IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND & WALES
COMMERCIAL COURT (QBD)
[2022] EWHC 1791 (Comm)

No. CL-2020-000398

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 13 June 2022

Before:

HIS HONOUR JUDGE PELLING QC

B E T W E E N :

ABT AUTO INVESTMENTS LIMITED — Claimant

- and -

(1) AAPICO INVESTMENT PTE LIMITED
(2) AAPICO HITECH PUBLIC COMPANY LIMITED
(3) SAKTHI GLOBAL AUTO HOLDINGS LIMITED — Defendants

MR P. DOWNES QC (instructed by Clyde & Co) appeared on behalf of the Claimant.

MR S. ROBINS QC (instructed by Baker & McKenzie LLP) appeared on behalf of the Defendants.

J U D G M E N T

JUDGE PELLING:

1 This is the claimant's application for permission to further amend its particulars of claim in respect of a claim which is due to come to trial in just over four weeks' time on 12 July 2022 with an estimated length of hearing of between six to eight days.

2 The application is opposed by the defendants on the grounds that (a) the amendments proposed have no realistic prospect of success; (b) they are insufficiently particularised and (c) the amendments should be treated as being very late amendments, because the work that will have to be done if the amendments are permitted will mean that the trial date will be threatened. The application was estimated to last half a day inclusive of judgment. In fact, it commenced at two and finished just before 5 p.m. and in those circumstances I reserved judgment over the weekend.

3 It is necessary that I summarise the underlying dispute in order that the issues that arise on this application can be understood. The claimant owned 50.1 per cent of the shares in the third defendant and the first and second defendants own 49.99 per cent of the shares in the third defendant. The first and second defendants lent the third defendant a sum in excess of US$100 million. The claimant guaranteed the repayment of the loan and charged its shares in the third defendant to the first and second defendants as security for its liability under the guarantee by a charge dated 1 October 2018.

4 By clause 9.3 of the charge it was provided that:

> "Right of appropriation
>
> (a) This clause applies to the extent that:
>
> (i) The Charged Property referred to in it constitutes Financial Collateral; and
>
> (ii) this Charge and the obligations of the Chargor under it constitute a Security Financial Collateral Arrangement (as defined in the Regulations).
>
> (b) The Chargee or any Receiver or Delegate may, by giving written notice to the Chargor upon, and at any time after, the date the Security created under this Charge has become enforceable, appropriate all or any Charged Property in and towards payment or discharge of the Security Liabilities, subject always to Regulation 18 of the Regulations.
>
> (c) The value of any Charged Property appropriated in accordance with this Clause shall be determined by the Chargees and, for this purpose, the parties agree that the value of any Charged Property shall be, in the case of any Shares, the market value of such Shares determined by the Chargee by reference to a public index or independent valuation or if neither such option is available or reasonably practicable given the then current circumstances, such other process as the Chargees may select;

(d) The Chargor agrees that the method of valuation provided for in this Clause is commercially reasonable for the purposes of the Regulations …"

5 The third defendant defaulted on its obligations and the first and second defendants served notice of acceleration and demanded repayment of the loan. Repayment was not forthcoming and on 15 May 2019 the first and second defendants served notice under clause 9.3(b) of the charge. The first and second defendants obtained an independent valuation of the charge shares, as they were entitled to do under clause 9.3(c) of the charge. The shares were valued by an independent valuer, FTI, at US$27 million, which the first and second defendants then applied in reduction of the sum due from the third defendant and, therefore, from the claimant under its guarantee. The claimant did not accept that FTI's valuation correctly identified the market value of the charged shares and ultimately these proceedings were commenced to resolve that issue.

6 To date the dispute has been concerned exclusively with what was the true market value of the shares. Inevitably, each of the parties have retained expert valuers and the focus of the dispute so far has been on how a true market value of the shares should be ascertained. By its amended particulars of claim, filed and served on 23 March 2021, the claimant withdrew its allegation, contained in para.29 of the particulars of claim, that the market value of the shares was US$137.8 million and substituted an allegation that the true market value of the shares was substantially in excess of the figure arrived at by FTI and stating that it would plead its case as to true market value on receipt of its own expert's report. Although not apparent at the time, it is now apparent that the claimant's expert valuer, Mr Plaha, valued the claimant's shares on a market value basis at US$92.5 million. It is common ground that this is lower than the debt and so it would not result in either the first and second defendants having to account to the claimant for an overpayment and would leave the claimant liable for any alleged shortfall.

