Neutral Citation Number: [2019] EWHC 3312 (Ch)

Claim No. FL-2017-000001
Claim No. FL-2016-000019

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (Ch D)

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 3rd December 2019

Before:

THE HONOURABLE MR JUSTICE HILDYARD

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Between:

THE PERSONS IDENTIFIED IN SCHEDULE 1 OF THE CLAIM FORM (the "SL Claimants")	**Claimants**
- and –	
TESCO PLC	**Defendant**

And Between:

(1) MANNING & NAPIER FUND, INC. (a company incorporated in the United States of America) (2) EXETER TRUST COMPANY (a company incorporated in the United States of America) (the "MLB Claimants")	**Claimants**

-and-

TESCO PLC **Defendant**

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NEIL KITCHENER QC, RICHARD MOTT and SIMON GILSON (instructed by **Stewarts**) appeared on behalf of the SL Claimants

PETER DE VERNEUIL SMITH QC, PHILIP HINKS and DOMINIC KENNELLY (instructed by **Morgan Lewis & Bockius UK LLP**) appeared on behalf of the MLB Claimants

DAVID MUMFORD QC, MICHAEL WATKINS and NIRANJAN VENKATESAN (instructed by **Freshfields Bruckhaus Deringer LLP**) appeared on behalf of the Defendant.

Hearing date: 1st October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE HILDYARD:

The nature of the application to be determined

1. Tesco PLC ("Tesco") seeks the requisite permission of the court to withdraw an admission it made in its Defence in both sets of proceedings (and confirmed in the Agreed Case Memorandum in the MLB proceedings). The admission relates to the relevant Claimants' allegation that the Trading Statement Tesco made on 29 August 2014 ("the August Trading Update") was untrue and/or misleading in that it misstated the level of trading profit expected to be achieved by Tesco for the first half of the 2014/2015 financial year.

2. If permitted to withdraw that admission, Tesco now wishes to advance a defence to the effect that the statement in the August Trading Update which is relied on by both sets of Claimants, which is that *"trading profit for the six months ending 23 August 2014 is expected to be in the region of £1.1bn."* (emphasis added), was not of itself untrue or misleading.

Summary of Tesco's arguments

3. More particularly, Tesco now wishes to contend that further analysis has demonstrated that the figure for trading profit was overstated by £76 million, rather than the greater sum of £250 million which Tesco had originally announced it to be in its corrective announcement to the market on 22 September 2014; that the resulting correct figure for expected trading profit for the relevant period was £1.024 billion; and that £1.024 billion is indeed *"in the region of £1.1bn."*

4. Tesco presents this as "a short point of construction". It seeks to plead it by amendment accordingly. It contends that the proposed amendments have a real prospect of success and there would be real prejudice to Tesco if the application were to be refused because Tesco would thereby be deprived of a potential defence to an important part of the claim. It further contends that, conversely, there would be no real prejudice to the Claimants if the application were to be granted because the proposed amendments raise a narrow point of construction which would give rise to no additional factual or expert evidence, nor to any further disclosure. Accordingly, it contends that there will be no adverse impact on the case management of these proceedings, the timetable to trial or the trial itself.

5. Tesco has, however, stressed that it in no way wishes to resile from its acceptance of findings of market abuse made against it in the context of regulatory proceedings by the FCA in relation to the August Trading Update, as recorded by the terms of the FCA Final Notice. Tesco Stores Limited also signed the Deferred Prosecution Agreement ("the DPA") which relates to charges of false accounting. Mr David Mumford QC, representing Tesco, made clear from the outset of his oral submissions, and described it as a point of "the utmost importance", that if this court were to consider that the withdrawal of the admission and/or the new plea Tesco seeks to introduce by amendment is not consistent with what it formally and publicly accepted in the context of the regulatory proceedings and in agreeing the matters set out in the FCA Final Notice and the DPA (both dated 28 March 2017) and the statements of facts accompanying them then it would withdraw its application. This was accepted to be, in that sense, a "gateway point".

