, paragraphs 57 and 58 above.

67. It is not suggested that there are any witnesses available to the Claimant who could support the allegation that the sufficiency representation was false.
68. For these reasons, I conclude that it is not arguable that the sufficiency representation was false – in other words, it is not arguable that the Sellers did not honestly believe that the stock provision of £1.177m was sufficient to enable all stock to be sold through. In reaching this conclusion, I have anxiously considered whether I am, in effect, conducting a mini-trial, but I do not believe I am doing so: in reaching my judgment, I have not sought to weigh evidence pointing in different directions, but simply to identify whether there is any evidence at all to lend any real support to the Claimant's case. In my judgment, there is not.

Conclusion on deceit

69. Accordingly, I conclude that none of the claims in deceit are arguable.

The conspiracy, procuring breach of contract, and unlawful interference claims

70. As described at paragraph 9 above, the additional causes of action all depend for their existence on the deceit claim: if there are no false representations knowingly made, then there is no unlawful means, no deliberate procuring of breach of contract, and no unlawful interference. I understand this to be accepted by the Claimant. As a result, I conclude that none of these claims are arguable.

Summary judgment / strike out – the position of D2 to D4

71. As a separate part of the Application, the Defendants contend that the claim in deceit against the Second to Fourth Defendants, in any event, lacks any properly arguable basis in primary fact for the inferences sought to be drawn.
72. In light of my conclusions, I need not consider the particular position of the Second to Fourth Defendants in any detail. I would say only that, if I were to have held that it was arguable that one or more of the Defendants had made deceitful representations, the claim against the Second to Fourth Defendants would also have been arguable to like extent. They were all directors of Box, all Sellers, all involved in the due diligence process, and representations in the Information Memorandum and Disclosure Letter were made on behalf of them all. There was no evidence that (for example) one of them was deliberately excluded from involvement in the sale process and, on the contrary, by way of example, all were present at the 16 December 2021 presentation. In such circumstances, I could not have concluded that there was no arguable case that the guilty knowledge of one Seller was shared with another Seller.

The strike out application – the residual allegations

73. Separately to the allegations of representations concerning the stock provision, in paragraphs 7 to 14 of Schedule 1 to the Particulars of Claim there are further elements of falsity pleaded to support the breach of warranty claim. These are the residual allegations.
74. It is pleaded that the Management Accounts overstated the fixed assets by £163,837; overstating Net Book Value by the same amount. In addition, rebates that were due are said to have been overstated by £269,415 – with only very limited particulars given; stock returns are said to have been understated by £353,073 – with no particulars given; it is pleaded that provision was not made in the Management Accounts for credit notes raised after this date, nor for monies owed by Spotbuyer (an associated company of Box); that sales were recognised in the Management Accounts without also recognising the associated costs of sales, understating costs and overstating profits by £222,001; that missing stock, with a value of £242,891, was included in the Management Accounts; and that price protection of £172,907 was recognised in the profit and loss account, when it should have been recognised as a reduction in the stock balance as it related to items which had not yet been sold.
75. No request for further information was made in respect of the residual allegations, but in Schedule 1 to the Defence, it was repeatedly pleaded that the various residual allegations are not particularised, too vague to permit a proper response, etc. Some attempt was, nonetheless, made to plead to some elements of the residual allegations.
76. In Schedule 1 to the Reply, there was some pleading responding to the limited pleas of the Defendants concerning elements of the residual allegations. However, no further particulars of the residual allegations were given.
77. The application notice for the Application sought an order giving summary judgment on the whole of the claim, alternatively striking out the Particulars of their claim in their entirety on the basis that they disclose no reasonable ground for bringing the claim against the Defendants. No distinction was drawn between the various allegations in the Particulars.
78. In the evidence in support of the Application, Louise Wilson of Freeths LLP summarised, “*insofar as material for the purposes of this Application*”, the Defendants’ case in the Defence as including that: “*the warranty claim concerning other aspects of the Box accounts (i.e. matters other than the stock provision) and the deceit claim against the Second, Third and Fourth Defendants are completely unparticularised*”. Later in her witness statement, Ms Wilson stated: “*Insofar as the Application concerns the deficiencies of Tactus’ pleading, that will be addressed in submissions*”.
79. The Claimant’s responsive evidence came in the form of a witness statement from Fiona Parry of Hill Dickinson LLP. Ms Parry explained that she was authorised to make her statement “*in respect of the Defendants’ application for summary judgment dated 3 August 2023 (SJ Application)*”, appearing to overlook that the application also incorporated a strike out application. Ms Parry’s evidence was that there are “*various matters that are not addressed in the SJ Application*”, reciting the residual allegations and she observed, “*Nothing in the SJ Application explains how or why the Defendants will say that the Claimant has no real prospect of establishing... the non-compliances*

