[2019] EWHC 2371 (Comm)

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

CL-2017-000348

Rolls Building
Fetter Lane
London EC4A 1NL

Before :

THE HONOURABLE MR JUSTICE BRYAN

- -

Between :

SLATER & GORDON (UK) 1 LIMITED	**Claimant**
- and -	
WATCHSTONE	**Defendant**

- -
- -

MR S. SALZEDO QC and MR I. BERGSON (instructed by CMS Cameron McKenna Nabarro Olswang LLP) appeared on behalf of the Claimant/Respondent.

MR T. LORD QC and MS S. SHAW (instructed by Dorsey & Whitney (Europe) LLP) appeared on behalf of the Defendant/Applicant.

Hearing dates: 28 August 2019

- -

APPROVED JUDGMENT

MR JUSTICE BRYAN :

A. INTRODUCTION

1 The parties appear before the court today on the hearing of urgent vacation business on the defendant's application for permission (i) to make certain amendments to its defence and (ii) to bring a counterclaim against the claimant (S&G) for breach of confidence, inducing breach of contract and unlawful means conspiracy.

2 This application is supported by the thirteenth witness statement of Timothy Joseph Maloney ("Maloney 13"). The application is opposed in the ninth witness statement of Jeremy Beresford Mash ("Mash 9") and the fourth witness statement of Kenneth Fowlie ("Fowlie 4") and the third witness statement of Andrew Grech ("Grech 3"). I have had careful regard to the contents of those witness statements and the matters addressed therein, as well as the exhibits thereto in relation to the issues that arise. I have also had the benefit of detailed skeleton arguments on behalf of both the defendant, in support of the application, and from the claimant in opposition to the application, including a supplemental skeleton filed shortly before the hearing this morning. I have also had the benefit of counsels' respective oral submissions, for which I am grateful and which I bear in mind.

3 In these proceedings the claimant, S&G, claims against the defendant, Watchstone, for damages of £637 million for deceit and breach of warranty in relation to the purchase by it from Watchstone in 2015, at which time Watchstone was known as Quindell, of the shares in certain subsidiaries, comprising of the Professional Services Division (the "PSD"), which ran a large-scale personal injury litigation business (the "acquisition"). S&G's case is that Quindell, and specifically its CEO, Robert Fielding, made dishonest representations in relation to the future financial prospects of the PSD and concealed relevant information in the negotiations and due diligence leading to the acquisition.

4 The trial is fixed for nine weeks, starting on 21 October 2019, to hear S&G's claim in deceit and breach of warranty arising from its purchase of the PSD of Quindell. Following a pre-action expert determination process that took place in autumn 2016, these proceedings were issued in June 2017. In summary, and as is set out in S&G's particulars of claim, S&G alleges that it was induced to make the acquisition by fraudulent representations which were made to it by Watchstone regarding the failure rates, known as "dilution rates", of cases being handled by the PSD which fed directly, it is said, into the PSD's profitability. Further, S&G alleges that Watchstone breached the warranty in the SPA regarding its December 2014 management accounts and that Watchstone failed, during the period between the execution of the SPA and completion, to notify S&G of its breach of warranty as it was obliged to do.

5 More specifically, S&G's claim is based upon representations that Quindell is said to have made in relation to the prospective assumptions of dilution rates, as I have already referred to, namely the forecast rates at which in the future certain cases within the business would fail to achieve sufficient pay out, whether by settlement or judgment of the court.

6 In this regard, firstly, S&G says that Mr Fielding made, or permitted Quindell to make, representations in relation to such dilution assumptions which he knew to be false. S&G says that it relied on those representations and decided to acquire those

which it would not have done had it known the true position. In support of that, it particularises a number of matters which it claims were concealed from it, by virtue of which Mr Fielding was aware of "the true position", thereby rendering his alleged representations false and dishonest.

7 The first of these was a group wide independent business, cash flow and accounting policy review which Quindell had commissioned PwC to carry out ("the PwC report"), which S&G claims suggested that Quindell's dilution rate assumptions were too low. It claims that, in order to conceal that finding from it, Quindell did not disclose two volumes of the PwC report to it and that its advisers prevented S&G and its advisers from accessing PwC, and mischaracterised the findings in the PwC report, and the nature and extent of the work that PwC had been carrying out, in order to throw S&G off the scent, as it is put.

8 S&G's primary case is that no prospective purchaser with knowledge of the true financial position of the PSD would have made the acquisition and that, therefore, it is entitled to recover the full upfront cash purchase price, £637 million, the value of what was purchased being, so it alleges, £0.

9 For its part, Watchstone denies that there was any fraud on the part of it or Mr Fielding and even if, which is denied, any action or representations were made as alleged, they were honest statements of opinion as to what could happen in the future. Mr Fielding's evidence is that he genuinely believed the dilution rate assumptions which he was putting forward were achievable and that he had no intention to deceive S&G. It is said that it is evidenced by the contemporaneous documentation already disclosed and by his agreement to S&G and its advisers, firstly, being given a high degree of access to the PSD's operations and people at all levels and, secondly, being provided with all of the empirical historical information relating to the performance of the business, including dilution rates. Otherwise, there was no "true position", nor was any relevant information concealed from S&G.

10 As for the PwC report, it says that S&G made no further requests for any further material having received volume 2 of the PwC report, and that upon its proper construction it did not constitute a criticism of Quindell's forecast dilution rate assumptions as alleged and that, in any event, as S&G was carrying out the same sort of analysis internally as had been carried out by PwC in respect of dilution rates, with the same source information, receipt of the PwC report in that regard would have plainly made no difference to its decision to enter into the transaction.

11 It asserts that S&G at the time boasted, in clear terms, including in regulatory announcements to the Australian Stock Exchange, where it is listed, following the transaction, that the acquisition was carried out in circumstances where Quindell and its accounting policies had been publicly criticised, in particular in the financial press, and that S&G had accordingly not relied upon Quindell's accounting policies, including the underlying assumptions, nor on the opinions of Quindell or Mr Fielding. Instead, it is said that, as S&G explained to its investors, it carried out a "bottom-up, fundamental assessment of [the PSD]" based on "first principles" which John Skippen, the non-executive chairman of S&G, later referred to as "the most rigorous due diligence I have ever seen".

12 Watchstone also takes issue with S&G's case as to the value of the business it acquired in this regard. It has just served its report from its expert, Doug Hall, a partner and head of forensic services at Smith & Williamson, who opined that the

actual value of the PSD at the time of the transaction was around £618 million. Further, he says that the claimant's expert's report, which opines that the business was worth £40 million, is based on a model containing a number of fundamental flaws which, when corrected, would lead to an adjusted valuation of around £642 million.

B. THE ACQUISITION AND THE ROLE OF THE THIRD PARTY ADVISERS

13 S&G and Watchstone commenced discussions in relation to the potential acquisition (codenamed 'Project Malta') in November 2014. On behalf of S&G, negotiations were led by Andrew Grech and Ken Fowlie, then Group Managing Director and Executive Director respectively at S&G. On behalf of Watchstone, negotiations were led by David Currie, a Non-Executive Director and Interim Chairman of Quindell. Mr Currie is a partner in Codex Capital Partners LLP ("Codex"), who advised Watchstone prior to and in respect of the acquisition.

14 In or around the time of the negotiation of the acquisition, and as one would expect in a transaction of this size, both parties engaged a number of third party advisers. For its part, S&G was represented by *inter alia* Citigroup, Greenhill and Ernst & Young. In December 2014, Watchstone announced to the market *inter alia* that growth in cash receipts in the final quarter had not been as significant as anticipated and that PwC had been engaged by it to carry out an independent review. This review included "expectations as to cash generation into 2015".