6. Put shortly, Tesco denies any inconsistency. This is on the basis that the case put forward by the Claimants, at least as presently pleaded, is narrower than the terms of the statements of fact accompanying the FCA Final Notice and the DPA; that Tesco is only required to meet the case as pleaded; and that its proposed new plea is an answer to that case which does not negate, qualify or undermine its previous admissions.

Summary of the Claimants' objections

7. Both sets of Claimants oppose Tesco's application root and branch.

8. As to the "gateway point", the Claimants contend that there is an obvious inconsistency between Tesco's public acceptance of the facts stated in the FCA Final Notice and in the Statement of Facts accompanying the DPA. They have stressed that Tesco has throughout presented itself, and been commended by the authorities (see the DPA Statement of Facts at para.18) as having demonstrated, an "exemplary standard of co-operation" with the authorities, and thereby secured the DPA instead of prosecution, and received in the DPA a 50% reduction in its financial penalty (from £257 million to £128 million). The MLB Claimants contend that to permit the withdrawal and the new plea would be to permit Tesco to embark on a collateral attack on both the FCA Final Notice and the DPA.

9. In addition, the Claimants contend that the application fails all the tests recommended by the Court of Appeal in the context of an application to withdraw admissions in *Sowerby v Charlton* [2006] 1 WLR 568, as also more recently illustrated in (for example) in *Kojima v HSBC Bank plc* [2011] 3 All ER 359 and *Aldersgate Investments Ltd v Bank of Scotland Plc and Anr* [2018] EWHC 2601 (Comm). They submit in summary that:

    (1) The proposed new argument has no real prospect of success.

    (2) Tesco has advanced no (or no good) reason for its change of position some 32 months after its admission.

    (3) Tesco's withdrawal of the admission would cause prejudice to the Claimants.

    (4) Permitting the withdrawal of the admission would be contrary to the interests of justice.

10. I deal with these points in turn. I start with the "gateway point" since in light of Mr Mumford's stated wish to withdraw the application if this court were to regard the proposed withdrawal and new plea as inconsistent with Tesco's public admissions that point is capable of being determinative.

The "gateway point"

11. To determine the "gateway point" it is necessary to identify more precisely (1) what Tesco agreed when accepting the statements of fact accompanying the FCA Final Notice and the DPA and (2) what the Claimants have pleaded, and subsequently confirmed in the Agreed Case Memorandum. I take the following summary from the Claimants' respective skeleton arguments.

12. The FCA's Final Notice made the following findings:-

(1) "*On 29 August 2014, Tesco plc published a trading update in which it stated that it expected trading profit for the six months ending 23 August 2014 to be in the region of £1.1bn (the "August Statement")*": paragraph 2.1.

(2) "*The August Statement contained information that gave a false or misleading impression as to certain qualifying investments (in particular, Tesco plc shares and certain Tesco group bonds – "the Relevant Securities" defined in this Final Notice)*": paragraph 2.3 (and see paragraph 4.6 to the same effect).

(3) "*Accordingly, Tesco plc and Tesco Stores Limited engaged in market abuse contrary to s.118(7) of [FSMA]*": paragraph 2.3.

(4) "*In summary, therefore, Tesco plc has admitted that the expected profit figure for H1 2014/2015 in the August Statement was overstated by £76 million (£118 million less £42 million). The total overstatement of actual and expected profit was £284 million (£155 million plus £53 million plus £76 million)*": paragraph 4.4(5).

(5) "*As a result of the market abuse, a false market was created in the Relevant Securities. Purchasers of the Relevant Securities paid a higher price than they would have paid had there not been a false market*": paragraph 2.4 (and see paragraphs 4.6 and 4.7 to the same effect).

