Neutral Citation Number: [2019] EWHC 303 (Comm)

Case No: LM-2016-000046

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

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

Date: 21/02/2019

Before :

MARTIN GRIFFITHS QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

PLAYBOY CLUB LONDON LIMITED	**Claimant**
- and -	
BANCA NAZIONALE DEL LAVORA SPA	**Defendant**

- -
- -

Simon Salzedo QC and Fred Hobson (instructed by **Simkins LLP**) for the **Claimant**
Jeff Chapman QC and Andrew de Mestre (instructed by **Bird & Bird LLP**) for the **Defendant**

Hearing date: 25 January 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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MARTIN GRIFFITHS QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

Martin Griffiths QC, Deputy High Court Judge :

1. This is an application by the Claimant for permission to amend Amended Particulars of Claim by adding new paragraphs 32A and 32B. The application is opposed. Other proposed amendments are not opposed and I will say no more about them.

The background

2. The Claimant ("the Club") runs a casino in London. In October 2010 it gave credit to a gambler, Mr Hassan Barakat, on the strength of a reference it obtained from the Defendant ("the Bank"). Mr Barakat's credit proved to be worthless and the Club suffered losses.

The Original Action

3. In a previous action in this Court ("the Original Action"), the Club sued the Bank for negligence in providing the credit reference. However, the Original Action had a chequered history. At the trial, the Club obtained a judgment for damages against the Bank. The Court of Appeal in 2016 overturned the judgment, and the Supreme Court in 2018 reached the same conclusion. The final result was, therefore, that the Club was unsuccessful in the Original Action and was ordered to pay the costs of it.

4. The basis of the Supreme Court decision was that the Club had not sought the reference directly from the Bank, but had used a different company to ask for and receive the reference, called Burlington Street Services Ltd. This was done in order to ensure discretion for the gambler, disguising the fact that the reference was being sought by a gambling club. The Supreme Court held that, in an action for pure economic loss caused by the negligent provision of a bank reference, the duty of care, established in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* and later cases, is owed to the person who asks for and is given the reference, but is not owed to an undisclosed third party who relies on the reference (such as the Club), even if the third party is (as the Club was) the undisclosed principal of the company to which the reference was provided (see *Banca Nazionale del Lavoro SPA v Playboy Club London Ltd and Others* [2018] UKSC 43).

The New Action

5. The litigation did not end there. During the trial of the Original Action, evidence emerged which emboldened the Club to make a more serious allegation against the Bank; namely, that the reference had been given, not merely negligently, but fraudulently. As a result, the Club launched the present action ("the New Action") as an action in deceit.

6. The Claim Form in the New Action was issued on 5 April 2016 and Particulars of Claim (subsequently amended by consent) were issued on the same day. The Court of Appeal gave its judgment in the Original Action on 18 May 2016 and the Supreme Court upheld it on 26 July 2018.

7. Meanwhile, the Bank applied to have the New Action struck out as an abuse of process, arguing that the deceit claim ought to have been brought in the Original Action if at all. In December 2016, that argument was successful before a Judge of this Court. On appeal to the Court of Appeal, his decision was reversed, and the New Action was

reinstated. The Court of Appeal concluded that, although it would have been possible to make a claim for deceit in the Original Action, it was understandable, and not an abuse of process, that the Club chose not to do so. The deceit claim (the Court of Appeal decided) would have been weak as matters stood before the trial of the Original Action, and the Club was not wrong in hesitating to raise it at that stage. Evidence strengthening the deceit claim emerged in the course of the trial of the Original Action, and the Club was entitled to bring it in the subsequent New Action accordingly.

8. The judgment of the Court of Appeal reviving the New Action was given on 12 September 2018 (neutral citation [2018] EWCA Civ 2025). An application to appeal that decision was made to the Supreme Court, and at the date of the hearing before me it was still pending. The parties agreed that, if the Supreme Court did agree to hear an appeal, further proceedings in the New Action would be stayed until the decision of the Supreme Court. However, the Supreme Court on 11 February 2019 refused permission to appeal, on the basis that the Bank's application did not disclose an arguable point of law.