15 Following an initial meeting between S&G and Watchstone on 27 November 2014, it is common ground that Watchstone put forward a proposal for S&G to purchase a number of client files owing to cash flow issues that Watchstone was experiencing at the time. That led in due course to an "advance purchase agreement", ("the APA"), concluded on 31 December 2014, whereby Watchstone agreed to transfer circa. 6,000 cases to S&G in return for an upfront payment of £12.1 million. The agreement also dealt with exclusivity and the due diligence that was to be carried out on the acquisition, which took place in the period from December 2014 to March 2015.

16 The price for acquisition of £637 million, plus a deferred element on hearing loss cases, was provisionally agreed between Mr Grech and Mr Currie on 22 February 2015. For their own particular reasons, each of the parties suggest that this was, in whole or in part, a "horse trade", informed on S&G's side, says S&G, by its modelling work as to the PSD's maintainable earnings and the representations allegedly made by Watchstone during the due diligence process. S&G say that in Watchstone's defence, which gives an account of the negotiations between Mr Grech and Mr Currie, there is no suggestion that Watchstone was unhappy with the price it agreed nor that it sought £700 million, as features in the proposed amended defence and counterclaim, as I will come onto.

17 The share purchase agreement itself was subsequently ultimately signed on 29 March 2015.

C. THE ALLEGED GREENHILL/PWC BACK CHANNEL

18 At the start of the disclosure process, the parties agreed that each would contact its own third party advisers to see if they would provide voluntary disclosure which, once reviewed, would fall within the scope of the relevant party's standard disclosure obligations. S&G was unable to reach agreement with Greenhill as to the terms under which such voluntary disclosure would be provided and, given that Greenhill's

documents were therefore not going to be before the court at trial, Watchstone took up the mantle and agreed to pay the costs of the voluntary disclosure which Greenhill agreed to provide. The documents were, as the parties had agreed, provided to S&G first for it to review for privilege before being passed to Watchstone just over a month ago, on 19 July 2019. Over 10,000 documents were provided and these were processed and reviewed as quickly as possible by Watchstone.

19 In the course of reviewing Greenhill's disclosure, thus provided, Watchstone came across a series of email exchanges which Watchstone say shows that Greenhill had established, on behalf of and for the benefit of its principal, S&G, a secret back-channel with PwC ("the PwC back-channel"), by which it obtained confidential information in relation to Quindell, not least PwC's view as to the time at which it would run out of cash. The emails in question are set out and quoted from in detail in the draft counterclaim.

20 In summary, Watchstone say that the document shows the following: First, that one of the main players in orchestrating that channel was a Gareth Davies, who worked for Greenhill as Head of European Restructuring and was a Managing Director in England. After initially considering, together with Mr Fowlie and Citigroup, whether information about Quindell could be obtained by establishing a secret channel with Quindell's lending banks, he arranged to meet with a contact of his at PwC, who he described as "the Head of Restructuring" and the "lead partner" advising Quindell. Mr Davies then fed the information thus obtained back to the Greenhill team in Australia, who were advising S&G.

21 It is said that the Greenhill operatives in Australia, who were working on the transaction, including a Mr Bordignon, who is a witness for S&G in these proceedings, and Ms Michelle Jablko, then Managing Director and Co-Head of Greenhill in Australia, who is now Chief Financial Officer at Australia and New Zealand Banking Group Limited (ANZ), gave specific instructions to Mr Davies as to the sort of information that they wished him to find out, including specific commercially and price sensitive matters relating to the wider Quindell group. When he reported back with the information, following the meeting, Ms Jablko said that it was "extremely helpful".

22 Watchstone points out that the parties to these exchanges regularly remarked on the need to keep it secret from Quindell, indicating that they were well aware of the illicit nature of what they were doing.

23 Watchstone says that S&G were responsible for their agent. However, in addition, they also say that there is evidence of direct knowledge and authorisation on the part of S&G's key witnesses, and in particular submit that one of the email exchanges suggests that Mr Davies' note of the interaction with his contact at PwC in January 2015 would be shared with Mr Fowlie. Michael Lord, of Greenhill, who was due to be meeting with Mr Fowlie, agreed to hand it to him in hard copy, with strict instructions not to distribute it further. In the same exchange, Mr Davies invited Mr Lord to ask Mr Fowlie if there was "anything he wants to raise with PwC" and that Mr Davies could do it the following week.

24 In another exchange, in the period directly before the negotiation of the price for the PSD, Ms Jablko said that she had discussed with "Andrew", which it is said, in context, must mean Andrew Grech, whether to ask Mr Davies to "check back in" with his PwC contact "to see what Intel you can gather". It appears from the emails that such further contact, says Watchstone, was arranged. Ms Jablko told Mr Davies that "we want you

to speak to PwC" and Mr Davies replied that he would arrange to meet PwC face to face on Monday, 23 February 2015 because "over the phone won't be easy". Mr Davies then told Ms Jablko, on 27 February 2015, that he had "an excuse to sit with PwC soon and we will come on to the debate re [Quindell]".

25 Watchstone also says that upon revisiting S&G's disclosure in the action in the light of those email exchanges, confidential information thus obtained by S&G formed part of S&G's negotiation tactics and strategy, referring, by way of example, to a reference to "PwC intelligence" under the heading "Tactical Considerations" in the strategic analysis prepared in draft by Greenhill for S&G, into which, it is said, Mr Fowlie had input, which subsequently appeared in S&G's board pack, which Mr Grech and Mr Fowlie prepared, incorporating that analysis. I should say that Watchstone's interpretation of some of these exchanges and documents is very much not accepted by S&G, as was stressed before me today by Mr Salzedo, leading counsel for the claimant.

26 Watchstone submits that the "PwC back channel" was in breach of PwC's express and equitable obligations of confidence to Quindell, and the existence of those obligations was or ought to have been known to S&G who, together with Greenhill, procured their breach.

27 Watchstone, it says, had not been made aware of the PwC back channel by S&G or, indeed, by PwC or Greenhill, including in S&G's disclosure and witness evidence in these proceedings. That is said to be notable in circumstances where, firstly, Watchstone alleges that at least three of S&G's key witnesses in these proceedings were aware of these matters contemporaneously and, secondly, in these proceedings S&G is accusing Watchstone of dishonestly concealing pertinent information from it, including by refusing it access to PwC and by mischaracterising the nature of the work that PwC were carrying out.

28 Watchstone's position is that, firstly, these matters are serious, and clearly of relevance to these proceedings, and should not have been kept from it until now. Secondly, that if it is aware of them there can be no principled objection to it relying upon them in these proceedings by way of both defence and counterclaim. It is said that there would be clear and significant prejudice to Watchstone if it is not permitted to make the amendments which it seeks and that there is no, or no relevant or sufficient, prejudice to S&G if such amendments are allowed.

29 As to case management, it submits, firstly, that these are matters which, regardless of the counterclaim, are now going to form part of the coming trial. Secondly, in order to avoid wasted court time and costs, and the obvious risk of inconsistent judgments, the counterclaim should be tried together with the main claim. Thirdly, Watchstone has moved quickly to bring these matters before the court, which can all be accommodated within the trial, which, as I foreshadowed, is listed to run for nine weeks starting on 21 October, and in this regard it has proposed directions and revisions to the trial timetable to that end. I should also say that, as a result of the submissions made before me and the debate in relation to that timetable, I have also made enquiries of Commercial Court Listing which has indicated that it would, if necessary, be possible to release some Fridays within that trial timetable. Another possibility is that that trial timetable, which currently runs up to the end of the Michaelmas term, could, all the evidence having finished by that time, have some aspect of the closings dealt with at the start of the following term, which would be the beginning of the judgment writing time for the trial judge.