13. As to the DPA Statement of Facts:-

(1) The fact that the false accounting led to an incorrect and overstated profit estimate in the August Trading Update is referred to repeatedly in the Statement of Facts: see e.g. paragraph 6 ("*the overstatement predominantly arose as a result of the dishonest falsification by TSL of its results for the 6 month period, known as H1 2014/15, upon which the Group trading forecast was based*"), paragraph 9 ("…*dishonestly perpetuated the misstatement leading up to the trading update on 29 August 2014 and up until the correction on 22 September 2014, thereby falsifying or concurring in the falsification of accounts or records made for an accounting purpose*") and also paragraphs 7(e), 8, 56 and 57.

(2) Under the heading "*Impact*", Section F of the Statement of Facts said, "*Tesco ordinary shares are listed on the main market of the LSE. On 22 September 2014 its share price fell by 11.585% reducing its total share value by £2,160,175,739*". The only basis on which the false accounting could have "*impacted*" the market in the SFO's view is if Tesco's market statements – including the statement closest in time to the share price drop, the August Trading Update – had misled the market.

14. In his judgment providing the requisite court approval of the DPA Leveson LJ

(1) at paragraph 1, identified the gravamen of false accounting:

> *"If false or misleading information is provided to the market by a listed company, a false market can be created. As a consequence, securities will trade at a higher (or, depending on the nature of the false or misleading information, a lower) price than otherwise would*

> *be the case. Thus, in the case of a higher price, purchasers of the securities will have paid more than they would have paid had there not been a false market; in the case of a lower price, vendors will have received less. Thus, for such a company, the accuracy of financial results reported to the market is of critical importance and substantial loss can be caused if material inaccuracy is subsequently identified."*

(2) at paragraph 2, after referring to the publication of FY13/14 accounts in May 2014, the Court said:

> *"…On 29 August 2014, Tesco plc issued a trading update* ***for expected trading profits for the six months up to 23 August 2014: the estimate was in the region of £1.1 billion****. It is* ***undeniable*** *that the market will have reacted to this news."* [emphasis added]

(3) At paragraph 3, the court referred to the 22 September 2014 corrective statement, noting that the overstated profit relating to H1 2014/15 was £76 million.

(4) At paragraph 4 it is stated that:

> *"… it is* ***undeniable*** *that purchasers of shares and bonds in Tesco plc* ***between 29 August 2014 and 22 September 2014 paid a higher price than they would have paid had the false impression not been created*** *and, provided that they continued to hold some or all of them immediately prior to the issue of the corrective statement on 22 September, will have suffered a loss as a result." (*emphasis added)

15. On the same day as the Final Notice and the DPA were announced, Tesco made a public announcement confirming it agreed to the findings of both the FCA and the SFO.

16. As to the pleadings:

(1) the specific words of the 29 August Trading Update are pleaded verbatim in the SL Claimants' Particulars of Claim ("the SL PoC") at para. 5.6:

> "*On 29 August 2014, Tesco issued a trading update saying "We now expect trading profit for 2014/15 to be in the range of £2.4bn to £2.5bn.* ***Trading profit for the six months ending 23 August 2014 is expected to be in the region of £1.1bn***" (emphasis added).

17. The SL PoC goes on to allege in para. 8.3.3 that the August Trading Update:

> "*was untrue and/or misleading in that it misstated the level of trading profit expected to be achieved by Tesco in the first half of the 2014/15 financial year*".

18. Tesco's Defence admitted the specific words used and admitted that those words constituted an untrue or misleading statement for the purposes of FSMA Schedule 10A:

(1) Tesco's Defence states at paragraph 70: "*As to paragraph 8.3.3, the first sentence is admitted*."

(2) Tesco's Defence states at paragraph 117:

> "*Save that it is admitted that the statement of expected profits for H1 2014/15 in the August Trading Update was untrue or misleading…*".

19. Further, Tesco positively relied upon the admission as showing that its new management had responded appropriately and responsibly to the discovery of the wrongdoing: -

(1) Tesco's Defence states at paragraph 3:

> "*Upon realising that the H1 2014/15 expected figure referred to in the August Trading Update was overstated, Tesco drew attention to and publicly corrected the overstatement*".