7 The charge refers to "*the regulations*". The regulations concerned are the Financial Collateral Arrangements No. 2 Regulations 2003 (hereafter "the regulations"). They apply to financial collateral arrangements and, it is common ground to the charge, the subject of these proceedings. By Regulation 18(1):

> "Where a collateral-taker exercises a power contained in a security financial collateral arrangement to appropriate the financial collateral the collateral-taker must value the financial collateral in accordance with the terms of the arrangement and in any event in a commercially reasonable manner …"

I return now to Mr Plaha's report served on behalf of the claimant. At para.9.24 he states:

> "I have been instructed to consider the potential value of SGAH to Aapico. The valuation I have undertaken elsewhere in this report is at Market Value, i.e. assuming a willing buyer and willing seller. The potential value of SGAH to Aapico is not at Market Value, but would be at Investment Value, as defined in the IVS Framework (2017) as:
>
> 'Investment Value is the value of an asset to a particular owner or prospective owner for individual investment or operational objectives.

> Investment Value is an entity-specific basis of value. Although the value of an asset to the owner may be the same as the amount that could be realised from its sale to another party, this basis of value reflects the benefits received by an entity from holding the asset and, therefore, does not involve a presumed exchange. Investment Value reflects the circumstances and financial objectives of the entity for which the valuation is being produced. It is often used for measuring investment performance'."

Paragraph 9.25:

> "The value of SGAH to Aapico may therefore differ from what I have calculated as Market Value as it would be what is commonly known as 'special purchaser' value."

8 In looking at the definitions referred to in the report, the definition in the first paragraph set out in para.9.24 is of significance, because it establishes investment or special purchaser value as being the value applicable to an asset in the hands of a particular owner, or prospective owner, for individual investment or operational objectives and, thus, engages an issue as to when, in what circumstances, for what purposes and over what length of time the asset was to be held.

9 The propositions outlined in para.9.24 are potentially material, because the first and second defendant have retained the claimant's shares in the third defendant rather than selling them. The claimant alleges, but does not currently plead or clearly plead in the proposed amendments, that that was their intention all along and the result is that the shares should be valued at a sum in excess of market value.

10 Mr Plaha goes on to state at para.9.26 to 9.28 of his report:

> "In my opinion there are two primary ways in which the value of a company to a special purchaser may differ from Market Value, these reflect:
>
> (a) Adjustments to the cash flows to reflect synergies and other strategic benefits to the special purchaser; and
>
> (b) Adjustments to valuation premia and discounts.
>
> 9.27 A special purchaser may seek to acquire a company because the synergies (cost savings, economies of scale, consolidation of key accounts) yield a value to the purchaser that is greater than the value achieved by other prospective investors and which will be reflected in a Market Value. I am unable to quantify what (if any) synergistic or strategic benefits there may be to Aapico from the acquisition of ABT's 50.01% shareholding in SGAH from the information available. As a result, I am unable to propose an adjustment in this regard without that information.
>
> 9.28 As stated in section 8 above I apply a DLOM in my Market Value valuation of SGAH …"

I interpolate to state that DLOM is a discount to reflect lack of marketability of shares in a private as opposed to a publicly quoted company. The report goes on at para.9.28:

> "The DLOM reflects the principle that shareholdings in private companies are less liquid than those of quoted companies. This means that the shares are harder to sell which in turn suggests they would not attract the same value as quoted shares in an equivalent company. Investment value reflects the value of the shares to a specific purchaser and therefore the concept of marketability is disregarded and no DLOM should be applied …"

11 Mr Plaha then arrives at a valuation which is not market value and which, for the reasons I have already outlined, cannot be a true special purchaser value either. As he puts it in para.9.30 of the report:

> "In order to illustrate the potential investment value to Aapico (in line with my instructions) I include in the table below an adjusted valuation where I have removed the DLOM. For the avoidance of doubt this valuation does not reflect Market Value as is required by the Share Charge. It is not a comprehensive investment value valuation because as stated above I am unable to quantify the synergies to Aapico arising from the acquisition …"

He then proceeds to value the shares on this illustrative basis at US$119.8 million; that is, US$17.8 million odd in excess of the debt. This basis of claim is not currently pleaded and it has not been addressed in disclosure, in any of the witness statements or in the defendants' expert report. It is, however, the subject of some comments in the joint memorandum.