30 Fourthly, it is submitted that to the extent that S&G now has to deal with such matters expeditiously, it lies ill in the mouth of S&G to complain, given the nature of the matters in issue as well as to how and when they were first revealed to Watchstone. It is said that if any party has cause to complain about having to move swiftly, it is Watchstone.

31 Fifthly, it is said that S&G's overarching refrain is, in effect, that this is a "storm in a teacup" and that the information gleaned was irrelevant to its evaluation of the PSD and the price it paid for it. If that is the case, and the amendment is allowed, then it follows then all the more readily should S&G be able to be ready and thus required to address such matters at the forthcoming trial.

32 And, lastly, the overriding objective of dealing with cases justly and saving costs comes down overwhelmingly in favour of the approach which Watchstone commends to the Court.

33 The amendment application as a whole, and the proposed directions, are contested by S&G. It submits that the draft amendments are unarguable and permission should be refused under CPR 20.4(2) and/or 17.1(2) for all or any of the following reasons. First, it is said that the allegedly confidential information was known to S&G in any event. Secondly, there is no arguable case that any use of the supposedly confidential information made any difference to the negotiations or caused Watchstone any, let alone the alleged, loss. Thirdly, it is said that the amendments are inconsistent with Watchstone's witness evidence for trial and it is also said that the plea of conspiracy, in its current form in relation to the position of PwC, is demurrable.

D. APPLICABLE PRINCIPLES IN RELATION TO AMENDMENT

34 The principles on applications to amend are well known. For the amendments to be allowed, Watchstone must show that they have a real, as opposed to a fanciful, prospect of success which is more than merely arguable and carries some degree of conviction. A claim does not have such a prospect *inter alia* where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance and (b) the claimant does not have material to support at least a prima facie case that the allegations are correct (see e.g. *Elite Property Holdings Ltd & Anor v Barclays Bank Plc* [2019] EWCA Civ 204 at [41]). In this regard:

> "The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents." (*Elite Property* at [42]).

S&G submits that this applies to the proposed amendments.

35 By way of riposte, Watchstone say that nothing could be further from the truth and the documents speak for themselves and show clearly a prima facie case of breach of confidence and inducing of breaches of contract.

36 The authorities that I have just referred to are well-known and are also highlighted in volume 1 of the **White Book** at para.24.2.3 on p.779.

37 However, it is also important to bear in mind, as was common ground before me, that when one is considering an amendment and the question whether there is a real prospect of success, one is actually doing a similar exercise as one would be doing on a

claim for summary judgment or setting aside a judgment in default, and the principles that apply are the same. That must be right because cases such as *Swain v Hillman* [2001] 1 All ER 91 and *ED&F Man Liquid Products v Patel* [2003] EWCA Civ 472 are in such contexts rather than permission to amend and also address whether there is a real prospect of success. It also means that the authorities in that context, which are stressed repeatedly, about the nature of the exercise that should be undertaken on a summary judgment application, have equal force and weight in relation to an application to amend. Thus, the commentary in the **White Book**, supported, as it is, by the various authorities referred to, is also apposite on an application for permission to amend:-

> "The hearing of an application for summary judgment is not a summary trial. The court at the summary judgment application will consider the merits of the respondent's case only to the extent necessary to determine whether it has sufficient merit to proceed to trial. The proper disposal of an issue under Part 24 does not involve a court conducting a mini-trial (per Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91). How the court decides whether a defence is real without conducting a mini-trial has led to a series of unsatisfactory cases now hopefully concluded by the clear statements of authority in *Three Rivers DC v Bank of England (No.3)* [2001] 2 All ER 513, HL (a summary judgment application; see especially, the speech of Lord Hope of Craighead at paras 94 and 95) and *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 (a set aside application; see especially paras, 9, 10, 11, 52 and 53 in the judgment of Potter LJ)/ At a trial, the criterion to be applied by the court is probability: victory goes to the party whose case is the more probable (taking into account the burden of proof). This is not true of a summary judgment application. 'The criterion which the judge has to apply under CPR Part 24 is not one of probability; it is absence of reality.' (Lord Hobhouse of Woodborough in *Three Rivers DC v Bank of England (No.3)*, supra."

E. THE PROPOSED AMENDMENTS

38 There are proposed amendments both in relation to the defence and in relation to a new counterclaim to be introduced. In that regard, the first of the amendments that is made is to paragraph 134 of the Defence. Paragraph 134 is responding to paragraph 99 of the Particulars of Claim in which reliance and inducement on the alleged fraudulent misrepresentations is made. Paragraph 134 begins:

> "Even if (which is denied) the Representations amounted to actionable representations, S&G did not rely upon them nor was it induced by them, either individually or collectively. Pending disclosure Watchstone relies in particular on the following facts and matters."

Then at sub-para.(5) it is proposed to amend to add at the end as follows:

> "S&G's use of the PwC back-channel set out in the Counterclaim below shows yet further that S&G did not rely upon the matters that it invokes."

39 The second proposed amendment to the Defence is to make a plea of equitable set-off which introduces a plea at paragraph 173:

> "Watchstone is entitled to and seeks to set off so much of its Counterclaim herein as may be necessary in extinction or diminution of the Claimant's claim and from that reference to the Counterclaim incorporate therein the contents of that Counterclaim into the Defence."

40 And then under the Counterclaim there is, as is normal, a repetition of the amended Defence, and then at paragraph 175 the Counterclaim provides:

> "Watchstone counterclaims against S&G damages for breach of confidence, inducing breach of contract, and conspiracy. It does so on the basis that, at S&G's behest and/or on its behalf and/or with its knowledge and authorisation and/or ratification, its agent Greenhill established a 'back-channel' with PwC, Quindell's trusted adviser, by a series of secret meetings between representatives of Greenhill and PwC, at which it unlawfully obtained information pertaining to Quindell which was, and which it knew to be, confidential. S&G (and Greenhill on its behalf) then factored that information into its tactics and strategy for the negotiations with Quindell leading to the Acquisition which is the subject of these proceedings, thereby gaining an unfair advantage in the negotiations, which it exploited in order to purchase the PSD at a lower price than it would otherwise have had to pay. It thereby planned to and did cause Quindell to suffer significant loss."

41 There are then sections of that Counterclaim dealing with the PwC retainer and the duty of confidence, a section which deals with S&G's alleged knowledge of that retainer and the duties of confidence, a section that then deals with the alleged back channel between Greenhill and PwC, which goes through the email correspondence that I have already foreshadowed and will return to in more detail in a moment. There is then a section which alleges that there is evidence which supports a conclusion that there were secret meetings between Greenhill and PwC in January 2015. Some of that involves inference from the email traffic that has now been disclosed. Then there is a section on confidential information disclosed through that back channel, which includes (but is not limited to) that Quindell was predicted to run out of cash in "mid-15", which is defined as the "confidential cash information". There are then other sub-particulars identified, one of which relates to Plan A, one relates to Plan B, and the other one relates to the question of how much Quindell was internally hoping to receive.

42 After this there is a section F, entitled "Use of confidential information in S&G tactical considerations", which essentially assert, with the particulars there given, that that confidential information, as so defined, was then used by S&G and its advisers in relation to the tactics and strategic planning for the negotiations leading to the acquisition. And that addresses both the email traffic and also slides entitled "Discussion" and materials which contains reference to PwC intelligence in more than one slide, and the final version of a board pack which refers to "PwC intelligence".

43 There is then a section, "Causes of action", where the causes of action are pleaded out. They are foreshadowed at the beginning of the counterclaim as being, firstly, for breach of confidence; secondly, for inducing breach of contract and, thirdly, for unlawful means conspiracy. In relation to unlawful means conspiracy, a point is taken by Mr Salzedo QC for the claimants in relation to para.212(4), where it is currently pleaded:

> "The intention of S&G and/or Greenhill, acting through the persons identified above, was to improve the negotiating position of S&G vis-à-vis Quindell, and

> therefore to cause loss to Quindell by securing a lower purchase price for S&G in respect of the proposed transaction."

It is said there is no positive plea in relation to the intention of PwC. However Mr Lord QC, who appears on behalf of the defendant, Quindell, has identified before me orally today that, in fact, the intention was, and should have been, to include the words "and/or PwC" after "Greenhill", and he has applied for permission to do so as part of the application that is before me today.

44 There is then section H, entitled "Loss and damage", which deals with the quantum that is claimed. In summary, at paragraph 220, it provides as follows:

> "At present, Watchstone contends that the difference between the initial cash price paid and £700 million, i.e. a sum of £63 million, would be a conservative assessment of the loss suffered by Quindell as a result of S&G's wrongdoing. Watchstone reserves the right to seek an alternative amount should further disclosure or evidence reveal a different or more precise means of evaluating the loss."

F. THE BLACK HOLE CORRESPONDENCE

45 The story in terms of correspondence dates back to December 2014, although it appears that at that time any reference to a "back channel" was to do not with PwC but possibly with the banks. In that regard, there is an email from Michelle Jablko to Gareth Davies, copying in other people including Mr Bordignon, addressing an email that Gareth had sent on 29th about, amongst other matters, whether or not to contact the banks, and Mr Davies says:

> "Aren't S [that is the claimant, S&G] under an NDA [a non-disclosure agreement] preventing us from speaking to the Banks?"

To which Michelle Jablko responds:

> "Thank you, Gareth. I don't disagree with any of your points, although I think at the right time a back channel would be useful."

Although, as foreshadowed, it is clear, in context, that this is a reference to the banks, not to PwC.

46 In that same email chain, later on the same day, there is an email from Gareth Davies to Mr Bordignon and Ms Jablko saying:

> "Btw, I'm not being difficult and more than happy to help it is just a suggestion/observation that IF the board continues to play ball get DD [due diligence] done then start to be very aggressive depending on what we know about the real position rather than our perception – e.g. if we find they are in a real corner we can take them to the cleaners, possibly directly or via the Banks. Hopefully DD can be quite quick as don't want to leave bank discussion too late bit you should assume (worst case – but realistic case) that as soon as speak to the Banks the company will hear and might go native or at least start to be more suspicious about intentions. Keep friends for now whilst educating ourselves then stuff them is my general approach."

At that stage this is clearly addressing the banks in the earlier correspondence, but I see no reason why it is not arguable that the sentiment expressed in that email would apply equally if, contrary to the obligations of PwC, PwC were to share with them confidential information.

47 There is then the injection of cash and on 13 January, Mr Davies emails Mr Wyles and Michelle Jablko, subject "Project Malta news update", saying the following:

> "Fyi, I am sitting down with the head of PwC restructuring who I know very well to have a quiet coffee – time TBA – he claims to be advising the company! Will report back."

Mr Lord draws my attention, in particular, to the exclamation mark and the fact that it appears that what is contemplated is that a PwC representative, who clearly is subject to a retainer in favour of Quindell, is contemplating having a coffee and a discussion about the matters with someone who is on the other side of the fence.

48 On 14 January there is then an email from Michelle Jablko to, amongst others, Nicholas Bordignon and Gareth Davies, in which she says:

> "Thanks, Gareth. This will be very helpful. I would like to understand more about what it is they are being guided to do (eg support current WIP valuations, support cashflow estimates, etc.), and also do they know of any other things Q is working on (capital raising) etc. Many thanks, Michelle."

That is in response to an email chain that had begun earlier on in the day from Gareth Davies, where he had said:

> "I am having a quite (sic) coffee with the lead partner from PwC tomorrow evening - list of questions?
> - views on accounting?
> - position of banks/general liquidity?
> - plan for the new team? (were they brought in by Tosca or with their support)
> - appetite for S&G?
>
> We can assume it will go no further."

Those words suggest that what is going to be said is going to be kept confidential between Mr Davies and the PwC representative and not shared with PwC's client. It is in response to that, that we firstly get the response of Ms Jablko, that I have just identified, but also a response from Mr Bordignon, who says:

> "That will be very helpful, thanks."

And he also says:

> "Some other potential questions:
> - views around timing of completing the report, whether the banks will release the report
> - quality of management, views on management's objectives
> - internal chatter around timing of the Malta process (assuming they see a potential for a deal, is it a near term prospect or do they think it will be dragged out by Q)".

So it is quite clear, I am satisfied, from this series of emails that what is being envisaged is that potentially confidential information will be sought from PwC in relation to the position of Quindell.

49 The central email on which Quindell place reliance, as the bedrock of their case in relation to the amendments that are sought to be made, is an email that follows on 16 January, at 5.58am, from Gareth Davies, it appears following just such a meeting between Mr Davies and a representative of PwC. That email is an important email and I bear in mind its contents as a whole, but it suffices at this point to quote particular passages from it. It begins "Please keep confidential", and then there are a series of bullet points:

> "- Pwc were put in by RBS.
> - Initial plan was for them to work with the banks, but they went company side as debt was small and value clearly breaks in the equity.
> - Report was mainly cashflow focussed, with a bit on accounting policies – as he said slightly academic sticking to accounting policies if not generating any cash.
> - **Conclusion – running out of cash mid-15**; accounting aggressive on hearing loss side, RTA ok …
> - Questioned why not by the whole plc? As the bits we don't want are small and easily separable or shut down (as to their value who knows but telematics fascinating technology, cost a lot to buy and could either be worth a fortune or next to nothing – sells for + 30m could be 200m today and ???m tomorrow)
> - S is definitely Plan A in DC's mind – whether new team think differently he doesn't know
> - Plan B is a fundraising via Tosca/M&G …".
>
> (emphasis added)

50 I consider that it is well arguable that Gareth Davies, when heading that document "Please keep confidential", is aware that there is a confidential relationship between PwC and its client, Quindell, and that the subject matter of the matters discussed, which are there set out in that email, are matters which are subject to confidence and that in sharing that confidence PwC are breaching their obligations that are owed, at first blush, to Quindell. It is clear that, even though this was at a time when there already had been, as I foreshadowed, a cash injection by S&G, that this information was regarded as extremely helpful. I say that because one of the responses to that message from Michelle Jablko was, "Gareth thank you this is extremely helpful". Equally, it is clear that Michael Lord, at Greenhill, thought that this was something that should be passed on to their client, Ken Fowlie, because he sends an email to Gareth saying, "You are referring this one for Ken?", to which the response received from Gareth Davies to him is:

> **"Yes. Just stress to him not to pass on pls**. If there is anything he wants to raise with PwC I can do it next week." (emphasis added)

I am satisfied that there is at least a good arguable case in relation to this that first, what is contemplated is that this information will be passed on to Mr Fowlie and, again, in that context it would be stressed to him that the information is confidential and, secondly, that the implication is that that is confidential because it is information that S&G should not have or, at the very least, that S&G do not wish Quindell to know that they have acquired via PwC.