(2) Sub-paragraphs (1) to (5) then set out the various corrective statements and publications, ending at 30(5) by saying it was now known that:

> "*the expected profit figure for H1 2014/15 in the August Trading Update was overstated by £76 million*".

(3) Having set that out, paragraph 4 of Tesco's Defence states that:

> "***In these proceedings, Tesco stands by the admissions it has previously made**. It is **accordingly** admitted that the expected profit figure for H1 2014/15 in the August Trading Update was an untrue or misleading statement within the meaning of Schedule 10A FSMA*" (emphasis added).

(4) In the Case Memorandum it was stated that Tesco *"accepts that the August Trading Update was untrue and misleading".*

20. It is not necessary to recite at length from the MLB Claimants' Particulars of Claim ("the MLB PoC"); suffice it to say that:

(1) In their Particulars of Claim served on 5 December 2016, the MLB Claimants alleged that the August Trading Update was untrue or misleading within the meaning of Schedule 10A to FSMA in respect of the first half of the 2014/15 financial year to 23 August 2014 *"because* [it] *overstated profits/projected profits by £76 million".*

(2) In its Defence served on 27 January 2017, Tesco did not deny that the August Trading Update was untrue or misleading. It is common ground that by failing to deny this allegation, Tesco was taken to admit it pursuant to CPR 16.5(5): See Mr Taylor's 14th witness statement, para 8.

21. Further, paragraph 15 of the Agreed Case Memorandum in the MLB proceedings states that:

> "*Tesco accepts that the statement of expected profits for H1 2014/15 in the August 2014 trading update was an untrue or misleading statement*".

22. To get through the gateway, Tesco must demonstrate a workable interstice between what it publicly accepted and what it now wishes to plead by amendment. More colloquially, it must thread the eye of a needle.

23. Mr Mumford sought to achieve this by characterising the regulatory and criminal proceedings as concerned with the cumulative overstatement of trading profit up to August 2014 and the omission of Tesco to disclose the cumulative overstatement (of some £284 million, see paragraph [12(4)] above) when it updated the markets in August (by the August Trading Update). He presented those proceedings (quoting from his oral submissions) as "not concerned or not concerned solely, with the express misstatement of the 1.1 billion figure to the tune of 76 million"; its concern was (quoting again from Mr Mumford's oral submissions) "the omission by Tesco to disclose the full amount of [the] cumulative overstatement [of some £284 million] when it updated the market in August". On the other hand, he characterised the Claimants' pleaded case in these proceedings as focused only on the £76 million overstatement of trading profit in H1 2014/15, and pointed out that on their pleading it was that which was alleged to render the express statement in the August Trading Update false.

24. Mr Mumford accepted it was a "very narrow point"; but, he submitted, it is a fair distinction and thus an available and substantive point, and none the less so simply because it has only recently been focused upon by Tesco and its advisers.

25. The somewhat rarefied and elusive nature of the distinction led, as it seemed to me, to some of the contrary submissions on the part of both sets of Claimants rather missing the point. Counsel for the Claimants both tended to rely on passages within the Statements of Facts accompanying the FCA Final Notice and the DPA, and in the Leveson judgment in each case stating the overall falsity of the Autumn Trading Update without focusing upon and tying them back to the way the matter is pleaded. In particular, none of those documents seemed to me to adopt (expressly at least) the "in that" formulation pleaded by the SL Claimants or the "because" formulation of the MLB Claimants, both of which pin the untrue or misleading quality of the August Trading Update on (and Tesco would say, only on) the £76 million error in the statement of expected trading profit for H1 2014/15.

26. In my view, the argument is not as far-fetched as the Claimants sought to depict it. On my reading of them, the FCA Final Notice and the DPA do rather elide the reasons why, overall, the August Trading Update was false and misleading; and the £76 million error (which was originally thought to be £118 million but was reduced when it was found that trading in the relevant half year had been £42 million more profitable than first predicted) was a constituent element in their overall conclusion, and not necessarily the dominant, still less exclusive, element. An example of this elision is provided by paragraphs 4.4(5) and 4.5 of the FCA Final Notice, which read as follows:

> "(5) In summary, therefore, Tesco plc has admitted that the expected profit figure of H1 2014/2015 in the August Statement was overstated by £76 million (£118 million less £42 million). The total overstatement

of actual and expected profit was £284 million (£155 million plus £53 million plus £76 million).