12 Against that background, the claimant seeks to amend its particulars of claim so as to allege in principle at para.19A of the proposed amendment:

> "Further pursuant to Regulation 18(1) (which prevailed over the provisions of clause 9.3(c)) in circumstances where the Chargee appropriated the Security for its own use, a commercially reasonable valuation was required to take into account any special value of the shares to Aapico Investment or Aapico Hitech (or the applicable related party) in excess of the market value …"; and

at para.20, to add the words "and 19A" so that it reads:

> "Alternatively, the Share Charge contained in implied term that any 'independent valuation' would have the characteristics identified in paragraphs 19 and 19A above …"

The claimant wishes to add an allegation that clause 9.3(c) of the charge was not commercially reasonable at paragraph 21.6 because:

> "The clause did not provide that the valuation should take account of the value of the Security to the Chargee as a special purchaser in circumstances where the Chargee proposed to appropriate the Security for its own use …"

It then seeks to amend para.29 of the amended particulars of claim so that it reads in addition to the text inserted as a result of the previous amendment the following:

> "The market value of the Shares at 15 August 2019 (excluding the loans made by made to SGAH by Aapico Investment) was US$92.5 million. The special purchaser value of the Shares to Aapico Investment and Aapico Hitech was in excess of this figure and was US$119.8 million or a figure in excess of US$92.5 million depending upon synergies arising from their acquisition of the Shares".

It then seeks to add in as part of the allegation that FTI's valuation was not in accordance with clause 9.3(c) of the charge, when taken together with the alleged implied terms, by adding to para.34A of the amended particulars of claim:

> "The valuation did not have the characteristic pleaded at paragraph 19A above as it failed to account for the special value of the Shares to Aapico Investment and Aapico Hitech in excess of the market value of the Shares …"

In addition, the claimant seeks permission to add clause 34C to the particulars of claim which is in these terms:

> "In the further alternative the Claimant claims equitable relief from forfeiture in relation to the appropriation of the Shares in that the effect of the provisions of the Share Charge has been to impose on the Claimant a penalty, disproportionate to the breach alleged against it which will confer on Aapico Investment and Aapico Hitech a windfall which in all the circumstances of the case it would be unconscionable for them to retain …"

and at paragraph 37.8 the assertion that:

> "Equitable relief from forfeiture with reinstatement of the Shares to the Claimant, alternatively an equitable account of the benefit that Aapico Investment and Aapico Hitech have secured from their wrongful appropriation of the Shares and restitution of the resulting sum found due to the Claimant …"

as a basis for relief sought in these proceedings.

13 There is no dispute between the parties as to the applicable principles. In summary

(1) before permission is given to amend, whether or not the application is late, very late or not late at all, the proposed amendment must have a realistic prospect of success - see *Kawasaki Kisen Kaisha v James Kemball* [2021] EWCA Civ 33; however

(2) consistently with the approach adopted on summary judgment applications, when the application gives rise to a short point of construction or law, the court should resolve it for all the reasons that a court should resolve such disputes on summary judgment applications; but

(3) that does not mean that a court should attempt to resolve difficult or under-developed points of law on summary applications, but should instead leave them to be resolved at trial.

(4) As to amendments:

(i) Late applications to amend are ones that could have been made earlier or which involve duplication of costs or effort or significant steps already taken being revisited;

(ii) An amendment is very late if it threatens the trial date;

(iii) A heavy burden rests on a party seeking a very late amendment to show why justice to that party, his opponent and the court's other users requires him to be allowed to pursue it;

(iv) The history of the amendment and explanation for its lateness is relevant to the balancing exercise;

(v) Prejudice to the revisiting party may range from being messed about at one end of the scale and one extreme to disruption and additional pressure on the legal team while preparing for trial at the other and other extreme;

(vi) In arriving at a conclusion, the prejudice to the applying party of an application failing is only one factor and may be further diminished in its cogency if it is the result of error or omission on the part of the applying party; and

(vii) The party applying to make a late or very late application to amend must ensure its pleading is properly particularised, since if it is not it will cause yet further delay, expense and disruption, may prevent a proper view being taken as to the realistic arguability issue and may result in the trial date being threatened as a result

- see generally *Qhah Su-Ling v Goldman Sachs International* [2015] EWHC 759 and *Swain-Mason v Mills & Reeves LLP* [2011] 1 WLR 2735 amongst many other authorities to broadly similar effect.

14 I turn first to the realistic arguability issue. It was submitted on behalf of the defendants that the proposed amendment are, as formulated, legally hopeless, because (a) the claim to imply a term to the effect alleged is bound to fail, applying the well-known applicable principles; (b) the contention that Regulation 18 requires a court to rewrite the terms of clause 9.3(b) of the charge so as to provide for a special value other than the market value to be attributed to the shares where a chargee intends to retain the shares is bound to fail as a matter of construction; and (c) the proposed relief from forfeiture plea is bound to fail, because the claimant cannot and does not allege that it is ready, willing and able to repay the outstanding debt of US$102 million.