51 There was also, on 16 January, from Gareth Davies to Michael Lord, the following – an email that provides:

> "Can you give him a copy of the note from last night. **Ask him not to send it round pls".**
> (emphasis added)

That suggests that there may have been a note in relation to that meeting and it is again stressed that that is not to be sent round which supports the submission that the information is known to be confidential. Below that there is an email to Michael Lord, which precedes that message and to which that was a response from Michael Lord, in which he says:

> "Fyi, I'm meeting with Ken at 8.30am before the meeting starts tomorrow morning."

52 On 18 January there is an email from Michael Lord to, amongst other people, Ms Michelle Jablko and Gareth Davies which provides, amongst other matters:

> "PwC – **on the back of Gareth's insights**, Ken [that is Ken Fowlie] was to ask Grech [that is Andrew Grech] over the weekend if there was merit in progressing/encouraging an interaction (at least between EY [that is Ernest Young] and PWC) over their report."
>
> (emphasis added)

Then on 16 February there is an email from Michelle Jablko to, amongst other people, Mr Bordignon and Gareth Davies, subject "Meeting with Hugh", which provides, amongst other matters:

> "We landed on let's continue to be friendly this week to get as much information as we can – Citi is speaking to Lee to see if EY can still get the info they are after from PwC. **Gareth, we might ask you to reach out to your contact** (it may be worth a conversation ahead of them finalising their report – although I would wait until later in the week)."

53 Then on the following day, 17 February, there is an email from Ms Jablko to Gareth Davies and David Wyles which provides, amongst other matters:

> "Gareth I discussed with Andrew [that is Andrew Grech] today whether it is worth you checking back in with your contact at PwC to see what Intel you can gather. Nick and I will give you a call to discuss."

Then on 18 February, the following day, Gareth Davies sends an email to Ms Jablko saying the following:

> "I will arrange a time to sit with PwC on Monday. It is better face to face as over the phone won't be easy. We can speak today."

Also, on that same day, there is an email from Ken Fowlie to, amongst other people, Mr Bordignon and Michelle Jablko, headed "Re Malta working draft board doc", which provides, amongst other matters in relation to various slides:

> "Slide 27. I understood our **latest intelligence** to suggest that Q won't necessarily have much from PWC by 25th. Don't know if that changes the commentary."
>
> (emphasis added)

Again it is suggested that at least one interpretation of those words is that he is, indeed, referring to intelligence from PwC through the illicit gateway which it is alleged has been set up. In this regard, I am also referred to a subsequent email from Gareth Davies on 27 February.

54 I have taken it out of order but, in fact, there were also various discussion material prepared by Greenhill (which I have already alluded to), although there was an issue as to what, if any, use was ever made of those. One of those is headed "Situation overview" and the second heading is: "PwC intelligence", and it includes, amongst other matters:

> "Cash deficit in mid-2015 if business continues to operate on the current basis."

And also, under a heading "Should S&G submit a proposal in the near term", under the heading of "Delay proposal", it provides:

> "**Intelligence** suggests that Quindell's cash position may deteriorate over the medium term potentially increasing S&G's leverage." (emphasis added)

There is also a document prepared by Mr Grech and Mr Fowlie for discussion, the subject matter being "Project Malta Board Report", and as part of that very lengthy document, there is a heading "Tax considerations", and one of those, under "Context", refers to "**PwC intelligence**".

55 Quindell says, relying upon that material, which, as I say, is pleaded out at length in the Counterclaim, that there is very much more than a real prospect of success on the Counterclaim and that, firstly, there is confidential information which has been wrongly shared by PwC with Quindell via its agent or at least the agent has acquired that information, and that such information gives rise to the various causes of action that are pleaded, i.e. a breach of confidence, an inducement of a breach of contract on the part of S&G inducing PwC to breach their retainer with their client, and also that gives rise to an actionable conspiracy.

56 I consider that that material, on its face, does give rise to very much more than a real prospect of success in relation to the causes of action which are identified. In particular, the email at p.158 of the bundle, which is the email from Gareth Davies on 16 January, clearly contains information which, on its face, is prima facie confidential and it is known to be confidential, and the emails that follow and the contents of those emails show that all those concerned within Greenhill are well aware that what was being done is something that is not appropriate. It would be surprising, in those circumstances, in particular considering the earlier emails that I have referred to, including that on 30 December, which show the attitude of those acting on behalf of S&G to information that can be used to their advantage, that such information was not used to the advantage of the Claimant.

57 Against what, therefore, appears to be a good arguable, if not strong, claim for breach of confidence and also for inducing a breach of contract and for conspiracy, which is

recognised, at least at first blush, to be a case that requires answering, Mr Salzedo submits that, in fact, there are three points which show there is not, on a more detailed consideration, any arguable cause of action. Those three points are set out in some detail in section C of the Claimant's skeleton argument and have been elaborated upon orally before me today by Mr Salzedo. The first of those is that the alleged confidential information was known to S&G in any event, therefore it is not confidential even if shared with the agents; secondly, there is no arguable case that any use of the confidential information made any difference or caused any loss and, thirdly, that it is inconsistent with Watchstone's witness evidence. There is also the point made about the adequacy of the contemplated conspiracy plea.

58 The first of those, therefore, raises a question as to whether or not that information which was supplied was confidential. I consider that it is well arguable that that information was confidential. I consider that the submissions advanced on behalf of S&G gloss over the nature of the information and the difference between knowing in general terms that there are cash issues being experienced by a particular entity and being privy to a commercially sensitive analysis from the other entity's accountant which suggests that the group is running out of cash by a specific date. There is, in my view, a world of difference between one which is general and the other which is specific.

59 Secondly, the access to information between PwC and its client is, by its very nature, at least at first blush, confidential and that can be tested by reference to the chronology of events which I have identified. What that shows is that even after the injection of cash to ease the cash flow, the reaction of Greenhill to this information being shared by PwC is that it is extremely helpful and it would not be extremely helpful or leverage if all this information was in the public domain and was available from other sources. If such information was all in the public domain it would be somewhat surprising that the reaction is not only that it is helpful but that it is "extremely" helpful and I consider that that series of email correspondence shows, on its face at least, that such material was considered to be commercially confidential. It is tracked through not only in that email correspondence but, also to the long briefing note that I have referred to, and that expressly refers to the "intelligence". As already foreshadowed, I consider that there is a world of difference between knowing in general terms about cash flow problems and knowing specifically when it said by PwC to be coming home to roost. One would also expect that such material would be used in commercial negotiations, information which it appears that Greenhill, at least, were very keen to keep secret and not to make the actual client of PwC aware of because, of course, if the client was aware that PwC had shared this information then the commercial benefit of that unknown bargaining chip would be lost.

60 I consider that the matters identified by Mr Salzedo, which he develops at some length and with some force, are all matters which are really matters for exploration at trial. They are points that can be raised both in the responsive pleading and also can be explored with the witnesses that are going to be called. The exercise that I was taken through, which I have given careful consideration to, essentially invited me to embark upon a mini-trial in order to reach a conclusion on the merits. I consider that that would be wrong as a matter of principle and that the case in relation to the information being confidential is far from being shadowy or contrived or not being arguable. It may or may not be that in due course at trial it is possible to establish that it is confidential information, but I consider that it passes the threshold test of whether there is a real prospect of success, a case that is more than merely fanciful, by some considerable margin, for the purpose of the application to amend.

