Neutral Citation Number: [2020] EWHC 1714 (Comm)

Case No: CC-2019-MAN-000031

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL (QB)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 27th August 2020

Before :

HIS HONOUR JUDGE EYRE QC

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Between :

1) ANDREW PERVIS SCOTT **2) ADAM LEWIS** **3) BISON TRANSPORT LIMITED (in liquidation)**	**Claimants**
- and - **HARBINDER SINGH**	**Defendant**

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Terence Bergin QC (instructed by **Clarke Willmott LLP**) for the **Claimants**
Greg Pipe (instructed by **Harrowells Ltd**) for the **Defendant**

Hearing dates: 21st and 22nd April 2020; 26th August 2020

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JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down was 10.00am 27th August 2020.

HH Judge Eyre QC:

1. These proceedings arise out of the sale by the Defendant to the First and Second Claimants of his controlling shareholding in the Third Claimant ("Bison"). Bison is engaged in road haulage. There are two extant applications. The Claimants applied on 20th March 2020 for permission to amend the Particulars of Claim and on 7th April 2020 the Defendant applied for the striking out of the claim alternatively for summary judgment on the claim and for judgment on his counterclaim. Both applications are opposed by the other side and both were listed before me on 21st and 22nd April 2020. I directed that the Claimants' amendment application be considered first and adjourned the Defendant's application with a view to considering that in due course in the light of the decision made in respect of amendment.

2. The initial hearing was conducted remotely by way of a video conferencing platform provided by the Claimants' solicitors. I am grateful to the solicitors and counsel on both sides for their patience and persistence in overcoming the difficulties of communication which arose in the course of that hearing.

3. There was a further hearing on 26th August 2020 conducted by MS Teams hosted by the court. The parties had received an earlier draft of this judgment at the end of June 2020. On behalf of the Claimants Mr. Bergin QC made submissions as to the effect of the judgment and Mr. Pipe made competing contentions for the Defendant. In the light of those matters I directed a further hearing at which counsel orally expanded on those competing submissions.

The Progress of the Action.

4. The Share Purchase Agreements whereby the Defendant sold his controlling interest in Bison and in Roadways Express Ltd ("Roadways") to the First and Second Claimants were concluded on 25th October 2018. On the same date the Defendant's wife, Varinder Kaur, entered an agreement selling her controlling interest in Global Drivers Ltd ("Global") also to the First and Second Claimants. The agreement in relation to Bison provided for a retention sum and for the subsequent payment of that and an Additional Payment to the Defendant on the terms set out in the agreement.

5. On 22nd January 2019 the Claimants' solicitors wrote to the Defendant's solicitors alleging misrepresentation and breach of warranty on the part of the Defendant in respect of all three share purchase agreements ("the Initial Letter"). In that letter the Claimants asserted a right to rescission under the Misrepresentation Act 1967; alternatively repudiation together with damages; alternatively damages for breach of warranty. The Initial Letter alleged nine misrepresentations.

6. The Initial Letter did not describe itself as a letter of claim and indeed in its second paragraph it said that it was to be followed by a protocol-compliant letter of claim but no such letter was in fact sent and the Claimants commenced proceedings on 13th June 2019. In the Particulars of Claim the Claimants alleged sundry representations made by the Defendant together with express and implied terms of the Share Purchase Agreements. Six

misrepresentations were asserted together with breaches of the alleged terms. In addition it was said that the Defendant had unlawfully removed £80,000 from Bison. The Claimants contended that the Defendant had known of the falsity of the representations and that there had been a fundamental breach or a repudiation of the Share Purchase Agreements. The Claimants sought declarations that they were discharged from any future obligations under the agreement; damages; and recovery of the sum of £80,000.

7. In the Particulars of Claim the claim for damages was put in two ways. At [58] it was said that the shares in Bison had "no value whatsoever" because of "the difficulties with the operation of Bison and Roadways and in particular the unlawful way they have been operated". As a consequence of that the Claimants sought damages in the sum of £200,000 being the initial payment to the Defendant. At [59] as an alternative a claim is made for an "ongoing loss of £350,000 per year" on the basis that if the Defendant had not been in breach of contract Bison would have made a profit of no less than £350,000 per annum "which profit would accrue or substantially accrue to the Claimants as owners of Bison".

8. By his Defence and Counterclaim of 22nd July 2019 the Defendant denied liability and counterclaimed for payment of £100,000 in respect of the Retention; for the Additional Payment to be calculated as at the date of trial; and for damages said to have been caused by the Claimants' failure in breach of the Share Purchase Agreement to pay to him a bonus payment received from Maritime Transport Ltd.

9. In the Defence and Counterclaim the Defendant had contended that elements of the Particulars of Claim were too vague for him to plead to. He had also asserted that the allegations made by the Claimants were allegations of fraudulent misstatement which were inadequately particularised and which were liable to be struck out on that ground. The Defendant also took issue with the claims made with reference to the sum of £80,000 and to the alleged loss of profit on the part of Bison pointing out that the claims by the First and Second Claimants in relation to those elements were not recoverable by reason of being reflective losses.

10. The Defendant's criticisms of the adequacy of Particulars of Claim were repeated when the matter came before me for a case management conference on 31st October 2019 and the Defendant's counsel explained that a strike out application was being contemplated. At that hearing directions were given for disclosure; for lay and expert evidence; and for listing for trial. It was common ground that disclosure and the preparation of evidence would be a time-consuming exercise. The directions provided for disclosure to be concluded by 27th March 2020; for lay evidence to be exchanged by 5th June 2020; and for expert forensic accountancy evidence to be concluded by 30th October 2020. The trial was listed for 1st February 2021 and was to take thirteen days of court time (included one day of pre-reading).

11. The Claimants were represented at the latest hearing by Mr. Bergin. He had not drafted the original Particulars of Claim and was not counsel at the CMC. He was, however, instructed on behalf of the Claimants at some point after the

CMC and on 23rd December 2019 draft amended Particulars of Claim prepared by Mr. Bergin were served on the Defendant's solicitors. The Defendant took time to reflect on the proposed amendment and it was only on 14th February 2020 that his solicitors confirmed that the Defendant would not consent to the amendment. In the letter of 14th February 2020 the Defendant's solicitors said that the Defendant was consenting in writing pursuant to CPR Pt 17.1 (2)(a) to parts of the proposed amendment but not to others and the letter listed those parts to which consent was being given and those to which the Defendant objected.

The Amendment Application.

12. It was against that background that the Claimants applied on 20th March 2020 for permission to amend the Particulars of Claim. The draft pleading which accompanied the application was a revision of that which had been provided to the Defendant in December 2019. I will deal with the proposed amendment in some detail below but it is to be noted at this stage that it involved revision of the body of the pleading but also the addition of a Schedule of Loss and Damage and a Schedule of Representations, Falsity, and Knowledge. The latter was a substantial document running, in its original form, to 26 pages and 146 paragraphs. In part the proposed amendment of the Particulars of Claim involved the deletion of the short particulars of the alleged misrepresentations contained in the body of the Particulars of Claim and their replacement by markedly fuller particulars in the Schedule together with Particulars of Falsity and Particulars of Knowledge in respect of each representation or set of representations.

13. On 15th April 2020 and so only six days before the date when the court was to determine their application the Claimants served further revised draft Particulars of Claim together with revised schedules. These further revisions to the proposed Particulars of Claim involved the removal of Bison as Third Claimant and the making of an averment that its claim for an alleged breach of the Defendant's duties as director (appearing first in the proposed amendment) had been assigned to the First and Second Claimants. The revision to the Schedule of Representations, Falsity, and Knowledge involved the addition of three paragraphs setting out the legal elements necessary for a claim of negligent misstatement. The revision of the Schedule of Loss and Damage involved the addition of the losses said to flow from the alleged breaches of the Defendant's director's duties.

14. The process whereby the Claimants have put forward a series of differing versions of the proposed new pleading was in large part a consequence of Mr. Bergin having been brought into the matter at a comparatively late stage and seeking to revise a pleading for which he had not been responsible. In his skeleton argument he explained (see at [17]) that the case was a complex one which was "not an easy case to plead concisely and clearly" where "new thoughts [were] still occurring" and where he had been "running to catch up". He frankly accepted (see at [18]) that in the course of preparing for the hearing he had noticed omissions in his earlier drafts. I do not say that by way of any criticism of Mr. Bergin who was having to deal with a difficult position against time pressures. However, it did mean that the Defendant and to some

extent the court was having to deal with a moving target. The bundle contained responses addressed to earlier versions of the proposed pleading and the cross-referencing was at times by reference to those versions.

15. For the reasons I gave in a short judgment at the start of the hearing I allowed the Claimants to make those revisions and said that I would determine the amendment application by reference to the proposed pleading and schedules in their revised form. In short this was because I concluded that despite the short notice there was no injustice to the Defendant in taking this course and that it was appropriate to address the question of amendment by reference to the latest version of the case which the Claimants wished to present at trial.

16. The proposed amended pleading abandons various elements of the original Particulars of Claim. As now formulated the claim sets out a number of representations. It is said that those were negligent misrepresentations for the purposes of the 1967 Act with alternative averments that they were fraudulent and that they constituted negligent misstatements on the part of the Defendant. Breaches of express and implied terms of the Share Purchase Agreements are alleged. The Defendant is said to have been in breach of his duties as a director of Bison with that claim having been assigned to the First and Second Claimants. The Claimants now seek a declaration that they are discharged from further obligations under the Share Purchase Agreements; payment of £200,000 said to be due under the Bison agreement; and damages.

The Approach to be taken.

17. There was substantial agreement between Mr. Bergin for the Claimants and Mr. Pipe for the Defendant on the principles underlying the exercise of my discretion to permit or refuse the proposed amendments.