15 In considering these points, it is necessary to start with the second of these three sub-issues, because it is accepted that the third is parasitic, on any view, on the second and the first is either parasitic on the second or is entirely redundant if the second point succeeds.

16 The defendants' submission that it is unarguable that Regulation 18 requires clause 9.3(b) of the charge to be rewritten depends upon a nine line *obiter dicta* in para.125(a) of the judgment of the Privy Council in *Çukurova Finance International Ltd v Alfa Telecom Turkey Ltd* (*No 3)* [2013] UKPC 2, 20 and 25 [2016] AC 923. That case was concerned with a very different contract with very different terms and very different circumstances to this case. That said, the board commented in the paragraph I have referred to a moment ago in these terms:

> "ATT submitted, with understandable circumspection, that, when regulation 18 specifies that 'the collateral-taker must value the financial collateral in accordance with the terms of the arrangement and in any event in a commercially reasonable manner', the concluding nine words could enable ÇH and ÇFI to require ATT to credit them with the premium, contrary to express terms of the charges. But, as Mr Milligan in effect accepted, ATT would be likely vigorously to resist any such suggestion. When ATT announced that it had appropriated the charged shares on 27 April 2007, it did so expressly on the basis that it would value them under clause 9.3 of the Charges. The Board need do no more than express scepticism that the concluding nine words of regulation 18 could over-ride this agreed basis …"

17 In my judgment, the question of the correct construction of the regulation is not one that I should attempt to resolve on an application of this sort and the dictum relied upon by the defendant does not justify the conclusion either that the claimant's construction must necessarily fail or that the legal direction of travel is sufficiently clear from the dictum referred to a moment ago to justify a conclusion that the claimant's proposed construction is fanciful. My reasons for reaching that conclusion in summary are as follows:

(1) The dictum relied upon by the defendants is just that and, further, is contained in a judgment of the Privy Council which, while it is entitled to receive great respect, is not binding.

(2) The dictum does not purport to express a decided view on the true construction of the regulation, but merely scepticism and scepticism which is unreasonable.

(3) The regulations arise from an EU directive and, as such, has to be construed in a way that is compatible with the directive and which requires, or may require, the application of special rules.

(4) The language of the regulations is ambiguous. Whilst it could mean that the phrase "*commercially reasonable manner*" merely qualifies how valuation in accordance with the terms of the charge are to be carried out, the effect of the words "in any event" may mean that some wider principle is engaged.

(5) No other authorities have been drawn to my attention concerning the construction of this provision which means that the issue is a novel one, which of itself justifies delay of the construction exercise until all relevant facts have been found or admitted and, therefore,

(6) for each and all of those reasons, the construction issue ought to be considered at trial following the finding of all relevant facts and at which a detailed consideration of the relevant statutory and legal context can take place.

18 So far as the relief from forfeiture point as set out in para.34C of the proposed draft is concerned, Mr Downes has satisfied me by reference to the authorities that he took me to that the defendants' argument may not necessarily be as clear cut as is suggested in the event that the claimant succeeds in making good its case under Regulation 18. In those circumstances, I consider that too passes the realistic arguability test.

19 In my judgment, however, the implied term allegation does not pass that hurdle for at least the following reasons. First, if the regulations are to be construed as the claimant alleges then there is no necessity to apply the term alleged. The point is one that takes effect as a matter of law by operation of the regulation. By the same token, if the regulations are not to be construed as the claimants allege, then there is no basis on which the implied term alleged could be implied, applying conventional principles, and such a term would not be necessary in order to give business efficacy or effect to the presumed common intention of the parties and such a term would contradict the express term set out in clause 9.3 of the charge contrary to the principle identified in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co* [2016] AC 742 per Lord Neuberger PSC at para.28.

20 It is now necessary to consider the two more general bases on which the proposed amendments are challenged; that is, that the proposed amendments are insufficiently particularised and are very late in the technical sense identified earlier; that is, if permitted they would endanger the trial date. It is common ground that if these issues are resolved against the claimant then all the amendments must fail, since, as I have said, they are all parasitic on the allegation concerning the effect of the regulations.