The application to amend

9. The Club's application to me is for permission to add the following paragraphs 32A and 32B to the Amended Particulars of Claim:-

> "32A. The Claimant has suffered further loss and damage as a result of the Bank's deceit as follows:
>
> a. Although the Claimant's claim in the Negligence Proceedings was ultimately unsuccessful on a point of law as determined by the Supreme Court, at all relevant times that claim had at least a reasonable prospect of success (as demonstrated by the facts that the claim succeeded at trial and permission to appeal was granted by the Supreme Court) and the Claimant acted reasonably in bringing the claim and pursuing the appeal to the Supreme Court.
>
> b. The Claimant acted reasonably in not bringing a claim in deceit as part of its original action in the Negligence Proceedings.
>
> c. In the Negligence Proceedings:
>
> (i) the Claimant incurred costs in the total sum of £556,436.36 (inclusive of VAT); and
>
> (ii) the Claimant has paid to the Bank the sum of £295,000 pursuant to costs orders made in those proceedings.
>
> These costs are referred to as the "Total Costs Exposure".
>
> d. The Total Costs Exposure are sums that were reasonably incurred by the Claimant in mitigation of its loss and/or is itself loss and damage caused by the Bank's deceit. The Claimant's primary case is that the costs which it incurred in

> the Negligence Proceedings are recoverable in full; alternatively those costs fall to be assessed on an indemnity basis.
>
> 32B. The Claimant is accordingly entitled to and claims damages in a sum equivalent to the Total Costs Exposure, namely the sum of £851,436.36, or such other sum as may be assessed. The Claimant will provide an updated schedule of loss in advance of trial."

10. There is no challenge to the existing claim in deceit proceeding to trial in the New Action. It is simply the proposed addition of the costs of the Original Action as a new head of loss (in addition to the losses claimed in the existing pleading) which is opposed before me. Therefore, regardless of what I decide now, there will be a trial of the New Action.

11. The test to be applied on an opposed application to amend a statement of case is the same as the test applied to an application for summary judgment. The question is whether the proposed new claim has a real prospect of success: see the judgment of Jules Sher QC in *Flexitallic Group Inc v T & N Ltd* QBD (Commercial Court) 3 December 2001, unreported; referred to in paragraph 17.3.6 of the White Book, in which the Deputy Judge said:

> "It seems to me that the most appropriate test on an application for permission to amend to include a new claim is whether (in the words of CPR 24) the new claim, if added into the case, would or would not have a real prospect of success. A real prospect of success is to be contrasted with a "fanciful" prospect of success: see *Swain v Hillman* [2001] 1 All ER 91."

12. In allowing permission to amend in that case, the Deputy Judge said:

> "Much as I was tempted to analyse the witness statements and the extensive new allegations in this regard, I have come to the conclusion that it would not be right to do so. As will be seen I have decided to grant permission for all these amendments and, that being so, it is plainly inappropriate that I should conduct a mini-trial of the issues in this judgment. Such trial and analysis will be a matter wholly for the trial judge."

13. However, this only works in one direction. If the Court can see that an amendment has no real prospect of success, it will not flinch from disallowing the amendment, because a claim with no real prospect of success should not be allowed to proceed. Some analysis and evaluation of the case raised by the amendment objected to, whether it be a question of fact or a matter of law, must, therefore, be attempted, to see if it leads (without an unduly prolonged or difficult enquiry, bearing in mind that the procedure is a summary one) to the conclusion that the amendment has no real prospect of success. But if the Court is not persuaded that the amendment has no real prospect of success, the ultimate decision maker should not be encumbered with a preliminary view on the point raised by the amendment, nothing like a probability of success being required for these purposes. If some judge might reasonably uphold the claim, I will allow the

amendment and leave the decision until trial. If on the other hand there is no real prospect of success, I will not.