18. First, the proposed amendment must be properly formulated in the sense of being comprehensible and setting out clearly the case which the other party is to meet. The proposed amendment must satisfy the requirements of the CPR in terms of the proper particularisation and pleading of any cause of action asserted in the amended pleading. This is particularly so in the case of a late amendment (see per Lloyd LJ in *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 14, [2011] 1 WLR 2735 at [73]). It is not open to a party seeking to make a late amendment to say that any deficiencies in the proposed pleading can be remedied in due course by further particularisation.

19. The new case set out in the proposed pleading must have a real prospect of success (see the commentary in the White Book at 17.3.16 and Mrs. Justice Carr's summary of the position in *Quah Su-Ling v Goldman Sachs* [2015] EWHC 759 (Comm) at [36]). The approach to be taken is to consider those prospects in the same way as for summary judgment namely whether there is a real as opposed to a fanciful prospect of the claim or defence being raised succeeding. It would clearly be pointless to allow an amendment if the claim or defence being raised would be defeated by a summary judgment application. However, at the stage of considering a proposed amendment that test imposes a comparatively low burden and the question is whether it is clear that the new claim or defence has no prospect of success. The court is not to

engage in a mini-trial when considering a summary judgment application and even less is it to do so when considering whether or not to permit an amendment. Mr. Bergin says that this requirement only applies when the amendment in question is raising a new claim or defence. He contended that it did not apply if the amendment was in reality further particularisation or amplification of an existing claim. Mr. Pipe did not concede this but in my judgement Mr. Bergin is right. The requirement that the claim or defence proposed by way of amendment has a real prospect of success arises from the need to avoid the futility of allowing a claim or defence to be made by way amendment which is liable to be struck out or to be defeated by a summary judgment application. The same consideration does not apply if the line of claim or defence is in the original pleading and will remain in issue even if the amendment is not allowed. In practice in this case the Defendant said that the proposed amendments made new allegations while the Claimants said that they were no more than a fuller particularisation of the existing claim.

20. If the amendment is very late in the sense of being an amendment which will cause the vacation of an existing trial date then other considerations come into play. In such cases particular regard is to be had to the strength or otherwise of the new case and there is a heavy burden on a party seeking to make such an amendment to show that justice requires him or her to be allowed to do so (see *Swain-Mason v Mills & Reeve; Quah Su-Ling v Goldman Sachs*; and *Nesbit Law Group v Acasta Europe Insurance Company* [2018] EWCA Civ 268).

21. In the context of the current case those principles mean that I am to consider each limb of the proposed amendment. I must consider the amended pleading in relation to the original Particulars of Claim and assess whether a new claim is being made or whether the amendment is in reality no more than fuller particularisation of the existing claim. I am to consider whether the amended pleading satisfies the requirements of the Rules and is adequately pleaded. Where a new claim is being made regard must be had to whether it is a claim with a real prospect of success. I must then consider whether the inclusion of the new material will necessitate the loss of the trial date and if it would whether the Claimants have satisfied the heavy burden of showing that justice requires that they should nonetheless be permitted to advance the amended claim.

22. Having applied that approach to the limbs of the amended pleading separately I must then stand back and consider the combined effect of such parts of the proposed pleading as pass that scrutiny to see if that combined effect leads to a different result.

The Parties' Contentions in Outline.

23. Mr. Bergin and Mr. Pipe put forward detailed arguments on the particular elements of the proposed amended pleading which I will consider below. At this stage, however, it is useful to note the contrasting positions in general terms.

24. The Claimants did not accept that they were putting forward a new case. It was their position that the amended pleading and schedules although

substantial were in reality only fuller particularisation of the case which had already been advanced. Their position throughout had been that the Defendant had made misrepresentations in the period leading up to the signing of the Share Purchase Agreements and that the parties' dealings in that regard had always been in issue. Accordingly, they say that the amendments set out the details of those misrepresentations giving particulars of the matters they relied upon as showing that the representations were false and that the Defendant knew this. They say that the pleading is properly formulated setting out the elements of the causes of action on which they rely and giving sufficient information for the Defendant to know the case which he has to answer. They do not accept that the amendment will lead to the loss of the current trial date. In that regard the Claimants' position is that they are not to be held responsible for the period between 23rd December 2019 and 14th February 2020 while the Defendant was considering his response to the proposed amendment. The Claimants say that the time table for preparation in the run up to the trial is generous and that the amendments will not require significant further preparation work in addition to that which would have been required anyway (this last point flowing from the Claimants' contention that the amendments relate to matters which would have been in issue in any event).

25. The Defendant says that despite their length the amended pleadings are not adequately formulated and that necessary matters have not been pleaded. He characterises the amendments as being the introduction of new claims rather than better particularisation of the existing case. He says that the representations now relied upon are new and are different from those previously advanced. The Defendant then says that the case as advanced in the amended pleading has no real prospect of success and points to the change of tack on the part of the Claimants as an indication of the weakness of the latter's case. He says that the amendment will have a serious effect on the timetable and will result in the loss of the trial date. This contention is connected to the assertion that a new case is being advanced with the Defendant saying that if permission were to be granted there would have to be substantial amendment of the Defence and Counterclaim with more extensive disclosure and witness evidence than would otherwise have been the case. The Defendant says that the Claimants have failed to show any good reason for seeking to make a very late amendment let alone to discharge the heavy burden which is required before permission will be given in those circumstances. Finally, the Defendant says that the delay which will result from the loss of the trial date will cause him prejudice. Not only will the claim be hanging over him for longer but he is being kept out of the sums claimed in the Counterclaim and which he says should have been paid to him. The Defendant says that he should have been paid the retention of £100,000 in January 2019 and £144,000 as the first tranche of the additional payment in April 2019. The Defendant contends that the failure to make these payments is preventing him from engaging in other business ventures and in particular from pursuing a new business venture of building wedding venues in India.

26. I will deal in turn with the particular elements of the proposed amended pleading but before I do so it is appropriate to address those matters which are

of more general application or which apply to a number of different aspects of the pleading.

The Form of the proposed Particulars of Claim and Schedules.

27. The format which has been adopted in the proposed amended pleading is an unusual one. The original pleading contained the alleged representations with short particulars of falsity. The particularisation of falsity let alone of the Defendant's alleged knowledge was in markedly short terms and there is considerable force in the Defendant's contention that it did not amount to adequate particularisation. The Claimants seek to address this in the amendment by removing the text of the alleged representations from the body of the Particulars of Claim and setting them out in the Schedule together with particulars of falsity and of the Defendant's knowledge. However, some elements of the Claimants' case in respect of each alleged representation are retained in the body of the Particulars of Claim. This is a format which is ungainly. For almost all elements of the claim it requires reference to separate documents to understand the Claimants' position and it is not conducive to a clear understanding of the case. If and to the extent that permission is given it will be on the basis that the elements in the schedules and in the body of the Particulars of Claim are to be combined in a single document.

28. After the judgment was provided to the parties in draft the Claimant produced a new composite pleading seeking to reflect the consequences of the judgment in a single document. That, however, led to further dispute as to what those consequences were and this was, in part, why a further hearing was needed on 26th August 2020.

29. The allegations of misrepresentation, negligent misstatement, and of fraud are set out in the Schedule of Representations, Falsity, and Knowledge. The structure adopted is for details of the alleged representation to be followed by a section entitled "particulars of falsity" and then by a section entitled "particulars of knowledge". It is then said that in light of those matters the Defendant was negligent and that the representations were negligent misrepresentations within the meaning of section 2 of the Misrepresentation Act 1967 or were tortious negligent misstatements or were made fraudulently in that the Defendant knew they were false or that he made them recklessly or that he was asserting a belief which he did not have or which he had ceased to hold. The Defendant takes issue with the adequacy of the Claimant's pleading of fraud and I now turn to that question.

The Pleading of Fraud.

30. The parties were agreed that the principles governing the pleading of fraud were to be found in the speech of Lord Millett in *Three Rivers DC v Bank of England* [2001] UKHL 16, [2003] 2 AC 1 at [183] – [189] but disagreed as to the application of those principles.

31. Mr. Pipe contended that many of the alleged representations were matters of opinion and that they could only be regarded as having been statements of fact

and so capable of being actionable misrepresentations if it was proved that the Defendant did not honestly hold the opinion alleged. It followed, Mr. Pipe said, that dishonesty had to be alleged for the statements of opinion to be statements of fact and that dishonesty had to be pleaded by reference to the two-stage test set out in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391.

32. That contention was based on a passage in *Chitty on Contracts* (33rd ed) at 7-0009 where it was said "if it can be proved that the person who expressed the opinion did not hold it, or could not, as a reasonable man having his knowledge of the facts, honestly have held it, the statement may be regarded as a statement of fact". The editors cite *Connolly Ltd v Bellway Homes Ltd* [2007] EWHC 895 (Ch) as authority for that proposition. In addition Mr. Pipe drew support from the reference by Falk J in *Russell v Cartwright & others* [2020] EWHC 41 (Ch) at [159] to the *Ivey v Genting Casinos* two-stage test.

33. In my judgement Mr. Pipe's argument misinterprets the matters which need to be pleaded. There needs to be an analysis of whether a particular statement is statement of current facts or an expression of an opinion as to the future. Even if it is the latter it can be a statement of fact and as such be capable of being the subject of a misrepresentation allegation if properly construed it is a statement of a fact namely that a particular belief or opinion is currently held and can potentially be a representation that not only is such a belief held but that it is based on facts warranting that belief. An averment that the Defendant stated that he held a belief which he did not in fact hold is a proper averment of a misrepresentation and such a misrepresentation would be fraudulent if made deliberately in circumstances where the Defendant knew that he did not hold the belief. It is not necessary for the Claimants to plead or to establish that a reasonable man with the Defendant's knowledge could not honestly have held the relevant belief. That is an alternative route to the same conclusion namely that the statement of belief was made dishonestly but it is not necessary for that alternative route to be followed. The sentence relied on by Mr. Pipe in *Chitty* is not to be read in isolation. It is followed by the words "if a person states as his opinion something which he does not in fact believe, or which given the facts known to him, he could not honestly hold, he makes a false statement of fact" (emphasis added) making it clear that there are alternative routes to the conclusion that a false statement of fact has been made. Similarly it is of note that although Falk J referred to the *Ivey v Genting Casinos* test in *Russell v Cartwright & others* the allegation of dishonesty there failed at the first stage of the test because the requisite knowledge was not shown and for that reason it also failed at the second stage. The second stage of the test is the question of whether the conduct was honest by the standards of ordinary decent people. An averment to that effect does not have to be pleaded where there can be no question to the contrary. In the current case the Claimants contend that the Defendant made representations as to matters of fact and did so knowing that the representations were untrue or being reckless as to their truth. If the requisite falsity and knowledge are shown then dishonesty by reference to the standards of ordinary decent people cannot be in question.

34. I will need to consider the particular allegations below but I do so on the basis that the general structure adopted by the Claimants is an adequate pleading of fraud. As already noted it sets out the alleged representation; the matters rendering it false; the Defendant's knowledge of those matters; and the alleged fraudulent intention with which the statement was made. That form of pleading satisfies the requirements of Lord Millett's *Three Rivers DC* test by giving adequate notice of what is being alleged; making a clear allegation of fraud; and by setting out a case which if established is consistent with fraud and not solely with an innocent explanation. It is to be noted that although at [185] Lord Millett said that an averment that a statement was made recklessly can be equivocal and may not be a sufficient pleading of fraud it was clear that what will suffice will depend on the context. Here the averment that the statements were made recklessly is made as a sub-paragraph under an averment of fraud and is said to be one of the three alternatives establishing the fraudulent intention.

The Allegation of Negligent Misstatement.

35. The Schedule of Representations, Falsity, and Knowledge alleges negligent misstatement as an alternative cause of action to negligent misrepresentation under the 1967 Act and to fraudulent misrepresentation. However, until the very latest revision the Schedule did not allege a duty of care in relation to the alleged misstatements nor a breach of the same. The final iteration of the Schedule was produced very shortly before the hearing and as explained above I permitted the Claimants to rely on that. That revised version does allege duty and breach albeit in short and all-encompassing terms. I am satisfied that although in short form the pleading is sufficient to set out the requisite elements of a case of negligent misstatement and to enable the Defendant to know the case he has to meet.

36. There is a related question as to the extent to which that case has real prospects of success.

37. It is a necessary element of a claim for negligent misstatement that the person making the statement owes a duty of care to the recipient of the statement with that duty normally arising from the relationship between them. The Claimants set out the basis of the duty alleged here in these terms at [147.1] of the Schedule of Representations, Falsity, and Knowledge:

> "The Defendant, as controller and guiding mind of each of Bison, Roadways and Global, who was selling those companies, had access to information and special knowledge such that there was a special relationship between the Defendant and the First and Second Claimants giving rise to a duty of care in investigating information and in providing information and in making and continuing representations to the First and Second Claimants concerning: (i) the financial positions of Bison, Roadways and Global; (ii) the legality of the arrangements for trading of Bison, Roadways and Global and the position and attitude of regulators; (iii) the state of the relationships between Bison, Roadways and Global and their respective customers."

38. The Defendant says that there is no real prospect of the Claimants establishing that he owed a duty of care in the circumstances here and that permission to

amend to add a claim in negligent misstatement should be refused on that basis. The Defendant accepts that a relevant duty of care can arise between a seller and a purchaser such as to make the seller liable for negligent misstatements. However, he says that such a duty will only arise in particular circumstances. Thus in *Esso Petroleum v Mardon* [1976] QB 801 there was such a duty because Esso was in an expert position and gave an expert opinion. The Defendant says that the situation here is markedly different from such circumstances. He says that the situation here was that of a typical sale of shares by the owner and controller of a company and that there was no duty of care owed in respect of statements about the business of the company.

39. Through Mr. Bergin the Claimants acknowledged that the negligent misstatement claim is not a major element of their case but the Defendant's argument was not conceded. Mr. Bergin referred me to paragraph 8-127 of *Clerk & Lindsell on Torts* and says that indicates that the law has developed since *Esso Petroleum v Mardon*.

40. It is clear that the allegation of a duty of care in the circumstances here does go significantly beyond the circumstances which gave rise to a duty of care in *Esso Petroleum v Mardon.* The key factor giving rise to the duty there was that Esso professed special knowledge and skill and made the statement on that basis thus Lord Denning MR said at 820C:

> "It follows that I cannot accept Mr. Ross-Munro's proposition. It seems to me that *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*. [1964] AC. 465. properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another—be it advice. information or opinion—with the intention of inducing him to enter into a contract with him. he is under a duty to use reasonable care to see that the representation is correct and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages. This proposition is in line with what I said in *Candler v Crane, Christmas & Co*. [1951] 2 KB. 164, 179-180, which was approved by the majority of the Privy Council in *Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt* [1971] AC. 793. And the judges of the Commonwealth have shown themselves quite ready to apply *Hedley Byme* [1964] A.C. 465, between contracting parties: see in Canada, *Sea- land of the Pacific Ltd. v. Ocean Cement Ltd.* (1973) 33 D.L.R. (3d) 625; and in New Zealand, *Capital Motors Ltd. v. Beecham* [1975] l N.Z.L.R. 576.
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> "Applying this principle. it is plain that Esso professed to have—and did in fact have—special knowledge or skill in estimating the throughput of a filling station. They made the representation—they forecast a throughput of 200.000 gallons—intending to induce Mr. Mardon to enter into a tenancy on the faith of it. They made it negligently. It was a "' fatal error." And thereby induced Mr. Mardon to enter into a contract of tenancy that was disastrous to him. For this misrepresentation they are liable in damages."

41. That factor is not present here and I do not read the passage from *Clerk & Lindsell* on which Mr. Bergin relied as showing that the law has developed to the extent of imposing a duty in these circumstances. I remind myself that questions of the nature of a relationship and of the consequences flowing from

it can be fact sensitive but here the Claimants have set out the facts which are said to have created a "special relationship… giving rise to a duty of care". The information and special knowledge which the Defendant is alleged to have had was only such as would inevitably follow from that fact that he had been in control of the businesses of the companies whose shares were to be sold. That is a circumstance which would exist in very many share purchase agreements. There is no averment that the Defendant possessed special knowledge other than in that capacity let alone that he professed to have such special knowledge. I have concluded that even on the footing of the facts alleged in [147.1] there is no real prospect of a finding that there was a duty of care between the Defendant and the Claimants. It follows that there is no real prospect of the claim for negligent misstatement succeeding. Accordingly, permission is to be refused for the amendment asserting that claim.

Did the Defendant's Acceptance of the Terms of the Claimants' Draft Share Purchase Agreements constitute the Making of Representations?

42. In the Schedule of Representations, Falsity, and Knowledge the Claimants alleged that a number of the representations were made in writing in the draft Share Purchase Agreements. Thus at [53.4] and [57.5] the First and Second Bison/Roadways Legality Representations respectively are said to have been made in the draft Bison and Roadways Share Purchase Agreements. In those instances the allegation is that this was one of the ways in which those representations were made. However, other representations are said to have been made solely in the draft Share Purchase Agreements. Thus at [72] the Bison/Roadways Investigation Representation is said to have been made in the draft Bison and Roadways Share Purchase Agreements with no other mechanism alleged. Similarly the First and Second Global Legality Representations are at [123] and [126] alleged to have been made in the draft Global Share Purchase Agreement.

43. In each instance the draft Share Purchase Agreement was prepared by those acting for the Claimants. The Claimants' argument is that if a person selling shares in a company allows a warranty proposed by the other side to be incorporated in a share purchase agreement he or she thereby adopts the warranty and is to be seen as having made a representation to the effect of the terms of the warranty. The representation is said to have been made at the first point when the alleged representor allows the proposed warranty to remain in a draft without challenge. Mr. Bergin accepted that he was not able to rely on any authority for that proposition but said that it was to be regarded as following as a matter of principle.

44. I reject that argument. The proposition is a novel one and there is no real prospect of the argument that it follows from first principles succeeding. The proposition amounts to saying that a party makes a representation when in the course of negotiations about a draft sale agreement he or she allows a draft warranty proposed by the other side to be incorporated in the final agreement. Indeed the Claimants go further and say that the representation is made when the proposed warranty is allowed to remain in a draft agreement. A person who enters an agreement containing warranties which he or she is making as part of the agreement is liable under the terms of the agreement for the

warranties but is not to be regarded as having made a representation to the effect of the warranties at an earlier stage simply by not having challenged a proposed draft. The seller in such a case may in due course be liable as warrantor but there is no proper basis for constructing a representation artificially. As a matter of commercial common sense and reality a failure to challenge a draft term which one side proposes be incorporated in an agreement is not to be seen as an adoption of the term as a representation being made to the side proposing the warranty. It follows that to the extent that the Claimants are seeking to make amendments advancing this argument permission will be refused because the amendments do not show a case with a real prospect of success.

45. This means that [53.4] and [57.5] of the Schedule fall away. It also means that [72] falls away and that has the consequence that the alleged Bison/Roadways Investigation Representation claim cannot be pursued being based solely on a representation alleged to have been made in this way. Similarly the removal of [123] and [126] causes the First and Second Global Legality Representations to fail. In those cases there is a further factor which is that the Defendant was not a party to the Global Share Purchase Agreement which was between his wife and the Claimants. A contention that a failure to challenge a draft warranty proposed for an agreement to which the Defendant was not to be a party could operate as a representation by the Defendant is simply unarguable.

The Reason for the Amendment Application.

46. There is only one respect in which the Claimants say that the amendment has been caused by new information coming to light that is in relation to the insurance situation. Save for that they are frank in acknowledging that the amendment is the result of the assessment made by Mr. Bergin when he was instructed in place of the Claimants' previous counsel. Thus in his skeleton argument at [10] Mr. Bergin said:

> "While the original pleading was adequate to set out the Claimants' case in a condensed and paraphrased form, I took the view that the Defendant and the Court would be assisted by a more detailed and arguably more conventional recitation of the facts underlying the core allegations, whilst removing a couple of peripheral allegations. That approach was intended to assist the parties and the Court in identifying the issues and in ensuring that evidence adduced by the parties focused on the issues."

47. When I turn to the particular elements of the amended pleading I will consider whether the amendment is just further particularisation of the Claimants' existing case or in reality the assertion of a new case. It follows, however, that to the extent that any part of the amended pleading, other than that relating to the insurance situation, does assert a new case then the Claimants are not contending that there was any good reason for their failure to advance it earlier.

48. The Share Purchase Agreements were in October 2018 and the Initial Letter from the Claimants alleging misrepresentation was in January 2019. The Defendant took issue with the adequacy of the pleading of the Claimants' case in the original Defence in July 2019 and had repeated its criticism of the

pleading at the CMC in October 2019. The change in the Claimants' pleadings only came about at the end of 2019 following a change of counsel. That is not a good explanation for the delay in raising a new case. That has the consequence that, save for the possible exception of the claim arising out of the insurance situation, if the amendment does raise a new case and if it is very late in the sense of impacting on the trial date then attention will need to be focused on the strength or otherwise of the new case being asserted. In such circumstances the question will be whether the Claimants have shown a case of such strength that justice requires that they be allowed to advance it at the expense of the loss of the trial date and in the absence of any good explanation for the failure to raise it earlier.

The Financial Representations.

49. The Initial Letter set out nine alleged misrepresentations but none of these was in relation to the turnover or profitability of Bison.

50. The Particulars of Claim asserted at [20.1] a representation that:

> "the turnover of Bison in the current financial year was expected to make a profit of no less than £350,000 as noted in the Axis commercial sales details"

51. At [49] it was pleaded that the turnover and profit levels that appeared likely to be generated were expected to be lower than was anticipated and that no profit at all was likely in the first year of operation following the Share Purchase Agreement. At [50.1] and [50.2.1] it was said that the profits had been overstated through "accounting adjustments" to the extent of at least £100,000. At [50.2.2] it was said that the liability for business rates on Bison's lorry park had been understated by £21,358.50 per annum.

52. In the proposed Amended Particulars of Claim there is a marked expansion of the Claimants' case in this regard. [20.1] and [50.1] are deleted and replaced by the matters set out in the Schedule of Representations, Falsity, and Knowledge. Under the heading "Bison/Global Financial Representations" that Schedule sets out in twenty-eight paragraphs a series of representations said to have been made in respect of the finances of Bison and Global. Nine separate representations are alleged namely: the Continuing Net Profit Representation, the First Continuing Implied Profit Represention; the Second Continuing Implied Profit Representation (those three being defined collectively as the Bison/Global Financial Representations), the EBITDA Representation, the Recruitment Net Profit Representation, the First £400K Representation, the Half a Million Representation, the Second £400K Representation, and the Relationships Representation. The Schedule sets out in some detail the matters which are said to have constituted these representations. The representations are alleged to have been made variously either orally or in writing or to arise by implication from a combination of conduct and documentation. The EBITDA Representation and the Recruitment Net Profit Representation are said to have been made in a memorandum supplied to the First Claimant by his broker and the Claimants invite the court to infer that the information in

that memorandum came from the Defendant. In addition the Defendant and Mr. Ibbotson are alleged to have repeated those representations orally.

53. At [32] – [36] the Schedule sets out the matters on which the Claimants rely as demonstrating that these representations were not true. This is followed at [39] by an assertion of the Defendant's knowledge of these matters and by the contention that the representations were negligent for the purposes of the Misrepresentation Act 1967 or tortious negligent misstatements or made fraudulently.

54. Then at [45] – [47] under the heading "The Insurance Situation" the Schedule asserts that Bison owed £97,011 to its insurers in respect of unpaid premium. It is said that the Defendant knew of this and that this caused the Continuing Net Profit Representation and the First Continuing Implied Profit Representation to be untrue. The proposed Amended Particulars of Claim also contain an expanded [51.3.2] where it is said that the Defendant's knowledge of the insurance situation and his failure to disclose the same was a breach of the warranty in the Bison Share Purchase Agreement that the Defendant did not know of circumstances likely to give rise to proceedings against Bison.

55. At [46.7] the Schedule asserts that the receipt of a statutory demand dated 12th December 2019 was the first time the Claimants learnt of the indebtedness to the insurers.

56. Mr. Bergin sought to portray the Financial Representations other than the averment in respect of the Insurance Situation as being a fuller particularisation and amplification of the case already pleaded. His argument in essence was that the questions of turnover and profitability were already in issue and that the amended pleading and Schedule simply set out the details of the Claimants' case in that regard. I cannot accept that characterisation of the amended case. As originally pleaded the allegation was of a single representation in respect of Bison made in the commercial sales details. Now the Claimants are alleging nine separate albeit related representations variously express and implied made variously orally or in documents and referring to Global as well as to Bison. That is the putting of a new case.

57. In his further submissions Mr. Bergin said that my assessment of the original pleading involved a misinterpretation of that pleading. The relevant parts of the pleading read as follows:

> "20. In the course of the negotiations for the sale of the shares in Bison and/or Roadways and Global the Defendant made the following representations about Bison and the group.
>
> "20.1 That the turnover of Bison in the current financial year was expected to make a profit of no less than £350,000 as noted in the Axis commercial sales details".

58. Mr. Bergin says that the passage is to be read as an averment that the representation was made in the course of the negotiations which negotiations were conducted in various ways and with the Axis document being referred to simply as an illustration of where the representation was "noted". However, it

is significant that no other particulars of any occasion or occasions when the representation is said to have been made were given at 20.1 nor is there any further particularisation at 50.1 or 50.2 which are said to be the particulars of the misrepresentations. The proposed amendment demonstrates that the Claimants wish to put the matter more widely but absent amendment their case is of a single representation in this regard with identification only of a single instance of where the representation appears.

59. I am satisfied that the case being put is adequately particularised and that a case with a real prospect of success is shown. Mr. Pipe mounted a sustained critique of the allegations questioning in particular whether the representations could properly be said to have been implied in the documents relied upon; whether falsity could be shown (asserting that the Claimants' contentions were in part founded on a misunderstanding of the nature of the EBITDA figures); and whether reliance could be shown. The points which Mr. Pipe was able to make demonstrate that there is ample scope for argument about the Claimants' case as now put but those points were of varying force and Mr. Pipe accepted that he was not able to mount such an attack on the allegations of oral representations. The hurdle which the Claimants have to surmount to show that a new claim has real prospects of success is a comparatively low one and I am satisfied that the case that the particular representations were made; that they were false; and that they were relied upon is one which has a real prospect of success although some elements are stronger than others and none is free from difficulty.

60. The question then becomes one of the impact of the proposed amendments on the timetable and in particular on the trial date and whether permission should be given in the light of that impact. If the amendment to introduce these elements is permitted those acting for the Defendant will have to take detailed instructions on the allegations (though I accept that to some extent that will already have been done by way of preparation for the dispute about amendment). There will then have to be a substantial recasting of the Defence to address these allegations in detail. The scope of the disclosure exercise will be expanded albeit only to a comparatively modest degree. The exercise of gathering and preparing witness evidence will be a markedly larger one than would otherwise have been the case. I bear in mind that the principal witness will remain the Defendant and in large part this will be a matter of expanding the areas covered in his witness statement though the Defendant will also need to obtain additional evidence from Mr. Ibbotson and Mr. Pearman about the particular involvement which they are said to have had. The scope of the expert evidence will also be expanded. Again Mr. Bergin sought to persuade me that there would be only a modest expansion of the expert evidence but I am satisfied that there will be a marked expansion of the respects in which expert accounting evidence is likely to be needed if only to address the assertion that there were no grounds for the representations made. In the light of those matters Mr. Pipe was correct to say that there would also need to be a revisiting of the costs budgets. At least in the short term the additional work will have to be done against the background of the difficulties posed by remote working and the circumstances of the Covid-19 pandemic.

61. The current timetable in the light of sensible agreed modifications to take account of the current application and the Covid-19 pandemic provides for disclosure to be concluded by mid-August 2020 and for witness statements to be served by 25th September 2020. The trial is listed for thirteen days from 1st February 2021. That is a reasonably generous timetable for the current case and the crucial question is whether the additional work which the amendment would necessitate could be accommodated in that timetable so as to preserve the trial date.

62. Mr. Bergin sought to characterise the willingness of the Defendant's solicitors in correspondence in March 2020 to agree to a rearrangement of the timetable pending the outcome of the application as an indication that the current timetable could be expanded to accommodate the additional work. That was a misreading of the correspondence and I do not regard the Defendant's solicitors as having made such a concession.

63. Any extension of the length of the actual trial is likely to be modest given that the current provision of thirteen days is generous for the case as currently pleaded. My assessment is that even with these amendments the trial is unlikely to take substantially longer than the current listing. I have much more concern about the impact of the additional preparation which will be needed and the disruption of the existing timetable leading up to trial. The Claimants are now seeking to put a radically different case in relation to the financial representations which will as I have set out above require a significant expansion of the preparatory work. I am satisfied that the impact will be such that it will not be reasonably practicable for the case to be properly prepared for trial in February 2021.

64. It follows that permitting these amendments would result in the loss of the existing trial date. It may well be that the case could be ready for trial comparatively soon after the current listing but that listing would be lost and a new trial date would have to be found in a period when the court would also be likely to be seeking to accommodate trials which have had to be adjourned because of the Covid-19 pandemic.

65. As I explained at [46] – [48] above the Claimants do not have any good reason for their failure to include these allegations in the original Particulars of Claim or to seek to amend at an earlier stage. Accordingly, I must consider whether the Claimants have discharged the heavy burden on showing that their case in relation to these alleged misrepresentations is of such strength that justice requires them to be permitted to advance that case notwithstanding the loss of the trial date. The case is one which has a real prospect of success but as Mr. Pipe's critique has demonstrated it is far from compelling. A great deal would depend on the evidence of what was said in the particular conversations and on the inferences to be drawn from the various documents but the case is not one of such strength that justice requires that the Claimants be allowed to advance it in these circumstances. I have reflected on the point that the Claimants' contention is that the representations which they now allege are said to have been made fraudulently and that the Claimants should be allowed to seek redress for that fraud. The step of refusing to allow the Claimants to make that allegation is not to be taken lightly. Nonetheless that factor must be

considered in the light of the absence of any reference to a financial representation of this kind in the Initial Letter; the reference in the Particulars of Claim to a single particular representation only; and in the light of the facts that the making of the representations and the inferences to be drawn from the documents are heavily contested. In those circumstances justice does not require that the Claimants be allowed to amend at the price of the loss of the trial date. Accordingly, I refuse permission for the amendment proposed in relation to the Financial Representations.

66. In his submissions following receipt of the draft judgment Mr. Bergin said that the foregoing analysis was fatally flawed. He said that the approach taken to the Financial Representations overlooked the effect of the 14th February 2020 letter from the Defendant's solicitors. As I have explained above in that letter those solicitors said that the Defendant was consenting pursuant to CPR Pt 17.1 (2)(a) to parts of the draft which had been sent to them but not to others. Mr. Bergin said that the letter was effective as consent under Pt 17.1(2)(a) with the consequence that the Claimants were entitled to amend the Particulars of Claim to the extent of that consent and that the court had no jurisdiction to prevent this. He said that there was a further and crucial consequence of this namely that for the Defendant to address the matters covered in the permitted amendments would require him to undertake precisely the exercise which I have described in [60] above. It follows, the Claimants say, that my conclusion that permitting the proposed amendments would jeopardise the trial date was untenable. This was either because the work in question would have to be done anyway (so that the further amendment would not be the matter putting the trial date at risk) or because it was not open to the Defendant to say that the trial date was at risk.

67. Mr. Bergin asserted that this argument had been raised at the hearing in April. It is correct that mention was made of the letter of 14th February 2020 and that the Claimants' arguments were focussed on those parts of its proposed pleading which the Defendant had indicated were contentious. However, the argument in its current form did not in my recollection feature at the hearing. Nonetheless, it is to be addressed on its merits.

68. The argument depends on the effect of CPR Pt 17.1 (2). That provides that a statement of case made be amended either under (a) "with the written consent of all the other parties" or under (b) "with the permission of the court". In my judgement those provisions must be read as having reference to a statement of case seen as a single document and not to distinct parts of a proposed statement of case of which other parts lack consent or permission. That follows from the facts that the provision is for amendment of a statement of case as a whole and that the operation of the Rules requires that at any given time there needs to be a particular document which can be identified as the relevant statement of case of a given party. If Mr. Bergin's argument is right and a consent to some parts but not others of a proposed statement of case is binding on the parties and the court then the position would be that there would be a period of time when there was no single document which could be identified as the relevant statement of case.

69. The letter of 14th February 2020 did not approve an identified statement of case. The Defendant's solicitors indicated that there was consent to parts of the proposed amended pleading but resistance to others. There was no consent to the draft which had been proposed nor was there a consent to any identifiable document. It would have been open to the Claimants to produce a revised draft amended pleading containing only those elements to which the Defendant's consent had been indicated. It is possible that such a pleading could be said to have been amended with consent though there would be at least scope for an argument that the consent would need to be confirmed afresh with reference to the particular document. If that had been done it would have been open to the Claimants then to apply to the court seeking the court's permission for a re-amendment containing the elements to which the Defendant objected. However, the Claimants did not take that course. Instead they applied more than a month after the 14th February 2020 letter for permission to amend in a more extensive format. It is of note that the application sought the court's permission for amendment in a particular form. If and to the extent that permission is given as a result of that application the resulting statement of case will be recorded as having been amended with the permission of the court pursuant to Pt 17.1 (2)(b). It would not be said to be amended with that permission in some respects and with consent pursuant to Pt 17.1 (2)(a) in other respects.

70. It follows that the position here is that it has not been possible at any stage to identify a particular amended statement of case for which the Claimants have the Defendant's written consent. Rather there is an application seeking the court's permission for an amended pleading in a form going beyond that of an amended pleading containing solely those elements for which the Defendant had indicated consent was forthcoming. In those circumstances the court's jurisdiction is not ousted and it is not open to the Claimants to contend that they are entitled regardless of any decision of the court to amend by creation at some future date of a statement of case containing those elements to which the Defendant indicated in February that there was no objection.

71. In those circumstances Mr. Bergin's argument falls away. The effect of the proposed amendment is to be seen as a whole unconstrained by the letter of 14th February 2020.

72. The proposed amendment in relation to the Insurance Situation is in a different category. The Claimants case is that they first learnt of the debt to the insurers in December 2019. It follows that the amendment is one based on new information. The Schedule at [47] invokes the Insurance Situation as a further element demonstrating the falsity of the Continuing Net Profit Representation and of the First Continuing Implied Net Profit Representation. That averment cannot survive my refusal of permission for the amendment introducing those representations.

73. At [48] it is said that:

> "Further, by presenting financial information to the First and Second Claimants to take into account when considering whether or not to enter into the SPAs, the Defendant represented that the same was complete and accurate. The financial

> information did not disclose the existence of the insurance premium debt. That representation was therefore false."

74. That appears to be an allegation of a further representation which is said to be implied from the presentation of "financial information" and which was shown to be false by the Insurance Situation. As it stands it is an assertion that without more the provision of some financial information in the context of the sale of shares gives rise to an implied representation that the information was complete and accurate. There is no real prospect of a finding that such a representation is to be implied from the giving of financial information. In particular there is no prospect of the court finding that there was an implication that the information was "complete". The completeness of such information is a matter which one would expect to be the subject of a warranty but there is no prospect of an implied representation. A person selling shares in a business (even when those are the controlling shares) and who gives information about the business is not representing that there is no other information which could be given. Accordingly permission is not given for this amendment because it does not have a real prospect of success.

75. However, there is rather more force in the amendment proposed at [51.3.2] of the amended Particulars of Claim. Here the existence of the Insurance Situation is pleaded as a breach of the warranty as to potential litigation or disputes. That is a claim with sufficient prospects of success for amendment to be appropriate. It is moreover, one which standing alone will not have a material impact on the further preparation of the case nor will it jeopardise the trial date. Permission will, accordingly, be given for the amendment proposed at [45] and [46] of the Schedule and [51.3.2] of the Particulars of Claim.

The Legality Representations.

76. The Initial Letter asserted a representation that the Defendant had valid operating licences in relation to Bison and Roadways and lawfully operated two properly regulated companies. That letter attached a letter from Jared Dunbar, who is said to have been a "specialist transport solicitor" and the Claimants said that the Defendant had "failed to disclose that he had operated Bison and Roadways in an illegal and unlawful manner which is likely to have catastrophic consequences for the future viability of both businesses".

77. The Particulars of Claim set out at [20.2] an alleged representation that "Bison and Roadways were operating as road haulage companies in a way that was entirely lawful and compliant with the requirements of the operator's licensing regime and their respective operator's licences". At [33] and [34] the Particulars of Claim asserted that the Claimants had discovered that the Traffic Commissioner for the North-Western area had concerns over the financial arrangements of Bison and Roadway. Then at [37] – [38.4] the Particulars of Claim set out the respects in which it was said that Bison and Roadways had been operated in an unlawful manner. The falsity of the representation was pleaded at [50.3] and at [50.4] the respects in which the businesses were said to have been operated illegally were set out. At [51.1] these matters were said also to have constituted a breach of the warranty that the businesses had been operated in accordance with the relevant law and regulations.

78. In the proposed amended Particulars of Claim [20.2] and [50.3] are deleted to be replaced by reference to the Schedule. At [51] – [69] the Schedule alleges three separate representations.

79. The First Bison/Roadways Legality Representation is said to have been a representation that:

> "Bison / Roadways had at all times conducted its business and entered into all transactions in accordance with its Articles of Association and so far as the Defendant was aware in all material respects all applicable laws and regulations."

80. That representation is said to have been made orally by the Defendant on two occasions and orally and in writing by the Defendant's transport manager. In addition it is said to have been made in writing in the draft Share Purchase Agreements. I have addressed that last contention at [42] and following above and have explained why I reject it.

81. The Second Bison/Roadways Legality Representation is a representation that:

> "Bison / Roadways had not committed and, so far as the Defendant was aware, was not liable for, and no claim had been made, that it had committed or was liable for any criminal, illegal, unlawful or unauthorised act or breach of any obligation or duty whether imposed by or pursuant to statute, contract or otherwise."