61 The second point that is made is that the use of the confidential information is not said to have made any difference or caused any loss; in other words, that there is no arguable case that the use of the confidential information caused any loss. A number of points can be made in this regard. The first, which I have already foreshadowed, is that in my view the inherent probability, certainly for the purpose of an application to amend (and I say nothing about the overall merits which is a matter for trial), is that a company in the position of S&G, acting commercially rationally, having procured valuable sensitive information, which on this premise it has, would seek to use that material to their advantage. Again, whether or not that is the case is a matter that can be explored at a trial.

62 Secondly, that inherent probability is, in my view, supported by the documents which I have referred to as they show that PwC intelligence did, in fact, feature in the internal negotiation documents and strategy work that was done by Greenhill for S&G. By that I have in mind, in particular, the board packs and the slides. How much effect that ultimately had is, I consider, a matter for trial but it certainly appears to have featured in the internal negotiation and strategy documents which it might be thought is what one would expect a party to do having acquired what, on any view, appears to be information from a source within an entity on the other side of the fence. The logical conclusion would be that unless there was any disavowing of reliance on that evidence, and there is nothing before me in the documentation I have seen which shows that S&G or, indeed, Greenhill disavowed any use or reliance upon this material – in fact, very much the reverse given that there was a stress on the part of Greenhill to keep it confidential – the obvious inference would be that it would be used for leverage and that is the very reason why it has been suggested that it be kept secret because any leverage would be lost.

63 So I consider that there is a good arguable case that any use of the confidential information may have made a difference and could have caused loss. Whether that is so or not is ultimately a matter for trial. Of course, and as is candidly recognised by Mr Lord, the question as to whether or not at trial his clients will be able to prove, assuming that the other ingredients of the cause of action are proved, that a loss in the amount claimed is actually suffered will be a matter on which they bear the burden of proof and it may well be a challenging matter for them. Nevertheless, there is material that is before me which suggests that S&G were potentially prepared to pay more than they did, in fact, pay. Amongst other matters, there is an internal note of 23 February 2015 which says, amongst other matters, "Maximum price? – (700)". So there is at least some evidential material, that S&G may have been willing to pay more.

64 If one then factors in the evidence I have identified in relation to that, one can well see how, with that matter being explored in cross-examination and with the benefit of whatever evidence emerges, bolstered by the existing documentary material and any other documentary material that may emerge, it may be possible for the Defendant in their Counterclaim to prove loss in the amount claimed. Certainly, I consider that they have at the very least a good arguable case in relation to that element as well.

65 The third ground on which it is said that there is no real prospect of success is in relation to an alleged inconsistency with Quindell's existing witness statements, in which it is averred that S&G were well aware of the cash flow issues and that PwC's views on cash flow were neither sensitive nor confidential and that there is no evidence of a hard bargain being driven. In order to make good that point, it was necessary for Mr Salzedo to take me to a number of paragraphs both of the existing pleadings and

also to a number of the existing witness statements. I consider that, once again, this is straying into matters which will need to be explored at trial, and it is not appropriate for me to undertake a mini-trial. If, however, I am to delve into the detail of the existing evidence and individual paragraphs of the pleadings, I consider that S&G's approach ignores, in particular, an important paragraph in Mr Aston's existing witness statement, which is paragraph 40, where the sensitivity in relation to the group cash position is expressly attested to. I consider that that is an important point because it shows that even before this issue arose, there was a particular sensitivity of the defendant to what the group cash position was as opposed to the aspect of the business that was being sold. It seems to me that again those are inevitably matters that would need to be explored at trial, particularly given that at the time that these statements were actually written the material that is now available was not known to be available and will need to be explored in evidence.

66 I consider that in the circumstances I have identified, none of the points that are made by way of objection to the amendments being made have any force. I do not consider that there is any absence of reality to the proposed amendments, applying Lord Hobhouse's words in *Three Rivers*, and in fact, in order to reach a conclusion on particular points it would be necessary to engage in the minutiae of the witness evidence and, in effect, conduct a mini-trial, something that, it is quite clear from cases such as *Swain*, is not appropriate.

67 In such circumstances, I consider that there is a real prospect of success in relation to each of the amendments that is sought, that is both those in relation to the Defence and in relation to the Counterclaim, and I grant permission to amend in relation to each of those. I should say that, in addition to those points, there are distinctions between the points raised in the Defence and the points raised in the Counterclaim.

68 In relation to the points raised in the Defence, I consider that the email traffic that I have identified does, indeed, go to the question of reliance and is not simply a matter going to credit of the witnesses concerned. That that is so , and that it is relevant to the pleaded issues, is shown by the fact that Mr Fowlie, in his second witness statement, that is of 3 May, long before the proposed new amendments, deals with the position in relation to PwC. In particular, I have got in mind paras.81, 112 and 137 of his statement. Those paragraphs, which address what was or was not known in relation to PwC, certainly give the impression at first blush that the comments being passed are with the benefit of hindsight, for example, and I am looking at para.137, when it is now known that, in fact, their agent at least – and there is an arguable case not just their agent – knew rather more about what PwC were doing than it is here being suggested. The very fact that Mr Fowlie is addressing this matter in his witness statement for trial shows that information in relation to PwC, and what PwC were telling their client, is of relevance to the pleaded issues in the case so it goes not only to credit but also to reliance.

69 I consider that it is inevitable that the matters which form the subject matter of the amendments would be raised, and the Defendant would be entitled to raise them, when cross-examining the Claimant's witnesses, in any event. Ultimately, Mr Salzedo did not demur from that although he denied that it went to reliance and said it went only to credit. The reality is, therefore, that those matters will be before the trial judge in any event. There is at least an arguable case, I consider, that it does go to reliance and not simply to credit, and, therefore, it goes to pleaded issues in the case, and the learned judge will have to make findings if he considers it appropriate in relation to such matters. I consider that it would be inherently unattractive if the judge was doing that

in a vacuum where he did not have the full pleaded case in relation to such matters, not least in circumstances where, if it is relevant to pleaded issues, issue estoppel could arise which could then cause difficulties if the counterclaim was dealt with at a later time, which I am going to come onto in due course.

70 I consider, therefore, that the first amendment is an *a fortiori* amendment and that permission should be granted in relation to that. In relation to the second amendment, that is the one relating to equitable set-off, again, if the plea is made good it would be an equitable defence, and would actually extinguish the claim, at least in relation to the breach of warranty claim, and that therefore is a matter which itself should be pleaded. It also seems to me that, in fact, the vast majority of what is set out in the Counterclaim could properly and legitimately be pleaded in the main body of the claim in the context of the pleas in relation to the denial of reliance. It matters not whether it is in the counterclaim or the defence.

71 However, for the reasons that I have given, I consider that equally those amendments which form the subject matter of the counterclaim are matters where there is a real prospect of success, for the reasons that I have given, and, therefore, I give permission both in relation to the amendments to the defence and the amendments to introduce the counterclaim. I should say, for completeness, that it was not suggested that there had been any delay in making these applications and, indeed, it is not in doubt and it seems to me that they were made as soon as they possibly could be made as they arise out of, and only out of, the disclosure which has only recently been given and considered.

72 That, however, is not the end of the debate before me today because it is said that if I do grant permission to amend, on the basis that the pleas are arguable to the requisite level, that from a case management perspective I should not order that that Counterclaim be determined at the same time as the remaining issues in the trial. It is said in this regard – and this is dealt with again at some length in Mr Salzedo's skeleton argument – that, firstly, the Counterclaim can be tried separately; secondly, that the Counterclaim is contingent in nature, and those both go towards saying that the counterclaim can be tried at a subsequent stage. Thirdly, there is a question of the pre-trial steps and the need for further evidence, and that is broken down into statements of case, disclosure and witness evidence.