Arguments for and against the amendments

14. Turning to the particular amendments in question, the basis upon which damages are generally recoverable in a claim of deceit is set out by the House of Lords in *Smith New Court Securities Ltd v Citibank N.A.* [1997] AC 254. The starting point, as in any tort claim, is that (*Smith New Court* at 262H, quoting Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25, 39):-

> "…in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation for reparation."

15. Lord Blackburn recognised that this starting point must be qualified by other considerations, including

> "…the consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the person doing it was doing wrong."

(Lord Blackburn in *Livingstone*, quoted in *Smith New Court* at 263A-B).

16. Thus, damages are recoverable to a greater extent in a case of fraud than in a case of negligence. Lord Browne-Wilkinson in *Smith New Court* approved (at 263F) the way the law was stated by the Court of Appeal in *Doyle v Olby (Ironmongers) Ltd* [1969] QB 158, in which judgments were given by Lord Denning MR and by Winn LJ. Lord Denning said (at 167, quoted in *Smith New Court* at 263H-264B):-

> "In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say: 'I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages.' All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen."

17. Lord Denning does, however, go on to assume that the losses have been suffered reasonably, giving as an example a case where the Claimant "did all that he could reasonably be expected to do".

18. This limitation is brought out more clearly in the judgment of Winn LJ, at 168 (quoted in *Smith New Court* at 264D-F) where he says:-

> "…where there has been a tortious wrong consisting of a fraudulent inducement, the proper starting point for any court called upon to consider what damages are recoverable by the defrauded person is to compare his position before the representation was made to him with his position after it, brought about by that representation, always bearing in mind that no element in the consequential position can be regarded as attributable loss and damage if it be too remote a consequence: it would be too remote not necessarily because it was not contemplated by the representor, but in any case where the person deceived has not himself behaved with reasonable prudence, reasonable common sense, or can in any true sense be said to have been the author of his own misfortune. The damage that he seeks to recover must have flowed directly from the fraud perpetrated upon him."

19. The test that loss "must have flowed directly from the fraud perpetrated upon him", as Winn LJ puts it here, is not only approved but repeatedly echoed in the judgments of the House of Lords in *Smith New Court*: see per Lord Browne-Wilkinson at 265A and at 267A and per Lord Steyn at 282D, 283C and 283F.

20. For the Bank, Mr Jeff Chapman QC referred me to the decision of the Court of Appeal in *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 in which the question "How does the court decide whether the breach of duty was the cause of the loss or merely the occasion for the loss?" (at 1374H) is answered "By the application of the court's common sense" (per Glidewell LJ at 1375A). *Galoo* was a contractual negligence claim, but Evans-Lombe J referred to it in *Barings plc v Coopers & Lybrand* [2002] EWHC 461, [2002] PNLR 39 in which there was a counterclaim alleging deceit. At paragraph 136, Evans-Lombe J said, after quoting Glidewell LJ in *Galoo*:

> "While I am dealing here with a claim in deceit rather than contract or negligence, I think this approach is equally applicable. There are respects in which the rules as to causation and remoteness in deceit differ from those in negligence, but the basic appeal to common sense and the distinction between cause and occasion of the loss apply to both."

21. The Bank accepted, however, that this was not a substitute for the *Smith New Court* analysis and guidance. The Bank argued that, whether the costs of the Original Action are being resisted as damages in the New Action on the basis of causation, or remoteness, or even if they are being claimed (as they are) as having been incurred in an attempt at mitigation of loss, the issue is one of reasonableness (a concept central to the *Smith New Court* analysis based on *Doyle v Olby*). Adopting the *Smith New Court*

language, the Bank says that the costs of the Original Action cannot be said to have been directly caused by, or to have flowed as a direct consequence of, the alleged deceit, and were not incurred reasonably, by way of mitigation or otherwise.

22. In particular, the Bank questions in the New Action whether the costs awarded in the Original Action could ever be said to flow directly from the alleged deceit or whether the bringing of an action in negligence against a Bank which owed (as the Court of Appeal and the Supreme Court decided) no duty of care to the Club could be said to be reasonable. On the other hand, the Club, while recognising and accepting the final decisions made on the duty of care, says that it was not unreasonable to bring the action, given that it was successful at first instance and that the Supreme Court gave permission to appeal, which (they say) suggests that the decision reached by the Court of Appeal was (until considered and confirmed by the Supreme Court) open to question. They say that it was not unreasonable (until the duty of care question was definitively decided against them) to bring the action, initially, in negligence rather than deceit, and they point to the Court of Appeal judgment in the New Action in support of the reasonableness of the decision to hold off on the action in deceit.

23. The Bank also says it would be remarkable if the Club could recover by way of damages all their actual costs, or even indemnity costs, of an action they lost, in circumstances where, had they won the action, they would only have been awarded costs on the standard basis. They were awarded costs on the standard basis by the trial judge in the Original Action, before the judgment on liability was reversed on appeal. On the other hand, in the Original Action costs were being sought when the cause of action was negligence, not deliberate fraud or deceit, and this point seems to go more to quantum than to the question of whether costs can realistically be claimed as damages in the New Action at all.

24. In support of the amendment, Mr Simon Salzedo QC, for the Club, argues that, whilst various objections, including objections of legal principle, have been raised against the proposed action for the Total Costs Exposure in the Original Action as a recoverable head of loss for deceit in the New Action, the question is one of mixed fact and law and it would be wrong to decide it in the absence of a determination of the facts which might affect the outcome. The deceit itself is not admitted, and so the precise nature of the actual deceit, if any, has to be determined. Furthermore, since no defence has been filed to the proposed new paragraphs, the precise factual basis of any defence has yet to be formulated, let alone decided (although I observe that this is necessarily the case when any amendment requiring permission is objected to, and does not in itself mean that the amendment should go forward, if it does not appear to have a real prospect of success on any view of the facts).

25. Mr Salzedo relies on the principles summarised in the judgment of the Privy Council in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 [2012] 1 WLR 1804 at paragraph 84:-

> "The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law

> should be on the basis of actual and not hypothetical facts: e.g. *Lonrho Plc. v. Fayed* [1992] 1 A.C. 448, 469 (approving *Dyson v Att-Gen* [1911] 1 KB 410, 414: summary procedure "ought not to be applied to an action involving serious investigation of ancient law and questions of general importance … "); *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 741 ("Where the law is not settled but is in a state of development … it is normally inappropriate to decide novel questions on hypothetical facts"); *Barrett v Enfield London BC* [2001] 2 AC 550 , 557 (strike out cases); *Home and Overseas Insurance Co. Ltd. v Mentor Insurance Co. (U.K.) Ltd.* [1990] 1 WLR 153 (summary judgment).""

26. I am not convinced that no reasonable judge could find in the Claimant's favour on the issues of causation, remoteness or mitigation. I think the Claimant has a more than merely fanciful prospect of success. I also think there is force in the point that the question is one of mixed fact and law, with fact perhaps to the fore. Although the primary facts in terms of the way in which the Original Action and the New Action were conceived and pursued appear fairly straightforward, experience shows that a trial can often produce unexpected insights. Even secondary facts – such as whether a course of conduct was reasonable, in the light of the primary facts – are commonly sensitive to the precise emphasis, as well as the precise components, of the primary facts as they emerge from witnesses and documents and submissions at trial. It is for this reason that a judge will often find that his first impression of a case, when reading into it, is not the same as his final conclusion. In those circumstances, I think that it would be wrong to decide the question, one way or the other, in the absence of the fact finding process which will take place at trial. This will also avoid any appeal process being conducted in the absence of a full investigation, testing and finding of primary facts.

Costs as damages

27. That brings me, however, to a more fundamental objection, which is that (it is said) costs as damages on the facts of this case are irrecoverable as a matter of principle. In particular, it is said, on behalf of the Bank, that there is no case in which the costs (a) of a previous legal action (b) between the same parties (c) in which the claiming party was unsuccessful and had costs awarded against it, have ever been awarded to the claiming party as damages in (a) a subsequent legal action (b) between the same parties (c) so as, effectively, to reverse the costs award previously made.

28. The Club concedes that the claim is without direct precedent, but does not agree that this is because such a claim is unsustainable as a matter of principle. The Club says that, just because such a case has not been reported before, does not mean that it may not succeed now.

29. As the procedural chronology I have outlined shows, when costs were awarded against the Club, in the Court of Appeal and in the Supreme Court in the Original Action, it was already known that there was an outstanding claim of deceit in the New Action, which was launched before the hearing of the Original Action in the Court of Appeal. It was not suggested that the costs of the Original Action should not follow the event of

the Original Action, as costs usually do, or that they should await the outcome of the New Action or that they should be costs in the New Action.

30. The question is whether there is something fundamentally inadmissible about the claim for costs as damages in the circumstances of the present case, so that it has no real prospect of success, and an amendment to run the claim should not be allowed.

31. Both sides sought to shed light on this question by reference to previous authorities containing some but not all of the elements which I have identified as (a), (b) and (c) in paragraph 27 above, in an effort to identify points of principle which might be applied to the present, unprecedented case, in which all three of these elements feature together.

32. In *Dadourian Group International v Simms* [2009] 1 Lloyd's Rep 601, the Claimant (DGI) sued three individuals for deceit and won. Part of the damages successfully claimed by DGI consisted of costs incurred by DGI in earlier proceedings in New York and in an arbitration, in both of which DGI had been the successful Defendant or Respondent or Counterclaimant in actions brought by a different party (albeit a party to which the three individuals had a connection). The costs had been awarded in DGI's favour in the original actions and on an indemnity basis, but the unsuccessful party proved unable to pay. The damages were awarded to DGI in the new action by Warren J and upheld by the Court of Appeal.

33. *Dadourian* was a successful claim for costs as damages – element (a). The parties in the original actions were not the same as the parties in the new action, which means that element (b) was lacking. As to whether DGI had been successful in the earlier actions in which they were incurred – element (c) – the judgment of Warren J took a broad view, stating "all the costs of DGI in the litigation and the arbitration were incurred in fighting claims (either as claimant or defendant) on which it was wholly successful before the arbitrators" (judgment of Warren J para 760, quoted in para 119 of the judgment of the Court of Appeal), although in respect of elements of the procedural history DGI had not been successful. For example, DGI made an unsuccessful attempt to remove the arbitrator, but DGI nevertheless recovered the costs of the attempt as damages in the new action.

34. The Court of Appeal in *Dadourian* approached the issue as a factual question of causation, remoteness and mitigation, applying the criteria established in the cases of *Smith New Court* and *Doyle v Olby* which I have discussed. The "real question" was said to be whether DGI "acted reasonably" (Court of Appeal judgment para 144). The Court of Appeal said that Warren J was "fully entitled" to decide as he did, emphasising that it was "essentially a question of fact" (Court of Appeal judgment para 145). The Court of Appeal noted that the trial proceeded on an "all or nothing" basis, with no attempt to distinguish some costs as recoverable and others as not recoverable (Court of Appeal judgment para 147). This, to my mind, reduces the significance, if any, of the recovered costs including an element of costs for an unsuccessful application (for the removal of the arbitrator).

35. The factual basis of *Dadourian* is not on all fours with the present case; and, moreover, *Dadourian* was decided at first instance, and upheld on appeal, as a question of fact. I do not find that it shows whether the present claim for costs as damages is either sustainable or unsustainable as a matter of principle.

36. In *Berry v British Transport Commission* [1962] QB 306, Ms Berry was the defendant in a private prosecution by the British Transport Commission after she had pulled a communication cord during a train journey. She was convicted by magistrates but successfully appealed to quarter sessions, where her conviction was quashed and a costs order was made in her favour. She then brought a civil action for malicious prosecution in which she claimed damages which included (although they were not limited to) her costs of the criminal proceedings. Since she had been awarded costs on her successful criminal appeal, the claim for costs as damages in the civil action was for the difference between the amount of costs awarded in the criminal appeal (15 guineas) and the actual costs she had incurred (the difference being just over 61 guineas).

37. The trial judge, Diplock J, upheld a defence that the statement of claim disclosed "no damage of which the plaintiff is entitled to complain in law" ([1962] QB 306, 315) and dismissed the claim, but the Court of Appeal, consisting of Ormerod, Devlin and Danckwerts LJJ, allowed an appeal and said that the costs were recoverable as damages. In doing so, the Court of Appeal referred to and accepted a longstanding principle "that costs incurred in excess of the sum allowed on taxation cannot be recovered as damages" (per Ormerod LJ at 317, citing *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674; per Devlin LJ at 320) because to allow that would be "to permit a double adjudication on the same point" (per Devlin LJ at 322, albeit that Devlin LJ expressed doubt about the soundness of the rule). The Court of Appeal held that this principle did not apply when the original action was a criminal case, because it was not usual for costs to be awarded on a full compensatory basis in criminal cases (per Ormerod LJ at 317). Devlin LJ also pointed to the exceptions made to the rule in civil cases, including cases in which damages were claimed as costs in a tort action against a third party, who was not party to the original action in which the costs were incurred (per Devlin LJ at 321).

38. *Berry* was, therefore, a case quite far removed from the facts of the present case. It was decided on the basis that the original action was a criminal case, which is not the position here, and the party claiming costs as damages had been successful in the original action, so that element (c) of the present case was not present.

39. Devlin LJ observed in *Berry* (at 331) that:-

> "In the ordinary case the question of whether a plaintiff has done what is reasonable in minimising his damage is one of fact and not of law. If the defendants want to raise it, they must do so at the trial and not on demurrer."

40. Mr Salzedo QC for the Club argued that these and other cases, and the discussion in Chapter 21 of *McGregor on Damages* (20th edition, 2017), are consistent with his claim that the proposed amendment can form a new exception, or an exception consistent with established exceptions, to the general rule that, when costs have been awarded in a civil action between particular parties, a later action between the same parties cannot claim further costs between them as damages. He accepted that no reported case incorporates every one of elements (a), (b) and (c) present in the case before me, and the discussion in *McGregor* does not consider the precise situation in the present case either.

41. He emphasised that the claim in the New Action (deceit) is different from the claim in the Original Action (negligence), although both actions arose out of the same credit reference. He said that, provided he could overcome the hurdle of showing that the Club acted reasonably, the fact that it was ultimately unsuccessful in the Original Action should not bar it from arguing that the Original Action flowed directly from the alleged deceit, and the failure of that action should not preclude a claim for the costs of that action as actual damages directly flowing from the alleged deceit, and (putting it another way), the Club's attempt to recover the underlying losses (that is, the losses caused by giving Mr Barakat credit on the strength of the Bank's credit reference) in the Original Action for negligence should (or might at trial) be found to be a reasonable initial attempt at mitigation, although it failed.

42. I have come to the conclusion that the argument of principle, novel as it is, should not be decided in the absence of findings on all the disputes of fact in this case. Since the nature of the claim is unprecedented, it may be difficult to establish, but I think that the prospects of the Claimant succeeding are more than merely fanciful. Obviously, it will be harder for it to do so than if a clear and directly comparable precedent did exist. But that is not to say it cannot be done. It may be that a case like this one will be allowed to succeed in some circumstances and not in others, so that (as Devlin LJ said in *Berry*) the point should be decided at trial and not by refusing permission to amend so that it cannot be argued at all.

43. I will, therefore, grant the permission to amend.