4.5 Tesco Stores Limited and Tesco plc knew, or could reasonably have been expected to have known, that the information in the August Statement was false or misleading…".

27. In my view, on the Claimants' cases as presently pleaded, there would be in strictness be no legal inconsistency between the findings to which Tesco formally and publicly agreed and it now seeking to plead that Tesco's trading profit for H1 2014/15 (£1.024 million) was "*in the region of''* £1.1 billion. It may well be said that it depends on parsing the August Trading Update, the statements of fact accompanying the FCA Final Notice and the DPA, and the pleadings in an unswervingly literal way in order to separate the overall conclusion that the August Trading Update was misleading (as the FCA Final Notice and the DPA recorded, as Tesco formally agreed and as Mr Mumford acknowledges and accepts) from the particular reason stated and pleaded why it was so, and that the distinction is a fine and uncomfortable one. But the distinction is there: and if that were all that Tesco sought to plead in place I do not think that, without more, it would be inconsistent with what it accepted in the regulatory and criminal proceedings.

28. The problem, as I see it, is that there is more. Much more difficult to reconcile, however, as it seems to me, is what might be termed the punchline in the amendment which Tesco seeks to introduce. I have myself continued to be struck, and would expect others to be surprised and concerned, by the extent to which the careful parsing of its antecedent statements, and of the Claimants' pleading, results in an overall conclusion which immediately seems at odds with the thrust of what Tesco did publicly agree. The punchline sought to be pleaded is:

> *"Accordingly, the Autumn Trading Statement was not an untrue or misleading statement within the meaning of Schedule 10A."*

29. That punchline, stripped of its carefully crafted antecedents, does seem to me to contradict or at least cut across the basis of the FCA Final Notice and the DPA, which was that the August Trading Update was false or misleading. In my view, the concluding sentence of the proposed plea is plainly inconsistent with Tesco's previous public position. Even if I were not to do so as regards the earlier parts of the proposed plea, I would shut the gate on the conclusion of the plea to which they are intended and expressed to lead.

30. Whether, if not permitted the punchline, Tesco would still wish to withdraw the admission, I am not entirely certain. But in case it might, and in any event for comprehensiveness and in deference to the arguments put to me, I should address the other points raised against permitting the withdrawal of the admission and the new plea. These seem to me not only to point to the same conclusion that Tesco should not be permitted at this stage to deny that the August Trading Update was false and/or misleading; they have also led me to the broader conclusion that it would be too disruptive to permit Tesco now to plead that the trading profit for H1 2014/15 was *"in the region of"* £1.1 million even if it formally accepted in the pleading that the statement was false and/or misleading taken as a whole.

Withdrawal of the admission: how the court should exercise its discretion

31. As Briggs J (as he then was) observed in the *Kojima* case [*supra*] at [18] – [19], the power of the court to permit withdrawal of an admission pursuant to CPR 14.1(5) is discretionary; but it is usually to be exercised in accordance with the criteria set out in paragraph 7.2 of CPR PD14, which represent a useful and uncontentious distillation of earlier authority. This provides as follows:

> "In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case including –
>
> (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
>
> (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
>
> (c) the prejudice that may be caused to any person if the admission is withdrawn;
>
> (d) the prejudice that may be caused to any person if the application is refused;
>
> (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
>
> (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer was made; and
>
> (g) the interests of the administration of justice."

32. However, these are not cumulative requirements; they are all matters to be taken into account in the overall assessment of the Court's discretion. The weight to be attached to each of them depends upon the circumstances of the case. As Ward LJ explained in *Woodland v Stopford* [2011] EWCA Civ 266 at §26 (in the context of pre-action admissions):

> "It is quite clear to me that CPR 14.1A(3) confers a wide discretion on the court to allow the withdrawal of a pre-action admission and paragraph 7.2 of Part 14 of the Practice Direction lists the specific factors the court must take into account in addition to the need to have regard to all the circumstances of the case. These factors are not listed in any hierarchical sense nor is it to be implied in the Practice Direction that any one factor has greater weight than another. A judge dealing with a case like this must have regard to each and every one of them, give each and every one of them due weight, take account of all the circumstances of the case and, balancing the weight given to those matters, strike the balance with a view to achieving the overriding objective. Cases will

> vary infinitely and the weight to be given to the relevant factors will inevitably vary from case to case. Sometimes the lack of new evidence and the lack of explanation may be the important considerations; in others prejudice to one side or the other will provide a clear answer and in all the interests of justice will sway the balance. It would be wrong for this court to circumscribe the manner of the exercise of this discretion or to give any more guidance than is trite, namely, carry out the task set by the Practice Direction, weigh each of the identified factors as well as all the other circumstances of the case and strike a balance with due regard to the overriding objective."

Grounds for withdrawal: para 7.2(a)

33. As to its grounds and reasons for the withdrawal of admission that it seeks, Tesco frankly accepted that its application is based, not on any change in its knowledge or information or newly available evidence, but on a reappraisal of its case now that it has come to focus more clearly on two related considerations of which it was well aware but had not appreciated the full combined significance:

    (1) the Claimants plead their case about the falsity of the August Trading Update only with reference to the figure for expected trading profit in H1 2014/15; and

    (2) a correction of the cumulative overstatement as at the end of H1 2014/15 (some £284 million) would not affect the trading profit metric for that period, save for the £76 million that related to H1 2014/15.

34. The Claimants submitted that the fact that it could not rely on any new evidence or change of circumstances, and had been content to rest on its pleading in this regard for nearly three years, tilted the balance very much against Tesco. They relied in this context principally on the approach of Phillips J in *Aldersgate Investments Ltd v Bank of Scotland Plc and Anr* [2018] EWHC 2601 (Comm), where he stated as follows at [11]:

> "In proceedings of this size, where admissions have been made, sensibly, of regulatory findings and the case has proceeded on that basis and where there is nothing which has happened which would explain a change in stance, I consider that the first ground weighs very heavily indeed against the bank, taking on board the decision of the Court of Appeal, that I must nevertheless factor in all factors. I will consider them all below, but I have considerable sympathy for the views of Steel J [in *American Reliable Insurance Company v Willis Limited* [2008] EWHC 2677 (Comm)] that, in a case of this type, the applicant ought to be required to show that something had gone wrong in relation to the original admissions. Here these admissions were made, one has to take it, after very careful consideration and with full knowledge of what evidence was available to the bank to dispute them. The bank has simply changed its mind." [My interpolation in square brackets]

35. The Claimants relied also on that case for the further consideration that the closer the date to trial, and the greater the likelihood of dislocation if the withdrawal of the admission is permitted, the more cogent must be the grounds for the withdrawal application. At a late stage (in *Aldersgate* the application was being heard only two months before trial) a change of mind is not a sufficient justification, especially where the applicant is a sophisticated entity and well-advised.

36. Tesco sought to counter this by pointing out that in litigation of this size and complexity it is inevitable that as matters progress, certain points will be focussed upon differently. Indeed, the pleadings in this case have evolved considerably over time. The Claimants have amended on a number of occasions to plead new alleged misstatements and to withdraw allegations of fraud that had previously been made. Tesco has not objected to any of those proposed amendments simply on the basis that they should have been pleaded at the outset of the proceedings.