with Warranties set out above. As a result, I do not understand how the SJ Application could possibly dispose of the whole of the Claimant's claim".

80. Pausing there, it appears that there was a miscommunication between the parties as regards the nature and scope of the Application. The Defendants intended to strike out the residual allegations, on the basis that they were inadequately pleaded, and so disclosed no reasonable ground for bringing the claim against them. The Claimant, it seems, did not understand that. The position might, perhaps, have been avoided if the Defendants had served an explanatory covering letter explaining the nature of their application more fully than would be appropriately contained within a witness statement (see section F.8.2 of the Commercial Court guide), or if the Defendants were to have clarified the position after receiving Ms Parry's witness statement, but neither course was taken. (Mr Polley KC for the Defendants told me that they had understood Ms Parry's statement to mean that the Claimant maintained the existing pleading was adequate, not that there was no issue concerning the residual allegations raised by the Application.)
81. In his skeleton argument of 14 February 2024, Mr Polley KC advanced his clients' case seeking to strike out the residual allegations. Mr Cogley KC and Mr Patel responded that the Defendants were "*not at liberty to argue in a skeleton, served days before a hearing, that summary judgment or strike out is being sought on a basis that was not advanced in the Application*". They continued:
- "In Tactus' position it is not open to the Defendants only to raise pleading-related issues in a skeleton served days before a hearing. The Application was issued and served on 3 August 2023, some six months ago. If the Defendants' intention was to seek summary judgment or strike out based on alleged flaws in the Particulars of Claim then the Defendants ought to have stated what those flaws were in the Application or at some point in the last six months. For example, it is well known that a response to an application for strike out/summary judgment based on a pleading point, is to apply to amend. The Application Notice in this case has been structured in such a way as to obscure, presumably deliberately, the actual basis and so as to deny Tactus any opportunity to amend. No explanation is proffered as to why the Defendants waited so long to issue the Application, nor why in the intervening six months there has been no elucidation."
82. In my judgment, this goes too far. I do not consider that there is any ground for suggesting that the Defendants or their lawyers deliberately obscured the basis of the Application. Rather, I consider that there was a miscommunication for which both parties bear some responsibility: the Defendants could and should have spelled out more clearly (in the application notice, in Ms Wilson's statement, or in a covering letter) the particular bases on which a strike out was being sought; and the Claimant could and should have paid more attention to the fact that the Application was not merely a summary judgment application but also a strike-out application, and that Ms Wilson's statement also criticised the pleading of the various claims, which she said would be dealt with in submissions.
83. In the circumstances, while I do not consider that the residual allegations are properly particularised as it stands, I do not think it would be fair to strike them out at this time. I consider that the Claimant should, instead, have the opportunity to amend to plead proper

particulars. I will hear the parties on appropriate consequential directions to enable the Claimant to have such opportunity, and to enable the Defendants, if so advised, to object to any such amendment and/or to restore their application to strike out the residual allegations in any event.

Conclusion

84. For these reasons, I shall give reverse summary judgment on the claims in deceit, unlawful means conspiracy, procuring breach of contract, and unlawful interference. I shall refuse the Application insofar as it relates to the breach of warranty claim relating to the stock provision. I shall, in effect, adjourn consideration of the Application insofar as it relates to the residual allegations, pending proper particularisation of those claims.