21 It is convenient to start with the particularisation and in relation to one particular point that featured in the argument on the application. The factual case that the claimant wishes to advance is that set out in his expert report referred to earlier. In summary, arriving at a special purchase value involves (a) adjustment to reflect synergies and other strategic benefits to the "*special purchaser*" and (b) adjustments to the premia and discounts applied to arrive at market value. As the claimant's expert says in his report at para.9.27 he is unable to quantify any synergistic or strategic benefits to the first and second defendants from acquiring or holding the claimant's shares in the third defendant. As he states:

> "I am unable to propose an adjustment in this regard without that information".

The claimant's expert then goes on to say that in arriving at his valuation he has applied a discount to reflect the greater difficulty in selling shares in private companies over those that are publicly quoted (the so-called DLOM discount) and the need for such a discount falls away when arriving at a special investor value and he then proceeds at para.9.30 not to arrive at a special purchase valuation, because he cannot for the reasons I have already identified, but to set out in a table what the effect of removing the DLOM discount would be in order to illustrate the potential benefits to the claimant of a special purchaser valuation and which leads to the conclusion that the shares concerned should be valued at about US$119.8 million. As the expert states:

> "It is not a comprehensive investment value valuation because … I am unable to quantify the synergies … arising from the acquisition …"

Critically, however, the claimant's expert does not suggest that the special purchase or investment value would be lower than US$119.8 million once synergies are taken into account. To the contrary, he says that the value "… *may be subject to a further uplift for synergies* …"

22 Whether that is so was not considered at all by the defendants' expert, Mr Ryan, in his report, because the issue was not a pleaded issue, nor had he been notified by the claimant or the defendants at the time when the experts or at any rate the defendants instructed their expert, Mr Ryan, to prepare his report. However, the issue was considered by the experts, albeit relatively shortly, at their joint meeting and is the subject of comment, albeit very short, in the joint memorandum. In summary, the experts are agreed that if a special purchase or investment valuation is to be arrived at then

(a) DLOM is not applicable where a buyer proposes to hold the shares and

(b) the value of synergies can be included (see section 2.3) and

(c) the only dispute is as to whether the whole of the DLOM discount should be removed or retained in relation to two subsidiaries where in any event there was to be a sale.

23 On this material it appears to be common ground that the investment valuation involves both removing the discount for lack of marketability and may be further increased by a value attributable to synergies, but there is no evidence of the latter, because it has not been investigated, because it is not a pleaded issue and, therefore, has not been the subject of disclosure. It is not suggested by Mr Ryan, the defendants' expert, that the impact of synergy, or the lack of it, would reduce the value below that attributable to market value less DLOM or such part of DLOM as should be removed when attempting to arrive at an investment value.

24 When the claimant first sought consent for the amendments I am now considering the defendants' solicitor responded by a lengthy letter dated 31 March 2022. In that letter the defendant identified four issues of fact raised by the proposed amendments, being:

> "i. Aapico's intention for holding or selling the Shares and the shares in SGAH's subsidiaries;
>
> ii. the extent of any entity-specific benefits to Aapico of holding the Shares, including synergies or other strategic benefits that would accrue to Aapico as a result of taking full ownership of SGAH;
>
> iii. any costs that Aapico would incur as a result of taking full ownership of SGAH; and
>
> iv. Aapico's expectations at the valuation date for SAGUSA's receivership and Oxy Capital's enforcement of its rights in respect of Sakthi Portugal".

The issue I am now considering falls squarely within (ii) of that summary. As to the synergies point, I conclude that it is one that could only benefit the claimant and could on that basis be left out of account in the circumstances and that if treated in that manner would only benefit the defendant and could be achieved by giving permission to amend other than for the last line of para.29 of the proposed amendments.

25 However, that says nothing whatsoever about the other issues that are identified in the defendant's solicitor's letter and I turn to the rest of the factual issues on which the defendants rely for the suggestion that giving permission will endanger the trial date and all the more so because the allegations made are unparticularised or insufficiently particularised.

26 Paragraph 19A includes the allegation that the defendants "*appropriated the Security for its own use*". As far as I can see, that is the first time that that allegation is made in the proposed amended pleadings and is not made at all in the unamended particulars of claim. It engages issue (i) identified in the Baker & McKenzie letter of 31 March referred to earlier. Mr Plaha does not engage with the issue in his report for understandable reasons. He simply identifies at para.9.24 the basis of the valuation as being one that: "*reflects the benefits received by an entity from holding the asset.*"

27 In my judgment, if this issue is to be investigated properly at trial, it will require input from the expert valuers as to what constitutes "*holding the asset"* for the purposes of engaging the investment as opposed to the market value basis of valuation and will require some evidence from the defendant as to their intention when enforcing the charge, because that may, or probably will, inform whether the investment basis of valuation should apply at all. That has not been addressed anywhere in the materials that are currently available or, indeed, pleaded at any rate in any detail to enable the defendants to understand the case they must meet in relation to that issue or to enable their expert to comment meaningfully on the allegation that is being made.