82. That representation was said to have been made in the same meetings and documents as the First Bison/Roadways Legality Representation but also orally at a further meeting.

83. The Schedule then sets out the disclosure by the Defendant's solicitors of the fact that Bison had been subject to a public enquiry in May 2018. It particularises the queries which the Claimants raised as a result of this and asserts that the Claimants' concerns were put at rest by representations which had been included amongst the instances of the first two legality representations.

84. Then, at [68] the Claimants allege the making of a further oral representation, the Third Bison/Roadways Legality Representation. This was a representation that there was nothing else which Bison or Roadways had been doing which might be illegal.

85. The falsity of the representations is then alleged together with particulars of the Defendant's knowledge and an allegation that the representations constituted negligent misrepresentations and/or negligent misstatements. The Schedule does not contain an averment that these representations were made fraudulently but in the course of his submissions Mr. Bergin said that was an oversight in the drafting of the Schedule and I will proceed on the basis that the Claimants seek to allege fraud in respect of these representations in the same terms as are set out elsewhere in the Schedule in relation to other representations

86. I have already explained that the contentions at [53.4] and [57.5] as to the making of the representations in the draft Share Purchase Agreements do not have a real prospect of success and permission is not given for the amendment to that extent.

87. Turning to the balance of this part of the Schedule the alleged illegality in the operation of the businesses and the contention that there was misrepresentation in this regard have been a key element in the Claimants' case from the outset. Allegations to that effect were made in the Initial Letter and the original Particulars of Claim. The proposed amendment is a reformulation providing markedly more detail and clarity but in my assessment it does not introduce a new claim.

88. Mr. Pipe laid considerable emphasis on his argument that the contention that there were misrepresentations in this regard had no real prospect of success. He drew on material which had been put forward in support of the summary judgment application and in particular on an email of 27th September 2018 from the Claimants and associated correspondence. He said that this showed that before completion of the Share Purchase Agreements the Claimants were aware of the Traffic Commissioner's Enquiry and of the issues which had been raised as to the legality of the operation of the businesses. Mr. Pipe then said that this meant that the Claimants could not have relied on the representations in entering the Share Purchase Agreements and that the claim could not succeed in this regard.

89. In my judgement that argument overlooks the fact that the Schedule refers to the 27th September 2018 email and then proceeds to allege that the Claimants' concerns were assuaged – the Claimants say that the reassurances they were given were false.

90. The points which Mr. Pipe makes may well have force in the context of the yet to be determined summary judgment application but they are of limited assistance at this stage. I have already explained my conclusion that this part of the amended case does not amount to the assertion of a new claim. It follows that the question of whether a claim with a real prospect of success is shown is of minimal relevance for the reasons explained at [19] above. Certainly the contention that this part of the claim as amended has no real prospects of success is not sufficiently clear to justify refusal of permission to amend.

91. Mr. Pipe also said that the Third Bison/Roadways Legality Representation with its reference to whether Bison or Roadways had done anything which "might" be illegal was too vague to give rise to an actional misrepresentation. However, that expression has to be seen in context and I am satisfied that in the context here it is at least reasonably arguable that an actionable misrepresentation could arise.

92. It follows that the amendment here provides more detail than was in the earlier pleadings but it does not seek to make a new claim. The substance of the matters put forward was in issue in any event and I am satisfied that there will be no material addition to the preparatory work which would have been

needed even without amendment and I authorise the amendment save for [53.4] and [57.5].

The Investigation Representation.

93. There is a degree of overlap between this and the preceding representations.

94. In the Initial Letter the Claimant had said that the Defendant had represented that the only operating issue under investigation by the Traffic Commissioner was that disclosed in the Disclosure Letter. The letter went on to say that there was also an ongoing DVSA investigation into the operation of Bison and Roadways vehicles without tachograph cards.

95. The Particulars of Claim at [20.3] put the representation in somewhat different terms as being that Bison and Roadways "were not facing any investigations into their activities by the DVSA and/or the Traffic Commissioner". At [35] and [36] the Particulars of Claim asserted that the DVSA had been investigating alleged breaches of the drivers' hours and tachograph regulations at Bison and Roadways and that the Defendant had been aware of this. Then at [50.5] the falsity of the [20.3] representation is pleaded.

96. In line with the other amendments [20.3] and [50.5] are deleted in the amended Particulars of Claim to be replaced by reference to the Schedule. In the Schedule the Bison/Roadways Investigation Representation is included amongst the legality representations. It is said to have been a representation that:

> "Bison / Roadways had not received notification that any investigation or inquiry was being or had been conducted by, or received any request for information from any governmental or other authority, department, board or agency in respect of its affairs and, so far as the Defendant was aware, there were no circumstances which would give rise to such investigation, inquiry or request."

97. The representation is alleged only to have been made in the draft Share Purchase Agreements and as a consequence and for the reasons set out at [42] and following above it fails and this amendment will not be permitted.

The Maritime Representation.

98. Bison's customers included Maritime Transport Ltd ("Maritime") and Fowler Welch Ltd ("Fowler Welch"). The Initial Letter alleged misrepresentations about Bison's relationship with both those customers.

99. In respect of Maritime it was said that the Defendant had represented that "all relevant operating issues had been disclosed to Maritime and that there were no material problems with Bison's relationship with Maritime". This was expanded on at paragraphs 11 – 14 where it was said that the Defendant had failed to disclose Bison's failure of Maritime's audit and a subsequent failure to make improvements which had been required by that audit with the consequence that Maritime were said to have lost faith in Bison.

100. The Particulars of Claim at [20.4] pleaded a representation in respect of Maritime that "there was a good commercial relationship with Maritime and that all relevant operational issues had been reported to Maritime". At [39] particulars were given of a meeting between the Claimants and Maritime in which the Claimants were told that Bison had failed Maritime's audit and that Maritime had considered ending the relationship with Bison. That termination had been suspended to allow improvements to be made but that no improvements had been made with the effect that the relationship was still vulnerable to termination. This was expanded on at [50.7] and [50.8] where it was said that issues such as those arising from a DVSA investigation had not been reported to Maritime.

101. In the proposed amended Particulars of Claim the allegation of representation at [20.4] is deleted and replaced by reference to the Schedule. The particulars at [39] of matters which came to light after the completion of the sale are left unaltered but the averment of falsity at [50.7] is deleted and reference is to be made to the Schedule.

102. The Maritime Representation is pleaded at [89] – [102] in the Schedule. The representation is said to have been that:

> "there was a good commercial relationship with Maritime and that the Defendant had reported all relevant operational issues to the Claimants".

103. The Schedule proceeds to allege that the representation was made orally on three separate occasions and to assert that there was an implied representation that the Defendant had reasonable grounds for making the representation. It then refers to [39] of the Particulars of Claim and in addition sets out particulars of falsity contending by reference to sundry emails from Maritime that the relationship was "irreparably damaged" as at October 2018. The Schedule asserts that the Claimants had attempted to pull the relationship round but had not been able to do so. It then sets out particulars of the Defendant's knowledge and the contention that the representations were negligent for the purposes of the Misrepresentation Act 1967 or tortious negligent misstatements or made fraudulently.

104. In seeking to resist this amendment Mr. Pipe asserted that there had been a change from the Claimants' previous case. Instead of a representation that all operational issues had been reported to Maritime it was being alleged that there had been a representation that all operational issues had been reported to the Claimants. There is no substance in this point. The Claimants have throughout contended that the Defendant represented to them that there was a good relationship with Maritime it is implicit in such a representation that there were no issues between Bison and Maritime which needed to be disclosed to qualify that representation. If anything the amendment is narrowing down the scope of the allegation against the Defendant.

105. The Schedule spells out the circumstances in which the representation is said to have been made identifying three meetings at which the Defendant is alleged to have made the representation orally. This is not the assertion of a new claim but amounts to further particularisation which will not add

materially to the length of the necessary preparation nor to the length of the trial.

106. Mr. Pipe contended that there was no real prospect of a finding that the alleged representation had been made. However, as this is not a new claim that point has minimal weight. In any event the representation is said to have been made orally and the question of whether it was made is a paradigm instance of an issue which will need to be determined after hearing evidence at trial. The evidence filed in support of the summary judgment application includes a statement from Darren Heyhoe of Maritime saying that the relationship had been good at the time of the Share Purchase Agreements and that the problems which were encountered thereafter were new and were the result of the Claimants' actions. That evidence may well be very significant in the context of the summary judgment application but it does not assist on the question of amendment.

107. It follows that this proposed amendment will be permitted.

The Fowler Welch Representation.

108. In the Initial Letter the representation in respect of Fowler Welch was expressed shortly. At 3.4 a representation that the Defendant was "unaware of any other issues with existing clients … including Fowler Welch" was asserted. At paragraph 15 it was said that in fact Fowler Welch "had stopped using Bison due to unreliability, bad service, and poor communication" and that the Defendant had failed to inform the Claimants of this.

109. At [20.5] in the Particulars of Claim the representation in respect of Fowler Welch was said to have been that:

> "there was a good commercial relationship with Fowler Welch and that there was a realistic prospect that Bison would receive £1 million worth or business from Fowler Welch over the following year of operations."

110. At [40] it was pleaded that Fowler Welch had "recently ceased" to use Bison's vehicles or drivers and had said that they were "barred" because of poor performance.

111. The falsity of the Fowler Welch representation was pleaded at [50.9] and at [50.10] it was said that relationship with Fowler Welch had broken down and that there was no likelihood of Bison receiving £1m worth of business from that company in the forthcoming year.