37. Mr Mumford also pointed out, and I accept, that the position in this case is different in important respects from that in the *Aldersgate* case, however similar the context might at first appear to be. In that case, it appeared that the bank had made the initial admissions because it had been "reluctant to contradict its regulators in public and it took the commercial view at that time to make the admission described" but had then, in quieter times when the regulatory spotlight had moved away and the noxiousness of the regulatory charges had faded, had a "change of heart as to what [was] in its commercial interests in relation to these allegations". There was, in other words, some suggestion of ducking and diving. In this case, I do not understand any such thing to be suggested. Nor could such a suggestion plausibly be maintained, given the glare still on Tesco after two criminal trials, and the continuing press interest.

38. I bear in mind also the candour of Tesco through its Counsel of bringing to the fore the gateway point. I also take into account that whilst the trial is close, it is many months further away than was the case in *Aldersgate.*

39. I also appreciate, of course, that the process of review, possibly with a pair of fresh eyes, may throw up points even at a late stage, and that the purpose of pleadings is to define what is truly in issue between the parties, including justified amendments if these can properly be accommodated. Pleadings are not a game of Ludo. Nevertheless though I do not think it has the overwhelming, near conclusive, weight ascribed to it in the case of the applicant bank in the *Aldersgate* case, this factor does, in my judgment, weigh against Tesco, which allowed its admission to remain for some 32 months, and whose decision to make it I must take to have been carefully considered by highly capable and experienced Counsel and Solicitors. Where all that is relied on as a change of mind, the burden of justifying any adverse impact on the proceedings seems to me to be particularly heavy. To permit the amendment at this stage would, I would anticipate, lead to a round of further pleadings and in all probability expert evidence, close to Trial even if not as close as was the case in *Aldersgate.* Tesco has every right to reconsider its case; but not to destabilise the proceedings.

Conduct of the parties: para 7.2(b)

40. The Claimants further contended that Tesco has *"exacerbated"* any prejudice by *"waiting several months"* before making the application. They also referred back to the alleged unfairness of being allowed to withdraw an admission made in the

regulatory proceedings. However, the first of these points, to the extent not already taken into the balance in the context of the previous factor, in reality goes more to the later factor of prejudice; and the second is largely subsumed in the "gateway point". The Claimants did not otherwise emphasise this factor.

41. Generally, it has not been suggested that Tesco's conduct of these proceedings otherwise is a reason for refusing the application. I would accept that Tesco has approached these proceedings to date in a constructive and reasonable way. In short, I do not think this is a material point in the balance.

Balance of prejudice: paras 7.2(c) and *7.2(d)*

42. Tesco submitted that it should be readily apparent that if this application were to be refused, Tesco would suffer significant prejudice. This is, on any view, significant and high value litigation in which the SL Claimants seek damages in excess of £440 million and the MLB Claimants claim US$230 million. If Tesco's construction of the August Trading Update were to be accepted, a significant part of the claim against Tesco would fall at the first hurdle because there would be no untrue or misleading statement and, therefore, no liability under Schedule 10A.

43. However, my decision to refuse to permit Tesco to plead that the August Trading Update was not false and misleading largely, if not completely, neutralises this point. Even if I were to permit Tesco to plead its case that it was not the overstatement of £76 million for H1 2014/15 alone, but rather the cumulative effect of all the overstatements, which falsified the August Trading Update, the fact would remain that Tesco must, in my judgment, continue to be bound by the admission it made that the August Trading Update was false and/or misleading (as indeed Tesco accepts).

44. Turning to the other side of the balance of prejudice, the Claimants submit that there would be material prejudice to them if Tesco were permitted to withdraw its admission and introduce the new plea; and I apprehend that this objection would continue even if the new pleading stopped short of the intended punchline.

45. Whilst it is not for the court to plead for the parties, nor to formulate responses to proposed pleas, it seems to me almost inevitable that the upshot of permitting the proposed plea without the punchline is that the Claimants would amend to plead the other elements relied on by the FCA and in the DPA as leading to the conclusion that the August Trading Update was false and misleading, which Tesco could not then gainsay. In short, I have a strong impression that opening the gate would lead to a *cul de sac*.