28 It may be that that issue will require additional disclosure of internal documentation so far as the defendants are concerned in support of the defendants' position, whatever that might be once the claimant's position on the issue has been identified or which contradicts the defendants' own position. It is entirely unclear what internal documentation there might be relevant to this issue. In this regard, Mr Thomson, the defendants' solicitor states in para.40 of his statement that the issue was not an issue for disclosure. So it was not. I accept that it is probable that some additional witness evidence will be required and likely that there will be some additional disclosure as well. Although the claimant appears willing to waive disclosure so far as it is concerned, that is not to the point. Disclosure is material to both sides of any issue or potentially so. There is no evidence and no disclosure that addresses the core issue (i) identified in the claimant's solicitor's letter. Similar considerations apply in relation to the cost issue identified in the claimant's solicitor's letter as issue (iii). There is no exploration in either the expert evidence or the joint memorandum as to whether and, if so, to what extent the costs issue would impact on the net value to be arrived at once DLOM is removed from the valuation.

29 It is now necessary to take a step back. The central issue depends upon (a) the retention of the shares by the defendant and (b) the true meaning and effect of the regulations. The impact of the regulations on the issues which arose prior to amendment was an issue known or available to the claimant from the outset. Indeed, the regulations are referred to from the outset in the original particulars of claim - see para.4 to 9 and 17 to 18 of the particulars of claim). It is not suggested that retention of the shares is something that only recently came to the attention of the claimant. The claim form was issued as long ago as 26 June 2020. The original particulars of claim were heavily amended by permission granted as long ago as 23 March 2021 after the claimant's current solicitors had taken over conduct of these proceedings. Although it is said on behalf of the claimant that the point now taken only became apparent on review of its expert's report, that ignores the fact that the claim could and should have been prepared from the outset with expert evidence and, more pertinently, that the need for expert input was apparent on any view to the claimant and its advisers by

no later than the date when Moulder J approved the original amendment to the particulars of claim, para.29 of which was amended expressly in the terms set out earlier in this judgment by a reference to the claimant being in the process of obtaining expert evidence. There is no evidence explaining why there was a delay between then and the date when in fact a report was obtained from Mr Plaha to get the information needed to plead the claim.

30 The amendments as presently formulated do not particularise the factual basis on which it is contended that the investment basis of valuation should apply other than to the extent it is alleged that the shares were appropriated by the defendants "*for its own use*" in para.19A of the proposed amendment or that the defendants were or was "*a special purchaser*", as alleged in para.21.6 and 29 of the proposed amendments and by the allegation of "*wrongful appropriation of the shares*" in para.37.8 of the proposed amendments. Plainly, that is not a proper basis for pleading an entitlement to rely upon the investment basis of valuation and, equally plainly, it will invite a request for further information designed to elicit at least information concerning when the investment basis of valuation should apply and the facts and matters relied upon to support the contention that the investment basis of valuation should apply in the circumstances of this case. It is plain if that had been an issue at the CMC then those issues or, at any rate, the factual issue concerning whether or not the investment basis of valuation was engaged would have been an issue for disclosure and probably or perhaps more than probably Model D disclosure by the defendants.

31 I do not see how it could be said on the pleadings that the defendants could know what case they must meet in relation to this issue, even if the amendments were permitted as they are drawn. Although Mr Downes QC on behalf of the claimant submitted that it was apparent from the correspondence that the defendants knew full well the case they must meet, that is not to the point. The issue must be properly pleaded so that the defendant can properly set out what, if any, answer it has to the factual case that is advanced, but, more particularly, so as to establish what the issues are for the trial of this claim, coming up, as I have said, in just over four weeks' time. It is not for the defendant or, for that matter, the court to thrash through correspondence in order to attempt to establish what the issues for trial are. Even if a coherent case could be spelt out of the correspondence, there is nothing in the pleading that confines the claimant to that case, whatever it might be. If a coherent case is to be found in the correspondence, it is entirely unclear why that case was not set out in the proposed amendment although such a course would have lengthened the proposed amendment and emphasised the factual issues that might arise if the amendment was permitted. It is for the claimant or, at any rate, the party advancing the positive case by way of proposed amendment to set out, with full particularity, the factual case which it seeks to advance at any rate where a late amendment or very late amendment is proposed,.