112. The amendment in respect of Fowler Welch follows a similar pattern to that in relation to Maritime. So the allegations of representations at [20.5] is deleted and replaced by reference to the Schedule. The particulars at [40] of matters which came to light after the completion of the sale are left unaltered but the averment of falsity at [50.9] is deleted and reference is to be made to the Schedule.

113. At [103] – [120] the Schedule alleges two representations in respect of Fowler Welch.

114. The first, the "Fowler Welch Relationship Representation", is that "there was a good commercial relationship" with Fowler Welch. This is said to have been made "orally at various meetings" and by that representation the Defendant is said to have impliedly represented that he reasonable grounds for making it.

115. The second representation is the "Fowler Welch Business Representation". This is said to have been a representation that "there was a realistic prospect that Bison would receive £1million worth of business from Fowler Welch over the following year of operation". That representation is said to have been made orally "at various meetings" and in an email sent by the Defendant's agent, Neil Pearman on 24th May 2018. The Schedule also avers that representations as to the dealings with Fowler Welch were made at a meeting on 26th June 2018 and in an email of 29th May 2018. It is said that the Defendant impliedly represented by this representation that he had reasonable grounds for making the representation.

116. The falsity of the representations is pleaded by reference to the Particulars of Claim at [40] and it was said that the relationship with Fowler Welch was "irreparably damaged". Particulars of the Defendant's knowledge and of the characterisation of the representations are made in the same way as for the Maritime Representation.

117. Subject to one qualification this amendment is permissible. In the amendment the Claimants are not advancing a new case. The representation alleged in the Particulars of Claim contained two elements and the proposed amendment breaks those down into two separate representations. The allegation which the Defendant has to answer remains the same albeit that the Claimants are now providing more particularisation as to the circumstances in which the representations are said to have been made. Mr. Pipe sought to argue that there was no real prospect of fraud being shown and that the references to a profit of £4,200 per week being obtained were properly to be seen as time-limited and could not be regarded as amounting to a representation that £1million worth of business would be received. Given my assessment that this is not a new claim this argument has minimal weight. In any event there is clearly scope for debate about the interpretation of the correspondence and conversations and the Claimants cannot be said to have no real prospect of showing such a representation.

118. The proposed amendment is, however, deficient in the particularisation of the circumstances in which the representations are said to have been made. At [105] the Fowler Welch Relationship Representation is said to have been made "orally at various meetings" and at [108] the Fowler Welch Business Representation is similarly said to have been made "orally at various meetings". This is patently insufficient to enable the Defendant to know the case he has to meet. It follows that permission will be given for the amendment but if the Claimants wish to persist in asserting that either or both of the representations were made orally then the amended pleading must be revised so as properly to particularise the meetings in question; the persons present; and the gist of the words relied upon.

The Representations in respect of Global.

119. The Initial Letter had asserted that two representations had been made in relation to Global namely that it had no employees but operated as a lawful recruitment agency and that every invoice submitted by Global to its factoring company was genuine. At paragraphs 16 and 17 it was said that Global should have been registered as an employment intermediary because payments were being made to workers without deduction of the sums due under PAYE or as National Insurance contributions. It was said that the Defendant had been aware of these matters and had sought to cover up the unlawful activity. Then at paragraphs 18 and 19 it was said that Global had submitted about £15,000 worth of false invoices causing it to receive a payment to which it was not entitled and the Defendant was said to be aware of these matters.

120. In the Particulars of Claim only one representation was alleged in relation to Global. This was at [20.6] where a representation that "Global was operating entirely lawfully as a separate recruitment/employment agency" was alleged. At [41] and [42] it was said that Global had been operating illegally by failing to make PAYE and National Insurance contributions. The pleading proceeded to allege at [43] the supply of £15,000 worth of false invoices to the invoice factoring company. Then at [50.11] and [50.12] the falsity of the representation as to the lawful operation of Global was asserted by reference to the matters at [41] and [42].

121. In the amended Particulars of Claim [20.6] and [50.11] are deleted and replaced by reference to the Schedule. There [121] – [146] set out the "Global Legality and Profit Representations". Three separate representations are alleged.

122. The first is the First Global Legality Representation. This is said to have been made in the draft Share Purchase Agreement in respect of Global and to have been a representation that:

> "Global had at all times conducted its business and entered into all transactions in accordance with its Articles of Association and so far as the Defendant was aware in all material respects all applicable laws and regulations"

123. The Second Global Legality Representation was also said to have been made in the draft Share Purchase Agreement and was that:

> "Global had not committed and, so far as the Defendant was aware, was not liable for, and no claim had been made, that it had committed or was liable for any criminal, illegal, unlawful or unauthorised act or breach of any obligation or duty whether imposed by or pursuant to statute, contract or otherwise."

124. For the reasons given at [42] and following above there is no real prospect of the Claimants showing that these representations were made as alleged and permission is refused for these amendments.

125. At [127] it is alleged that on 19th May 2018 the Defendant represented that Global "was a recruitment business which was `going strong' and an integral

and attractive part of the deal". It is not clear whether this is intended to rank as a separate representation or as an instance of the other representations. Although somewhat strangely positioned the averment is best seen as an aspect of the Global Profit Representation to which I will now turn.

126. That representation is alleged at [130]. It is said to have been a representation that the profit from Global was £1,300 per week. This representation is said to have been made in an email from Mr. Pearman although an oral representation by the Defendant that Global was a "million-pound business" is also alleged.

127. The falsity of the representations is alleged and particulars of the Defendant's knowledge then follow. Here also the representations are said to have been negligent misrepresentations or negligent misstatements or to have been made fraudulently. The falsity of the Global Profit Representation is alleged in [137] where reference is made to the matters at [41] – [43] of the Particulars of Claim and where it is said that as detailed in those paragraphs "Global was not being run lawfully and was subject to immense contingent liability meaning that it was not a profitable business."

128. It is also to be noted that there is reference to Global in the Claimants' pleading of the Financial Representations in that profit from Global is said to have been included in the Half a Million Representation and in the Second £400K Representation.

129. The allegation of the Global Profit Representation is a new claim. It alleges a representation of a particular level of profitability. That is an allegation which did not appear in either the Initial Letter or the original Particulars of Claim. The Claimants have real prospects of succeeding in showing that the representation was made. The Claimants' interpretation of the email from Mr. Pearman is properly arguable although it is not the only potential interpretation of the email (as was shown by the different reading put forward by Mr. Pipe). In addition it cannot be said at this stage that the Claimants do not have a real prospect of showing that the oral representation alleged was made.

130. The reference at [137] in the Schedule to Global being subject to "immense contingent liability" is unclear and the basis of which this is alleged is not properly particularised. In [137] it is said that this is detailed in [41] – [43] of the Particulars of Claim but no contingent liability immense or otherwise is set out there. It may be that the circumstances alleged in [41] could give rise to a liability to HM Revenue & Customs but a potential liability is not actually alleged. In those circumstances the reference to an "immense contingent liability" in [137] will not be permitted. Not only is it lacking in proper particularisation but it has the potential to require evidence of and investigation into the finances of Global generally. That in turn has the potential to add materially to the scale of preparation needed for the trial and to create a degree of jeopardy to the trial date.

131. The amendment will be permitted to the extent of allowing the allegation of the Global Profit Representation as having been made in the email of 21st June 2018 and in the conversation on 26th June 2018 and of the falsity of the

representation as being evidenced by the matters in [41] – [43]. There will be a modest addition needed for trial to address the interpretation of the email and the circumstances of the representation but the evidence as to the alleged falsity will be the same as would need to have been prepared to address the unamended case.

The Bison Claim.

132. The Initial Letter alleged that the Defendant had received "an unlawful payment of £80,000" from Bison by having caused that sum to be withdrawn from the company's funds. In addition a failure to repay the money on demand was alleged.

133. The original Particulars of Claim at [45] – [47] repeated almost verbatim the allegation in the Initial Letter. The assertion that there had been a wrongful removal of the sum of £80,000 was repeated at [52] and was followed at [53] by the assertion that the Defendant's refusal to repay the money had been a conversion. At [61] the Claimants asserted that the removal of this money had caused a reduction "in the value and/or profits of Bison" by £80,000 and that they were entitled to "£80,000 in losses arising from that". That was a claim for loss allegedly suffered by the Claimants but at [63] an alternative case was put namely that Bison was entitled to the return of the sum of £80,000 or had suffered loss in that sum. In the prayer the Claimants sought damages but also £80,000 "on behalf of the Third Claimant".

134. Bison is currently the Third Claimant but the proposed amendment envisages that it will no longer be a party.

135. In the proposed Amended Particulars of Claim [45] – [47] are left unaltered but are followed by an addition explaining that "the Claimants do not pursue this claim but the First and Second Claimants rely on the Defendant's conduct as part of the course of dealing". The averments which were at [52] – [53] and at [63] are deleted. They are replaced by an averment at [52] of the Defendant's duties to Bison pursuant to sections 171 – 177 of the Companies Act 2006 and at [53] by an averment of a commensurate fiduciary duty owed to Bison together with a duty to acquire and maintain sufficient knowledge of the company's business to be able to perform his duties properly.

136. The Defendant is said to have been in breach of those duties by reason of the alleged failures to comply with the requirements of the operator's licence and of the "regulatory regime" and the issues about tachograph misuse as set out at [33] – [38.4] and [50.3] – [50.6] of the Particulars of Claim "and as expanded in the Schedule of Representations, Falsity, and Knowledge". Those breaches are said to have caused loss to Bison in the sum of £7,023 as the cost of restructuring of Bison together with a continuing annual cost of £23,845 being the cost of an additional staff member who is said to have been engaged to address the issue of the way the "group companies" have been run.

137. In a new [53A] the Claimants pleaded:

> "By an assignment in writing dated [**date**], Bison assigned, novated and transferred to the First and Second Claimants all its rights, title and interest in

> these claims. By a notice in writing dated [**date**], the First and Second Claimants gave notice to the Defendant of the assignment. Alternatively, written notice is hereby given of the assignment."

138. After the hearing the Defendant's solicitors wrote to the court and to the Claimant's solicitors saying that they had sought inspection of the document which was alleged to evidence the assignment. They had been provided with a document dated 22nd April 2020 (the second day of the hearing). In their letter the Defendant's solicitors made the point that the First Claimant's witness statement of 15th April 2020 had said that Bison's claim had been assigned to him. Also the Claimant's counsel had said on instructions during the first day of the hearing that the assignment had been made. The Defendant's solicitors said that they were making the court aware of these matters so that the court could "consider the consequences which follow" although they did not say what they believed those consequences to be. In the light of that I directed that further submissions be made in writing.

139. In his submissions the Defendant makes the point that the purported deed of assignment used "Claim" as a defined term by reference to the claim being made by Bison in the proceedings and assigns that to the First and Second Claimants. He says that the only claim being made by Bison in advance of amendment being permitted is that for £80,000 and so no other claim should be regarded as having been assigned. He also says that the Claimants have relied on "false evidence" in support of the amendment application (by referring to the assignment as having already been made at a date before 22nd April 2020 and by referring to it as having been to the First Claimant rather than to both the First and Second Claimants). Moreover, the deed of assignment was not put in evidence by the Claimants. The Defendant says that in the light of this the proposed amendment should not be permitted on the grounds that the Claimants have not shown a real prospect of establishing that there has been an assignment and/or that they have not given the Defendant a proper opportunity to investigate the contention and/or because false evidence has been advanced.

140. In response the Claimants say that the letter from the Defendant's solicitors contained nothing of substance and certainly nothing relevant to the grant or refusal of permission to amend. In his submissions on this point Mr. Bergin says:

> "Unless and until that amendment is permitted, the precise date of the execution of the assignment is irrelevant. The date of the execution of the assignment was not an issue before the Court and no submissions were addressed to that date."

141. I agree with that assessment. The lack of clarity on the Claimants' part in relation to the amendment is regrettable but there is no basis for a finding that the court was being deliberately misled. It is clear that the intention was for Bison's claim to be assigned and for Bison to cease to be a party to the proceedings. It was clear that the assignment had not yet been executed at the time of the drafting of the proposed amendment. There was nothing in the Claimants' conduct which could approach the level of refusing permission for an amendment if that was otherwise justified.

142. The Defendant's further points appear to be that the Claimants have not shown real prospects of establishing that there was an assignment and that the assignment was not of the claim now being asserted. That contention is simply unrealistic and ignores the overall position. That overall position is that Bison is making a claim against the Defendant; it can assign that claim and other rights; and it clearly intends to assign the claim and for the First and Second Claimants to proceed against the Defendant in its stead. There will have to have been an assignment by the time of the amendment taking effect but any difficulties in that regard can be addressed by permission for amendment being on terms that dates are inserted in [53A] so that any assignment relied upon will have to have taken place by the time of service of the amended pleading. It will be open to the Defendant at that stage to take issue with the effect of an assignment but the current points are not material to whether permission should be given.

143. I turn to the questions which are material. The allegation is a wholly new one asserting duties which had not been invoked before and alleging different loss. However, the breach of duty is said to consist in actions already alleged. The claim has a real prospect of success. If the Claimants establish that Bison's business was conducted in an illegal manner then it is at the lowest properly arguable that the Defendant was thereby in breach of his duties to Bison.

144. The issue of the existence or otherwise of the duty alleged is unlikely to add materially to the work needed in preparation of the case. The matters which are said to constitute the breach of duty are already in issue. Accordingly, the question becomes one of the extent to which consideration of the alleged loss and the collation of evidence in relation to it will add to the preparation and whether that will result in a risk of the loss of the trial date. Some additional preparation will be needed but it will be modest and in my judgement it is unlikely to create a risk of the loss of the trial date. In those circumstances the proposed amendment will be permitted.

The Schedule of Loss.

145. The proposed amended pleading deletes the existing Particulars of Loss and Damage which are to be replaced by a new Schedule of Loss and Damage.

146. In large part the proposed Schedule replicates (albeit with some modifications of language) the claim for £200,000 made in the existing Particulars of Loss and Damage. To that extent it is permitted.

147. In their original form the Particulars of Loss and Damage included a claim for Loss of Profit. It was alleged that but for the Defendant's breaches of contract Bison would have made a profit of £350,000 per annum and that a continuing loss in that amount was being suffered by the Claimants. Such a claim manifestly fell foul of the rule against the recovery of reflective loss and it has been deleted as has been the claim for £80,000 allegedly taken from Bison unlawfully. However, the Schedule of Loss and Damage contains two new elements at [10] and [11]. These are sums claimed by reason of the Bison Claim. As I have just explained I am allowing the amendment to introduce that claim and it is to be included in the Schedule of Loss and Damage.

Other Amendments.

148. The Claimants seek to introduce a new [7.1]. This expands on the existing [7] which states that Varinder Kaur is a private individual who was "purportedly" a director and legal owner of Global. The proposed pleading at [7.1] is an averment that Mrs. Kaur was a director in name only and that the Defendant was the Claimant's sole point of contact with Global's lawyers and accountants. I am satisfied that the proposed amendment is not a new claim but is instead an amplification and particularisation of the existing averment at [6] that the Defendant was the true owner and controller of Global. It will have no material impact on the work that will be needed to prepare this case going forward and is to be permitted.

149. Similarly at [8] the existing pleading avers that Jan Kozanak was the purported owner of Roadways. At [8.1] and [8.2] the Claimants seek to expand on their contention that Mr. Kozanak had no active role in that company and that it was beneficially owned and controlled by the Defendant. As with the proposed [7.1] this amendment is permitted.

150. At [19] the existing pleading asserts that the negotiations for the purchase of the Defendant's shares in Bison and the other companies had been conducted with the Defendant and with "his business partner Mr. Martin Ibbotson". The Defence had accepted that Mr. Ibbotson was a friend of the Defendant's who had assisted him on occasion in his business dealings but had denied that he was the Defendant's business partner. The proposed amendment sets out at [19.1] the matters from which the Claimants say it is "reasonable to infer" that Mr. Ibbotson is the Defendant's business partner. It lists eight matters which are said to be the basis for that inference. It follows that the proposed amendment does not advance a new claim but instead particularises the matters on which the Claimants rely to substantiate the existing assertion and which relate to an existing issue in the case. This amendment is also permissible.

151. As explained at [132] above the Particulars of Claim in their original form made claims in relation to the Defendant's alleged unlawful removal of funds from Bison and his actions in being involved in the business of Dart Transportation Ltd. At [47] and [48] the proposed amendment says that the Claimants no longer seek relief in respect of those claims but instead "rely on the Defendant's conduct as part of the course of dealing". That is not a permissible course. If the Claimants are no longer seeking redress in respect of these matters then the averment can only remain in the Amended Particulars of Claim if it is being said to be material to those matters where relief is being sought. A bare assertion that the conduct is part of the course of dealing is not sufficient as particularisation of the way in which these allegations are said to be material and while the Claimants are to be permitted to abandon these claims they may not then seek to rely on them in the absence of such particularisation.

The Persistence of the Fraud Allegation.

152. On seeing the document which Mr. Bergin had prepared as giving effect to the draft judgment Mr. Pipe contended that it was no longer open to the

Claimants to contend that the representations made by the Defendant had been made fraudulently.

153. The form of amendment for which the Claimants had sought permission involved the removal of the references to fraud from the body of the Particulars of Claim but the assertion in the Schedule of Representations, Falsity, and Knowledge of the Claimants' case that the representations were false and were made knowingly. As I have explained at [30] and following above I am satisfied that this amounted to an adequate pleading of fraud. In an earlier iteration of the proposed amended pleading the fraud allegations had been removed in an attempt, in Mr. Bergin's words, to take some heat out of the matter but that had not resulted in an agreed amendment and was not the Claimants' position before me.

154. Mr. Pipe argued that the Claimants were bound by their removal of the fraud allegations from the body of the Particulars of Claim and precluded from reviving them by my refusal to permit the allegations in the Schedule. I do not accept that contention. The proposed amendments are to be seen as a whole. Just as the Defendant was not precluded by its indication of consent to parts of a proposed amended pleading from resisting an application for permission for a more extensive statement of case so the Claimants revision of the Particulars of Claim does not operate in isolation and must be seen in the light of the proposed amendment in its entirety. When that is done it is clear that the Claimants were maintaining the fraud allegations but were simply recasting the way in which those were presented in the pleading. The Claimants' case properly viewed involved an allegation of fraud when the proceedings were commenced and they are not precluded from persisting with that allegation.

Conclusion.

155. It follows that I have refused permission for the amendments which would allege new financial representations; which would put a case in negligent misstatement; and which would allege that representations were made by the Defendant's failure to challenge terms which the Claimants proposed for inclusion in the Share Purchase Agreements together with other lesser amendments. I have permitted the amendments to introduce the Bison Claim and the claim based on the Insurance Situation together with the amendments of the Maritime and Fowler Welch claims and of the Bison/Roadways Legality Representations and the introduction of the Global Profit Representation. In the light of that I have considered whether those amendments which are being permitted would have the cumulative effect of putting the trial date in jeopardy. I am satisfied that they will not. Although more preparation will be needed and more evidence obtained than would otherwise have been the case it will not even when taken together put at risk the trial in the light of the comparatively generous pre-trial timetable and the provision of thirteen days for the trial.