46. Such new pleas, which may well in any event be to no avail, would be likely to lead also to supplemental witness evidence, possibly further disclosure and, it could well be, further expert evidence as to the likely effect on a reasonable market participant of the actual terms of the August Trading Update.

47. Again in summary, in my judgment, the balance of likely prejudice also weighs against Tesco.

Stage at which application has been made and trial date and length

48. I can be very brief in relation to this factor, since I have largely taken it into account already. I do not think what is proposed would cause the loss of the trial

date; nor do I think it would add to the length of the trial in such a way as could not be accommodated; but I do think it would destabilise the final phase of trial preparation. Even taking the date of assessment as being September 2019 when this application was first made, the fact that for so long Tesco was prepared not to dispute the pleading as to the falsity of the August Trading Update tells against any material modification of that approach.

Prospects of success of the claim to which the admission was made

49. I can be brief in relation to this factor also, since again this matter is subsumed in the conclusions I have already reached. It seems to me that even if Tesco were to be permitted to contest the plea that a trading profit of £1.024 million, though £76 million short, was still *"in the region of"* the forecast actually given of £1.1 billion, it would nevertheless be bound to accept that the August Trading Update was false and/or misleading in its overall effect.

50. Further, although I accept that there is a tendency for even the relatively financially numerate to discount the odd million in assessing a profit of more than a billion, the fact remains that a £76 million shortfall meant that the £1.1 billion figure was overstated by some 6.9%. As I also suggested in the course of the hearing, it is also difficult to imagine a good and honest basis for suggesting that a past profit was *"in the region of"* £1.1 billion if it had been appreciated to be materially less than that.

51. Accordingly, though I would not wish, and do not need, definitively to determine that the proposed new case would in any event have no real prospect of success, it seems to me that its premise is counter-intuitive and its prospects would be frail.

The interests of the administration of justice

52. The last, and in a sense compendious, factor to be taken into account in accordance with CPR 14PD.7 is the interests of the administration of justice.

53. Perhaps not surprisingly, since although each of the factors is to be taken into account, the factors are simply analytical guides to what ultimately has to be an overall assessment to be made, and almost inevitably overlap, this factor too has largely been implicitly weighed in the preceding discussion, especially in considering the "gateway point".

54. There is always danger in reformulating the same basic point in a slightly different way. But, taking that risk, I would summarise the position with particular regard to this particular factor as follows. At the highest level of generality, I take Tesco's previously publicly avowed position, and the perception it encouraged of its attitude, to have been that it does not wish to dispute, or be seen to dispute, on any technical or other grounds that the August Trading Update was false and/or misleading; nor has it wished in the past to advance technical disputes or issues of fine assessment of the materiality of constituent elements of the statement made. The point it now seeks to raise that a shortfall of £76 million does not mean that the trading profit was not *"in the region of"* £1.1 billion relies on a point of construction and an issue of materiality which, again at the highest of generality, is something of a departure from its previous stance and the perception of its attitude that it has previously sought to encourage.

55. I do not need to consider whether it would amount to a "collateral attack" on the FCA Final Notice and the DPA, given Mr Mumford's clear position on the

"gateway point". However, I do consider that even if the 'new' point is technically arguable, the interests of the administration of justice do not require Tesco to be permitted to raise it, but instead militate against a potentially disruptive change of position.

Conclusion

56. For all these reasons, in my judgment, Tesco's application to withdraw its admission should be refused. Tesco must in this context rest on their defence as they conceived it when they made the relevant admission.

57. It seems likely to be argued that costs should follow the event. That may be difficult to resist. Presumably in anticipation of such a result (one way or the other) all parties have lodged schedules of costs for the purposes of summary assessment. I would not propose to undertake such an assessment, given the sums at stake. Assuming the incidence of costs is agreed, the parties may also be able to agree a suitable payment on account. Any issue outstanding can be pursued in the first instance on paper: if possible, a hearing should be avoided, especially given the likely difficulties of arranging a hearing in view of my other commitments, though, of course, a listing would have to be obtained if any of the parties require such a hearing.