32 I return to the impact of permitting the amendment on the trial and the preparation for it. There will have to be a round of consequentially amended pleadings if the proposed amended Particulars of Claim is permitted. Disclosure is not something that can be avoided at the option of the claimant for the reasons I have given. That will require the preparation of additional issues for disclosure then the following steps necessary in order to enable the additionally disclosable documents to be produced. It is clear that some additional evidence of fact will be required which will go to at least issues (i), (iii) and (iv) identified by the defendants' solicitor on 31 March letter. It will then be necessary to consider expert evidence. I have assumed for present purposes that the synergy issue can properly be excluded, for reasons already given. However, as matters currently stand, the defendants' expert has not considered (1) whether the investment basis of valuation could properly apply in the circumstances of this case, which in turn depends on factual issue (i) in the 31 March letter and the evidence and disclosure relevant to that issue; (2) whether there is any negative aspect to synergies that ought to be considered when arriving at an investment

valuation; (3) there is no evidence whatsoever of what expenses will be incurred if the shares are held in a way which engages the investment basis of valuation as opposed to those that would be avoided if the market value approach was adopted; and (4) no consideration has yet been given at all to the expenses issue.

33 As I have said, the trial is due to start on 12 July. That leaves four weeks. In that time if permission is granted it will be necessary to timetable

(a) the service of a further amended defence;

(b) the service of a further amended reply;

(c) additional disclosure;

(d) the production of additional witness statements; and

(e) the exchange of a further round of expert evidence

all in the context of intense preparations for what on any view is a substantial commercial trial and without taking any account whatsoever of the particularisation issues to which I have already referred in some detail.

34 It was submitted by Mr Downes that I should proceed on the basis that this application was issued on 14 April 2022 and that the defendants could and should have been doing much more to prepare on the basis that the application would succeed when eventually it was listed and heard. I accept that if the application had been determined shortly after it was issued, then it may have been possible to accommodate the additional work necessary without endangering the trial. However, it was not. The congestion facing litigants in the Commercial Court is well-known and was well-known in April 2022. The problem in this case is in reality that caused by the failure of the claimant to grapple with the issues that arise much earlier than April 2022 and much closer to the date when the last amendment to the particulars of claim was carried out. As I have said, there is no explanation as to why matters were not dealt with then, particularly given the reference to expert evidence in the amendments that Moulder J approved.

35 As things stand, I consider it will only be with extreme difficulty that what has to be done could be accommodated within the time that remains. I consider that there is a very real risk that if the amendments are permitted there will be an application to vacate the trial date as it becomes apparent that the work involved simply cannot be accommodated in the time between now and trial. That is sufficient to justify a conclusion that the trial date is in danger and that, therefore, this is in reality a proposed very late amendment. I consider that the draft pleading is not fully particularised in at least the ways I have indicated and that will add to the difficulties and, more particularly, will delay the date by which the timetable that I attempted to summarise a few moments ago could commence and overall I consider that if permission were to be granted the trial date would be at significant risk, but in any event it would disrupt the defendants' preparation for trial and increase substantially the pressure on the defendants' legal team as they prepare for what is, on any view, a very substantial and technical commercial action and would incidentally substantially increase costs as well. As to this last point, it is unclear whether and, if so, to what extent further security has been provided or would be sought in order to address that issue. It was suggested that work could have been done in anticipation of permission being given, but as it seems to me that would be to incur costs which would or may not be recoverable in the circumstances. If additional security was required and not agreed that would create further delay and disruption.

36 In the result, I consider that the proposed amendments threaten the trial date and that factor, together with the absence of any adequate explanation for the delay that has occurred after permission to amend was given by Moulder J and the lack of particularity of the proposed amendments in relation to the critical factual issues as to whether or not the investment basis of valuation has been engaged and as to the impact of expenses incurred in holding the shares rather than selling them all weigh against the application being granted.

37 On the other side of the scale I accept that the claimant will be prejudiced if permission is not given, but, in my judgment, that prejudice is to be treated as outweighed by the other factors to which I have referred and on that basis and for those reasons I refuse permission to amend.

L A T E R

38 The issue I now have to determine concerns the costs of and occasioned by the application I gave judgment in just a moment ago. It is common ground between the parties that the test as to where the incidence of costs falls in principle depends upon who has been successful and who has not. It is accepted by Mr Downes QC on behalf of the claimant that the defendants have been successful and, therefore, in principle are entitled to recover their costs. He submits however that

(1) There are issues on which the defendants failed and the claimants were successful and that ought to be reflected by a reduction in the costs otherwise recoverable;

(2) The rates which have been adopted as the basis for charging solicitors' time are very substantially in excess of the guideline rates published less than a year ago which form the starting point for any assessment of costs on the standard basis; and

(3) The hours that have been worked are in excess of what is appropriate.