73 There is also the question of the trial timetable and whether or not the amendments could be accommodated within the existing trial timetable and there is also the fact, it is said, that S&G would wish to raise as part of its defence the activities of a David Ravech, who was engaged by S&G as a consultant in the transaction but was also a shareholder in Watchstone and, as such, stood to profit from the transaction. He is referred to by Watchstone in internal emails as their "back channel", and it is said that if, contrary to S&G's case, Watchstone is permitted to pursue the Counterclaim, as I have found they are, S&G would want to raise Mr Ravech's activities in any defence thereto. It is said that, in particular, insofar as confidential information was unlawfully disclosed by Mr Ravech to Watchstone, the Court will need to assess the impact of this on the negotiations.

74 For all those reasons, it is said that the Counterclaim should not be dealt with now as part of a trial starting on 21 October but should be deferred to a subsequent date.

75 Before addressing each of those points in turn, as I will do in a moment below, it is necessary to stand back somewhat from those submissions which are made on behalf of S&G because it will be immediately seen that there is a considerable tension between

those submissions and submissions that were made on behalf of S&G in relation to its opposition of the amendments. A large part of Mr Salzedo's opposition was on the basis that this was, as it were, all a "storm in a teacup" and that, in fact, there was no real substance in these various points. Now, if permission is granted, it is said, however, that there will be an enormous amount of work in terms of further witness statements, further disclosure, etc., which lies uneasily with the primary stance of S&G in opposing the amendments.

76 I consider that there is some substance in that point made by Mr Lord for the following reasons. Firstly, it is quite plain from the detailed and careful manner in which Mr Salzedo has been able to advance matters today, that S&G are in a position to plead out their defence in relation to the Counterclaim and the points made in relation to the Defence as evidenced by both the detailed and, I should say, very lengthy, skeleton argument but also the oral arguments that have been advanced today. Secondly, it is also clear from the witness evidence, in particular Fowlie 4 and Grech 3, that two of the witnesses who will be intimately involved in this further exercise have been able to give quite detailed evidence in relation to that. It is said that that evidence was prepared at relatively short notice but I have not identified any failings within that evidence in terms of the detail with which the matters are addressed. If, in fact, the witnesses had not been confident to say that which they say in those circumstances, I would have expected them to make that clear but, on the contrary, they set out what their position is.

77 Also, I consider that it is important to bear in mind that what they essentially say is that, firstly, they were not aware of this material in relation to PwC or, certainly, that they have no specific recollection of any meetings taking place or the like, and they also assert that they were aware of information in relation to cash flow, etc. in any event. In other words, they track the very points that S&G were raising. It seems to me inherently unlikely, given that that is their stance, that it will be difficult for those S&G witnesses to turn their statements in opposition to the application into supplemental witness statements for the hearing.

78 I also consider that, whilst it is perfectly understandable that the Claimants may wish to consider obtaining statements from other individuals both within Greenhill and potentially elsewhere – for example, PwC (there being no property in a witness) – in circumstances where the apparent evidence of Mr Fowlie and Mr Grech is along certain lines, one would not have thought it would be a difficult or complicated exercise to obtain evidence from further witnesses. I also bear in mind, as I must, the current health condition of the visiting witness who is going to be called on behalf of Greenhill, but there has already been a period of over a month since notice was given on 26 July 2019 in relation to the nature of the case that was going to be advanced, and I would have thought that there is every prospect that it will be possible to obtain further evidence from one or more of the Greenhill witnesses in due course. In any event, at the end of the day their central witnesses are undoubtedly Mr Fowlie and Mr Grech on this aspect and it is clear that they will be in position to provide evidence.

79 I also do not consider that there will be any difficulty in advancing a properly pleaded case within the timescale available, and I will hear submission as to whether or not there needs to be any tweaking of the timetable between now and the trial at the end of this judgment. I have had the benefit of detailed skeleton arguments from the parties and extensive oral submissions (which in fact over-ran their time estimate by a significant extent) from which it is apparent that the issues are already very clear. There are bright lines between the parties as to what their pleaded positions are and I

consider that it will be possible to plead the responsive Reply and Defence to Counterclaim within a relatively short period of time.

80 I am also satisfied, and this is perhaps part of the price to be paid by the Defendant, that Watchstone will be able to respond to that Reply and Defence to Counterclaim within a relatively short period of time and, again, I am willing to hear any submissions on any minor adjustment that will be required to the timetable. But I consider that that is something which ought to be capable of being done. In this regard, I bear well in mind that there are large counsel teams on both sides, that they are represented by very experienced commercial solicitors, and that the sums involved in this case are very substantial. This is a case where the resources are there if they need to be deployed in order to deal with matters relating to pleading and witness evidence, as may be required, within a short period of time.

81 Dealing with the suggestion, firstly, that the Counterclaim can be tried separately, I consider that to be an unattractive submission particularly in light of the fact that the matters involved are going to be raised anyway as part of the Defence, for the reasons that I have given, and, indeed, I have also given permission in relation to the amendment to the Defence. But even leaving aside that amendment, I consider that the trial judge is likely to make factual findings in relation to relevant matters which will give rise to issue estoppels, or potentially give rise to issue estoppels, and it would be inherently unattractive and unsatisfactory for the trial judge not to be in possession of all the evidence, and associated submissions, at the time. It would also result in wasted time and costs if there had to be a separate trial of the Counterclaim.

82 The other danger, of course, which the Claimant plays down but I consider is an important factor, is that there would be a risk not only of delay and increased costs but also of inconsistent findings. In particular, and although any subsequent trial judge would not be bound, of course, by any views expressed about particular witnesses, there would be an inevitable sensitivity about reaching a different conclusion about particular witnesses and their evidence than another Commercial Court judge had reached. In addition I consider that there would be a risk of inconsistent factual findings which could lead to injustice. It is far better that all issues be tried in the normal way at the same time. That, in my view, outweighs the downsides which have been identified.

83 Thirdly, in terms of the contingent nature of the Counterclaim, I consider that it may contingent in relation to the fraud claim but, of course, it does not necessarily follow that the fraud claim will be succeed, and it is not contingent in relation to the breach of warranty claim and the claim for equitable set-off (which would amount to a defence to the extent of that Counterclaim). Again, it is not an uncommon situation that, depending on the outcome of particular issues, other issues may or may not arise for determination but that does not necessarily deter a court from trying all the issues together, particularly where there would be a risk of issue estoppels and/or inconsistent findings if the issues were dealt with separately.

84 In relation to the pre-trial steps and the need for further evidence, I have already foreshadowed my views that in terms of statements of case it ought to be possible, with the teams involved and based on what I have been taken through today, for the Reply and Defence to Counterclaim to be dealt with in short order and, equally, the reply thereto.

85 There is then the question of disclosure. It may be trite but on one level, permission having been granted for the amendments, both parties will come under disclosure obligations in relation to disclosing documentation which is material. That is something that one would have thought would already be in train, firstly, because S&G has known of the claim which is sought to be advanced since 26 July 2019 and has also put in witness evidence in opposition to the application. One would have thought that S&G would not want there to be hostages to fortune in terms of documentation and any potential inconsistency with what is either admitted or averred to by individual witnesses because, of course, that material could potentially be held against them at trial. I would anticipate that some work has already been done on disclosure but, equally, as part of the continuing disclosure obligation both S&G and the Defendant will have to consider their disclosure obligations in the light of the amendments that have been allowed.

86 I consider that the particular points that arise on disclosure, and there has not been the time available today to debate them in detail), are just the sort of points in terms of the practicalities of what further searches need to be done, what search terms should be used, and what custodians need to be adopted, that this Court expects commercial parties to discuss in the first instance and hopefully reach agreement upon. Obviously if issues remain these can be addressed in written submissions or at a further short oral hearing. I would very much hope, however, that will not prove necessary as experience shows that with the cooperation that this Court expects of commercial parties it is usually possible to identify, and agree, appropriate steps to be taken in relation to disclosure.

87 I have also touched upon the question of witness evidence. I can see no difficulty in relation to Mr Fowlie and Mr Grech. So far as Mr Bordignon is concerned, whilst he is currently undergoing treatment, it is contemplated, and no one has suggested the contrary to me, that he is going to be a witness for S&G at trial by video-link, and, therefore, the likelihood is that contact will be possible with him. In this regard if, as one would have thought might well be the case, he is likely to give evidence supportive of Mr Fowlie and Mr Grech, (because if he is not I would not have thought he would be making a supplemental statement) I would have thought that the parameters of a supplemental statement would not be large and also ought to be capable of being addressed by Mr Bordignon without extensive detailed liaison with him. For example, it may be possible for him to agree, if he does agree, with the statements of certain other witnesses. In relation to the other witnesses that might potentially be called, including the likes of Mr Davies, Mr Lord, Ms Jablko and Mr Wyles, quite a considerable amount of time has passed since the points were first raised and I would expect that at least some enquiries have already been put in train but, to the extent that they have not, one would have thought that those matters can be followed up relatively promptly. I bear well in mind that, for example, one of those witnesses, Ms Jablko, is no longer with the company and holds a senior position in another bank, but again one would expect her to be able to give evidence that is supportive of the position of S&G and to be able to do so within the timescale that is foreshadowed.

88 I turn then to the question of the trial timetable itself. This question follows the PTR, which took place in July before Jacobs J, where the time estimate for this trial was increased. Mr Lord has identified space within that trial timetable whereby the time for cross-examining existing witnesses could be increased and accommodated within that trial timetable. I am satisfied that that is indeed the case. It also consider that if a point in time came whereby the cross-examination of particular witnesses, in the light of the Counterclaim, etc., was starting to cause concern, it would, of course, be within the

active case management powers of the trial judge to actively case manage precisely how much time Watchstone actually have in terms of cross-examination. It is said that although that explains three of the witnesses, that no additional time has been added in for any additional witnesses, be those from Greenhill or, indeed, if there were to be any evidence from anyone from PwC or by another party.

89 I have looked at the trial timetable carefully and one possibility, as I foreshadowed, is that the trial could sit, in case of need, or one or more Fridays (as Commercial Court Listing have confirmed would be a possibility in case of need). That is something which I would expect the trial judge, as part of active case management, to explore with the parties once the shape of the trial becomes clearer when the pleadings and the further witness statements and the further disclosure has taken place. I am satisfied that there is scope, both within the existing timetable and with potentially extending it to sitting on one or more Fridays, for any further witness evidence to be accommodated, including cross-examination, within the trial process.

90 There is also the possibility that, unpalatable though it may be to counsel and/or solicitors, that, in fact, if the evidence has concluded by the end of the Michaelmas Term, and given the start of the following term in January will be judgment writing time for the judge, certain aspects of the closing of the case could, in fact, be dealt with at the very start of the next term. That is the sort of matter which would very much be at the discretion of the actual trial judge hearing this matter and, indeed, different trial judges might have different views about that. Some judges, in fact, favour a gap between the conclusion of the evidence and the oral closing submissions so that the evidence and the written closing submissions can be fully assimilated before oral closings. It is currently contemplated that the oral closings will follow back to back and very closely following the conclusion of the evidence and the sight of the written closings. Again, it is really a matter for the trial judge as to whether that is a course which they find preferable or whether they would prefer a gap between the conclusion of the evidence and/or receipt of written closings and the date when the oral closings would take place. In such circumstances it is appropriate to bear in mind that one possibility would be that oral closings could in fact take place in the New Year if that was necessary.

91 Ultimately that is a matter for the trial judge who will no doubt actively case manage the trial, but when considering whether the Counterclaim should take place at the same time as the other elements of the trial, I am satisfied that it is a legitimate consideration that the additional witnesses could be accommodated either within the existing timetable or within the existing timetable with some Fridays inserted and/or, if necessary and it was considered appropriate, by hearing aspects of the closings in the New Year.

92 The other point raised by S&G relates to the position, as I have foreshadowed, of David Ravech. I confess that at the moment I am somewhat sceptical as to what the relevance is as to the evidence in relation to David Ravech or any pleading in relation thereto. That is simply because I have not yet seen the plea that is intended, or the associated evidence, and no doubt matters will become clearer when matter have been pleaded out. However I have no doubt that any plea can be promptly responded to in the reply and dealt with within the witness evidence. As I say, at this stage I am sceptical, probably because I have not had chapter and verse in relation to what is involved in relation to Mr Ravech, because, at first blush, it would appear to have some of the hallmarks of a tit-for-tat application. I say “at first blush” because nothing I am saying today is to be taken in any way, shape or form as expressing any concluded views on

the merits of any aspect of the claim. In any event I am satisfied that any plea in relation to Mr Ravech and any evidence in that regard, so far as relevant, can be accommodated within the existing trial and the existing trial timetable.

93 Accordingly, and for the reasons that I have given, I consider that not only in an ideal world but also in this world, the far better course is for the Counterclaim to be tried at the same time as the claim, which will ensure that that all evidence is before the judge at that time, that all issues are dealt with by the judge at that time and the risks of delay, increased costs and potentially inconsistent findings are obviated.

94 In terms of how that trial is carried out and how it is managed that is, as I say, very much a matter for the trial judge but a trial judge has a number of tools available to him in relation to active case management to keep under review on a regular, if not daily, basis depending on how the trial is progressing. Those tools include adjusting the timetable, sitting different sitting hours, if need be, and potentially chess clocking or guillotining parties in relation to the length of aspects of their cross-examination or, indeed, in relation to the length of submissions. I am satisfied that with the use of such tools this trial, as currently envisaged, is capable of being tried both as to the claim and the Counterclaim within the trial that is listed, starting on 21 October.

95 Accordingly, and for the reasons that I have given, I allow the amendments and I order that the Counterclaim be tried at the same time as the claim in the trial that is commencing on 21 October. I will now hear any submissions on any adjustments to that trial timetable that either party would now wish to address me on, having previously been reticent about addressing me on, at a time when they did not know the outcome of the application.

96 The final issue that arises today is in relation to what costs order to make. Mr Lord, on behalf of the Defendant, says he has been successful on the application and costs should follow the event, whereas Mr Salzedo says, in fact, that it should be costs in the Counterclaim and should stand and fall depending on the success of the Counterclaim or any equivalent resolution.

97 Whilst I consider that Mr Lord's approach (that costs should follow the event) might appear superficially to be appropriate, upon closer analysis I do not consider it would be appropriate because the Defendant had to come to Court in any event to get permission to commence a Counterclaim. At eight weeks before trial it was inevitable that there would have to be a substantial hearing in any event in relation to that, and it is inevitable that any judge hearing that application would want to grasp the nettle and look very carefully at the issues that arise, both in relation to any amendment to the Defence and the Counterclaim and in terms of active case management which has also usefully been achieved. In such circumstances I consider that the just and appropriate costs order in all the circumstances is that the costs of the application be costs in the Counterclaim and I so order.