39 I remind myself at this stage that where costs are to be assessed on a standard basis it is necessary to ascertain what work is reasonable and proportionate for the receiving party to have carried out and then to arrive at a sum which is reasonable and proportionate for the receiving party to recover in respect of that work. Proportionality in this context means the lowest amount which the receiving party could reasonably be expected to have spent in order to have its case conducted and presented proficiently.

40 Turning, first, to the issue of whether or not there should be any reduction in costs in respect of issues for which Mr Robins's clients were not successful, Mr Robins's submission in answer to all of this was to say that the Court of Appeal does not appreciate the making of issue based and therefore, by implication, reduced costs order by reference to issues, at any rate in interim or interlocutory applications. In my judgment, that is too much of a generalisation. As I indicated in the course of my substantive judgment, there is a real problem in the Commercial Court in relation to congestion caused by applications estimated at between half a day and a day. An application which is resisted on the basis of grounds which do not succeed ought to be costs sanctioned in the interests of discouraging parties from resisting applications other than by reference to the issues that really matter. Where an application for amendment was being made and determined just a smidgeon over four weeks from trial it is close to obvious that the issues which really matter are the issues concerning particularisation and the work necessary to meet the new allegations and the imp[act of that on the respondent's preparation for trial. The issues concerning realistic arguability, as Mr Downes submitted in the course of his substantive submissions, are required to pass a relatively low threshold and very clear focus is required to be maintained where resistance

to amendment is advanced on arguability grounds. That said, whilst I accept Mr Downes's submission that costs were incurred in preparing for that issue, the vast majority of the time and the evidence on this application was focused on the particularisation and effect on trial issues in combination with the delays that had occurred over the life of the action.

41 In my judgment, the appropriate course is to reduce the costs otherwise recoverable by the defendants by 10 per cent to reflect the issues concerning arguability, which in the end too up a relatively small amount of time, even in the judgment.

42 The next issue which arises concerns hourly rates. Those have been charged in a range of between £455 for a Grade C fee earner to £726.25 for a Grade A fee earner. The London 1 guideline rates provide for a Grade C fee earner to be charged out at £270 an hour, leading up to a Grade A fee earner at £512 an hour. The guideline rate publication makes clear that the guideline rates are not in any sense a fixed rate which is recoverable or a scale rate which is recoverable in all circumstances, but rather as a starting point for enabling the court to come to a view concerning reasonableness and proportionality. In those circumstances, the question which arises is whether the receiving party has justified the charge out figures that have been claimed on reasonableness and proportionality grounds.

43 The arguments which were advanced in support of it were limited to these being rates which had been discounted from the contractual sums which were payable by the defendants and the suggestion that in the past the claimant has paid costs bills that have arisen calculated by reference to these rates. In my judgment, neither of those points are an answer to why the sums that have been claimed should be permitted on proportionality grounds. As I have indicated, proportionality is to be tested in the way I have mentioned and the report of guideline rates establishes a benchmark for what is proportionate from which it is possible to seek increased sums, where justified. As things stand, I am prepared to accept that given the issues that arise in this case and given the fact that the issues arise in litigation where the solicitors concerned have been retained in relation to the much more complex substantive claim, some modest uplift is required in order to reflect that fact and that fact alone, but limiting it in that way I consider that no more £600 an hour should be recoverable for the Grade A fee earner, no more than £400 an hour for the Grade B fee earner and no more than £350 an hour for the Grade C fee earner. The Grade D fee earner will be allowed as asked.

44 The next question which arises concerns hours. The principal complaint, is in relation to some of the time which has been spent on work on documents, in particular the fourth statement of Mr Thomson. I consider that over 30 hours of work for that is in excess of what is reasonable and proportionate and I propose to adjust the costs overall by reducing the C hours recoverable for the fourth witness statement down to 15 hours.

45 Counsel's fees were £25,000 and £10,700. Mr Robins maintained that that was attributable in part to the fact that he had to be brought up to speed in relation to the proceedings generally because he is not trial counsel. So far as that is concerned, whilst I fully understand that that is a cost which has been incurred and has been incurred because of the non-availability of trial counsel, that is not something which ought to be recoverable on proportionality grounds and, therefore, what I propose to do is to reduce leading counsel's fees to £20,000. Other than that, there is no reduction that is appropriate and I assess the costs accordingly.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge.