Neutral Citation Number: [2019] EWHC 1043 (Ch)

Case No: E30MA138

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS IN MANCHESTER
PROPERTY, TRUSTS, & PROBATE LIST (ChD)

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

Date: 2nd May 2019

Before :

HIS HONOUR JUDGE EYRE QC

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Between:

1) DAVID MICHAEL ROSE	**Claimants**
2) DAVID PHILIP WAXMAN	
~~**3) DREADNOUGHT LIMITED**~~	
~~**4) KARUNIA HOLDINGS LIMITED**~~	
5) PALADOR INVESTMENTS LIMITED	
- and -	
1) CREATIVITYETC LIMITED	**Defendants**
2) STEPHEN CONN	
3) EDWARD GEE	

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Mr. Giles Maynard-Connor (instructed by **Atticus Law**) for the **Claimants**
Mr. Pepin Aslett and Mr. William Paris (instructed by **Ralli Solicitors LLP**)for the **First Defendant**

Hearing dates: 9th, 10th, 11th April 2019

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JUDGMENT

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

HH Judge Eyre QC:

1. This is an application by the Claimants for permission to re-amend the Particulars of Claim. The proposed re-amendment seeks a declaration that particular mortgages were rescinded because they were entered as the result of fraud on the part of those controlling the First Defendant. In addition there is a challenge to the execution of one of the mortgages together with other minor re-amendments.

2. Both sides were agreed that relief should be given in respect of the late service of a number of witness statements. I can deal with that aspect of the matter shortly. In accordance with the approach laid down in *Denton v T H White Ltd* [2014] EWCA Civ 906 I must have regard to the seriousness of the default; the cause of the default; and the circumstances of the case as a whole. Delay in the service of a witness statement can be a serious default but whether it is in the particular instance will depend on the relevant circumstances. I am satisfied that in the circumstances here it is wholly appropriate to give relief. It suffices to say that the delay has been very short; the reasons for the delay were understandable; and there has been no material effect on the proper preparation for or determination of the substantive application.

3. There was no evidence before me from the Second Claimant although there were a number of lengthy witness statements from the First Claimant. Through Mr. Aslett the First Defendant noted the absence of evidence from Mr. Waxman. However, it was not suggested that there was any material difference between the positions of the First and Second Claimants. I will proceed on the same basis.

The Relevant History.

4. There is considerable dispute about the history of the dealings between the parties but for the purposes of the current application I need not trouble with much of that dispute and can simplify large parts of the background.

5. The First and Second Claimants are the registered proprietors of properties at Hillgate in Stockport. They hold the registered titles on trust for Dreadnought Ltd. Mr. Rose says that in turn he is the beneficial owner of Dreadnought.

6. In 2015 the First Defendant made loans to Dreadnought and to Karunia Holdings Ltd ("Karunia"). The First and Second Claimants gave guarantees and there were debentures, charges, and other connected documents. In July the First and Second Claimants executed a mortgage over part of the Hillgate land in favour of the First Defendant. The First Defendant says that the First and Second Claimants executed a further mortgage in respect of part of that land though those claimants now seek to put that execution in issue.

7. In July 2017 the First Defendant brought proceedings against Dreadnought and Karunia for repayment of £252,208 ("the Debt Claim"). Default judgment was entered on 4th September 2017. On 10th October 2017 a draft defence was put forward on behalf of Dreadnought and Karunia in support of an application to set the judgment aside. Mr. Rose signed the statement of truth on that draft. The draft defence set out a convoluted history of dealings with Mr. Nicholas Henesy

averring that Mr. Rose had relied on the advice of Mr. Henesy. In essence it was said that the indebtedness was to be regarded as having been discharged by the proceeds of sale of a property in Bury Old Road. In September 2017 the First and Second Claimants had contracted to sell the Hillgate properties to the Fifth Claimant.

8. On 17th October 2017 District Judge Obodai extended the time for further evidence to be served in support of the set aside application. On 4th January 2018 a new draft defence and counterclaim was put forward on behalf of Dreadnought and Karunia. Mr. Rose again signed the statement of truth on that document which was exhibited to a witness statement from him. This draft pleading alleged a conspiracy between Mr. Henesy, the current First Defendant, and others to cause harm to Dreadnought and Karunia by a number of fraudulent misrepresentations which were set out. The draft did not refer to the mortgages over the Hillgate properties but part of the relief sought was "a declaration that the charges granted by way of security for the Loan be discharged/removed". The matter came before District Judge Matharu on 24th January 2018. Dreadnought and Karunia withdrew the former draft defence. However, the District Judge declined to allow them to rely on the further evidence (including the statement to which the draft defence and counterclaim was exhibited) and dismissed the application to set aside the judgment.

9. On 2nd February 2018 the Second and Third Defendants were appointed as Law of Property Act receivers over the Hillgate properties.

10. On 16th February 2018 solicitors acting for the Claimants asserted a right to redeem and sought a redemption statement in respect of the mortgaged Hillgate properties. This repeated a request which had been made on 26th January 2018 on behalf of the First and Second Claimants. This request was followed on 22nd February 2018 by the issue of the Part 8 claim form which commenced these proceedings. That claim form sought redemption in the form of an account of the sums due to the First Defendant and an order for delivery up and cancellation of the mortgages on payment of the sum found due on the account. That claim form was supported by a witness statement from Mr. Rose which did not challenge the validity or execution of the mortgages and in particular made no allegation that their execution resulted from fraud, misrepresentation, or conspiracy. At that time Mr. Mark Jones of JMW Solicitors was the solicitor for the Claimants. On 12th October 2018 he made his fourth witness statement which was in support of this re-amendment application. He said that the allegations contained in the draft re-amendment Particulars of Claim had not been made at the outset of these proceedings "principally for commercial reasons" [13]. At [17] he explained that the Claimants had thought that the amount which the First Defendant would say was due would be £350,000 - £400,000 and that "on that basis it was a commercial decision for the Claimants simply to seek to redeem the securities." This was because on redemption "they were confident of selling for an amount far exceeding what they paid out by way of redemption". At [30] this was repeated when Mr. Jones accepted that some of the matters in the proposed re-amended pleading had been raised before and said "I cannot stress enough that the decision not to pursue the allegations at the outset of this claim was purely a commercial decision when the Claimants

thought they would be able to quickly redeem and would have a property unencumbered which they could then sell for a profit".

11. The matter came before the Vice-Chancellor on 23rd April 2018. Mr. Timothy Polli QC represented the Claimants at that hearing. Mr. Polli had prepared a skeleton argument in advance of the hearing and at [34] that said Mr. Rose was "most concerned" about whether the advice given by Mr. Henesy had been given properly but that "any action C1 might take against Mr. Henesy and/or D1… will not challenge the validity of D1's charges nor seek to resist the enforcement of those charges – it cannot do so as C1 is party to this litigation seeking to redeem those charges."

12. I have been provided with a transcript of the hearing before the Vice-Chancellor. In the course of the hearing there were a number of exchanges between the Vice-Chancellor and Mr. Polli. Those were concerned with the effect of the Claimants' actions in seeking redemption and with the First Defendant's contention that the cost of litigation about the validity of the mortgages was a contingency to be taken into account in calculating the amount secured. Mr. Polli referred to the Claimants' sense of grievance and to the fact that they had threatened to bring proceedings seeking the discharge of the securities on the footing that they had been wrongfully obtained. He then said "but now they are before the court seeking to redeem those securities and … they can't have it both ways. They have …taken the view that they are going to fund their way out of this- these securities and that will prevent them – they accept that - …from challenging the validity of the securities." Mr. Polli went on to confirm that by seeking the redemption of the mortgages the Claimants had accepted their validity and that they could not thereafter seek rescission. He accepted the Vice-Chancellor's characterisation of bringing the redemption proceedings as having made an election. Mr. Rose was present at that hearing but, it is said, will assert that he did not understand the effect of those exchanges.

13. The Vice-Chancellor directed that the matter proceed by way of Particulars of Claim and Defence. On 30th April 2018 the original Particulars of Claim were filed with a statement of truth again signed by Mr. Rose. These sought redemption of the mortgages but again made no challenge to their validity or enforceability.

14. A Defence was served and this was met with a Reply dated 30th May 2018. The Reply had been drafted by Mr. Polli and Mr. Rose again signed the statement of truth. This referred to the sense of grievance and the possibility of litigation against Mr. Henesy but said, at 15.3.1, that "if the First and Second Claimants redeem the charges … as they seek to do then they will not be able to – and will not – impugn the validity of the said charges in any such future proceedings…".

15. The matter was listed for a five-day trial which was due to take place on 20th August 2018. However, on 12th July 2018 the First Defendant had exchanged contracts for the sale of the Hillgate properties. This had been done without reference to the Claimants and deliberately so because the First Defendant believed that if Mr. Rose had been aware of the potential sale he would have sought to thwart it.

16. The Claimant applied for permission to amend the Particulars of Claim to allege that the power of sale was being exercised in bad faith and for an injunction restraining the sale. The matter came before me on 3rd August 2018 when I granted permission for the amendment; vacated the trial; and granted an interim injunction. I did so on the footing that the First Defendant had brought about the changed circumstances and had deliberately kept the change of circumstances secret from the Claimants.

17. The amended Particulars of Claim alleged bad faith on the part of the First Defendant in entering the sale contract and in failing to investigate other potential purchasers. It was also said that the proposed purchaser was not at arm's length.

18. At the hearing on 3rd August 2018 the Defendants were represented by Mr. Mark Cawson QC. Mr. Cawson said that it was the Defendants' case that sums totalling at least £680,000 were secured by the mortgages. In his fourth witness statement Mr. Jones said that it was this information which brought about a change of approach on the part of the Claimants. He described the information given by Mr. Cawson as "startling". At [29] he said that the "commercial rationale" for limiting the relief to redemption "no longer [made] sense" and, at [31], that it was this information which caused the Claimant to "take the view that their best course of action is to expand the proceedings in order to plead the misrepresentations … and to seek to have the mortgages set aside."

19. On 23rd August 2018 the matter was back before me for a case management hearing. By then Dreadnought and Karunia were in receivership. There are a number of secondary issues and arguments about the validity and effect of those receiverships but they are not material for present purposes. At that hearing the Claimants indicated that they wished to re-amend the Particulars of Claim. They indicated they would seek to raise allegations in respect of the conduct of Nicholas Henesy in relation to other property dealings between him and companies he was said to have controlled and the First and Second Claimants (and in particular Mr. Rose). It was said that Mr. Henesy controlled the First Defendant and that this behaviour would be relevant as evidence of similar improper behaviour on his part and as such would support the allegation that the power of sale was being exercised in bad faith. It is to be noted that it was not then said that there was to be any challenge to the validity of the mortgages. Rather Mr. Henesy's actions were being put forward as matters which would support the pleaded case in respect of the exercise of the power of sale. The Claimants indicated that they wished to make these allegations by way of a schedule. I refused to permit that taking the view that if such allegations were to be made they would need to be properly particularised and set out in the body of the pleading.

20. In the light of that I permitted re-amendments reflecting the removal of Dreadnought as a claimant and set out a timetable for any further proposed re-amendments directing that any application by the Claimants was to be made by 14th September 2018. I also ordered that the Claimants were to telephone the court with all parties' dates of availability with a view to fixing a trial with an estimated length of 10 days in the period between 1st March and 31st December 2019.

21. Despite my order no telephone call was made to the court to fix a hearing date. Instead the Claimants sent by email dates of availability and the Defendants sent their dates of availability but neither actually asked for the listing of the trial. The result of this was that a trial date has not yet been fixed. A date should have been fixed and the reason it was not was the failure on the part of the Claimants to do what was ordered and on the part of the Defendants to take any steps to remedy this. I accept that this failing was due to a misunderstanding on the part of the solicitors on both sides as to what was required rather than a deliberate default. However, the predominant responsibility for this failing lies with the Claimants.

22. On 27th September 2018 the Claimants applied for an extension of the time given for applying to re-amend (there having been an earlier consensual extension). I refused to grant that application on paper but permitted renewal of the application at a hearing. The Claimants did renew the application and the matter came before HH Judge Pearce on 5th October 2018. Judge Pearce extended time for the re-amendment application to 12th October 2018. The hearing before Judge Pearce was the first time that the Claimants had indicated that the potential re-amendment would go beyond referring to the conduct of Mr. Henesy as similar fact evidence in support of the allegation that the power of sale was being exercised in bad faith but would instead involve an attack on the validity of the mortgages.

23. The application for permission with draft re-amended Particulars of Claim was made on 12th October 2018. I will summarise the terms of the proposed re-amendment shortly. The application said that the hearing would take 4½ hours and the hearing of the application was originally listed for 10th December 2018. However, on 29th November 2018 that hearing was vacated by consent when it was realised that the time proposed would be insufficient and when both sides wished to put forward further evidence.

24. The matter came before me on 9th April 2019. The hearing took 2½ days and had been preceded by a day of reading time. The parties put before me 9 lever arch files of evidence, pleadings, and orders and 4 lever arch files of authorities.

The Proposed Re-amendment.

25. The proposed re-amendment is substantial. The Amended Particulars of Claim ran to just over 13 pages. The proposed re-amended Particulars of Claim extend to just over 41 pages. More significant than the increase in length is the fact that the re-amendment raises markedly different matters than were contained in the original and amended Particulars of Claim. There is a radical change in the nature of the case being put on behalf of the Claimants.

26. If permission is given the re-amended Particulars of Claim will relegate the redemption claim to being an alternative to the Claimants' new principal contention which is that the mortgages should be held to have been rescinded. The allegation which the Claimants wish to make is that the mortgages were part of a dishonest scheme whereby Nicholas Henesy, who is said to control the First Defendant, has sought to appropriate the Claimants' properties or their value to himself or to companies which he controls.

27. The proposed pleading sets out an alleged relationship of trust and confidence; a complex series of representations which are said to have been false and fraudulent; and a number of complex dealings involving sham documents and an alleged forgery. Those matters are said to have been combined with breaches of fiduciary duty; undue influence; conspiracy; and deliberate action to harm the interests of the Claimants.

28. One of the Hillgate mortgages was purportedly executed in December 2016 and the proposed re-amended Particulars of Claim put that execution in issue. It is said that the First and Second Claimants have no recollection of having signed this document and it is now suggested that it might be a forgery.

29. There are sundry other minor elements to the draft pleading but the preceding ones take up the bulk of the pleading and are also the most significant in terms of their potential impact.

30. The effect of permitting the re-amendment would be to change the case from one where the Claimants were saying that there were mortgages which they were entitled to redeem and were saying that the sale contract had been entered in bad faith to one where the validity of the mortgages is being put in issue on the basis of an allegation of an extensive fraud.

The Claimants' Reasons for not asserting Rescission earlier in the Proceedings.

31. I have already set out the explanation given by Mr. Jones as to why the proceedings originally sought only redemption and did not, at the outset, make the allegation of fraud and entitlement to rescind. Thus Mr. Jones characterised this as a commercial decision and said that the balance of the commercial advantages and disadvantages was perceived to have changed when the Claimants learnt the amounts which the Defendants were contending were secured by the mortgages.

32. There was a change of solicitors on the part of the Claimants. As something of a "belt and braces" exercise the Claimants served Mr. Rose's sixth witness statement dated 2nd April 2019 to confirm Mr. Jones's evidence. In his statement Mr. Rose said in terms that the matters in Mr. Jones's statement were within Mr. Rose's own knowledge and that he believed them to be true.

The Principles governing the Exercise of the Court's Discretion.

33. What are the principles which govern the exercise of my discretion in relation to the proposed re-amendment?

34. I must at all times have regard to the Overriding Objective. Whatever stage proceedings have reached a proposed amendment will not be permitted if it does not disclose a cause of action or defence with a real prospect of success. In that respect the court has to have regard to the test applied in determining summary judgment applications with the distinction being drawn between claims or defences which are fanciful and those which are properly arguable and have a real prospect of success. Moreover, an amendment will not be permitted at any stage in the proceedings if it contains a claim or defence which is not properly

pleaded in the sense of being sufficiently clear to enable the other party to know the case which that party has to answer.

35. Mr. Maynard-Connor for the Claimants draws a distinction between three sets of circumstances. First, cases where the proposed amendment is neither late nor very late and in which he says the general approach is applicable; next cases where the amendment is late; and, third, those where it is very late in the sense of being an amendment which if allowed will cause the loss of a fixed trial date.

36. Applying that categorisation Mr. Maynard-Connor says that the general approach applicable where a proposed amendment is neither late nor very late is that which starts from the premise that amendments ought generally to be allowed and which was set out by Peter Gibson LJ in *Cobbold v London Borough of Greenwich* (1999) saying:

> "The overriding objective is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed."

37. However, I note that Peter Gibson LJ was then giving judgment comparatively shortly after the introduction of the Civil Procedure Rules and before the amendments to the Rules made in particular in 2013. It is of note that the Court of Appeal in *Swain-Mason v Mills* [2011] EWCA Civ 14, [2011] 1 WLR 2735 warned against regarding Peter Gibson LJ's approach as being of general application: see in particular per Lloyd LJ at [72] and [85]. The correct approach in the light of the Rules as they now are is by way of application of the principles laid down in *Quah Su Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) and *Nesbit Law Group LLP v Acasta European Insurance Co Ltd* [2018] EWCA Civ 268.

38. Those decisions demonstrate that the courts are now required to have a much greater appreciation than was formerly the case of the effects of amendments on the court and consequently upon litigants other than those in the particular case. The courts are also now more conscious of the fact that amendment bringing delay and/or the need to change the approach to a case can cause prejudice to the other party which is not readily capable of being precisely identified or quantified (and so compensated) but which is nonetheless real. As Mrs. Justice Carr said in *Quah Su Ling* at [38e]:

> "gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation"

39. In my judgment there are not, as Mr. Maynard-Connor suggested, a series of separate categories with bright-line divisions between them and with different approaches applicable to the separate categories. Rather there is a continuum or spectrum with different factors likely to carry different weight at different points

on the continuum. This accords with Mrs. Justice Carr's first principle, at [38a] of *Quah Su Ling*, namely:

> "whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted"

40. At the early stages of proceedings the interest in allowing the real dispute between the parties to be determined and in allowing each party to put forward its best case is likely to predominate. That is because normally at that stage the prejudice to the other side; the waste of court time; and the adverse effect on other litigants are likely to be less than they later become and so they are unlikely to prevail. As a case progresses and the later an amendment is proposed then those factors will normally acquire greater weight because as a case progresses the prejudice, waste, and adverse effect will normally become greater. Similarly the later in the process an amendment is proposed then normally the less justified will be a party's contention that it is unjust for that party to be prevented from raising the new matters. A party who delays in putting his or her full claim or defence forward runs the risk of being seen as the author of his or her own misfortune.

41. In this respect the principle set out at [38d] of *Quah Su Ling* is of particular relevance namely that:

> "lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done"

42. Thus whether an amendment is late is not a matter simply of date nor even of the stage reached in the proceedings. An amendment which is precise and focused and which raises no new matters of fact but simply issues of the interpretation of the facts already alleged may well be one which should not be described as being late even if it is close in time to the trial. Conversely an amendment proposed several months before trial may be seen as late if it requires a substantial recasting of the case and if there is no adequate explanation for why it was not made earlier.

43. It is for these reasons that (per Sir Geoffery Vos, Chancellor, in *Nesbit Law Group* at [41]):

> "There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it."

44. Where the effect of a proposed amendment would be to cause the loss of a trial date then the burden on the party seeking to amend becomes even heavier. This is because the loss of the trial date is a factor which then goes into the balance

(which, ex hypothesi, it would not have done before) and has a considerable and often predominating impact. See *Quah Su Ling* at [38b]:

> "where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission"

45. I have already said that for an amendment to be permitted at any stage in proceedings the pleading in question must be properly articulated and must have a real prospect of success. Those considerations acquire greater force and in respect of the latter are regarded in a different way the later in the life of a case an amendment is proposed.

46. The authorities indicate that the attention paid to the strength and merits of the proposed amended case changes the later a party seeks permission to amend. Any amendment needs to show a case with real prospects of success but in *Quah Su Ling* (at [38b]) and *Nesbit Law Group* (at [41]) reference is made to the burden of showing "the strength of the new case". It is also of note that at [57] and following in *Quah Su Ling* Mrs. Justice Carr undertook a detailed analysis of the prospects of the proposed amended case in circumstances where it was not being contended that there was no real prospect of success but where the question was whether the case was sufficiently strong to justify permission for amendment at the late stage reached in those proceedings. Similarly in *Nesbit Law Group* at [43] regard was had to the strength of the amended case. This changed consideration flows from the fact that the court is at all times carrying out a balancing exercise weighing the relative injustice of granting and of refusing the proposed amendment. In this regard I refer again to Mrs. Justice Carr's first principle at [38a] of *Quah Su Ling*. The strength of the proposed case is a factor and potentially a significant factor in assessing the degree of the potential injustice to the party seeking to amend if permission is not given and in determining whether that potential injustice outweighs the potential harm to the other party and to other court users of permitting the amendment. At the very lowest the later an amendment is proposed then the more care the court will take in assessing whether a real prospect of success has been shown. However, as matters progress and the further along the continuum the application for permission to amend is made then the more the court has to have regard not just to the question of whether the comparatively low hurdle of showing a real prospect of success has been surmounted but also that of assessing whether the proposed claim is of sufficient strength for the potential injustice to the amending party if permission is refused to outweigh those other considerations.

47. Even when having regard to the strength of the proposed new case the court must be careful not to engage in a mini-trial but a detailed examination of the merits and the contentions can be required as I have already indicated was undertaken by Mrs. Justice Carr in *Quah Su Ling*. The court has to be conscious

that it has not heard the explanations which might be given in cross-examination and that points which appear unanswerable all too often are found to be answerable. It has to be conscious that the evidence currently before it may be supplemented by further evidence at any trial. Though in that latter regard there is a need for a degree of caution. There must be some basis for believing that there will be fuller evidence at a trial and a party whose evidence is inadequate cannot simply assert that there will be better evidence at trial.

48. Mr. Maynard-Connor referred me to the decision of the Court of Appeal in *P & O Nedlloyd BV v Arab Metals Co (The UB Tiger)* [2006] EWCA Civ 1300. He contended that the approach adopted by Thomas LJ at [22] – [24] demonstrated that a party resisting an amendment should establish the prejudice which will be caused by allowing the amendment and that in the absence of prejudice being shown the amendment should be allowed. That is an over-simplification and I do not accept that as the governing principle. *The UB Tiger* was a case where the party seeking to amend was not putting forward any new factual contentions. The claimant there was simply putting forward alternative legal interpretations of the facts which had already been asserted. That is very different indeed from the circumstances of this case where the proposed re-amendment introduces a large range of new factual allegations. Moreover, in *The UB Tiger* it seems that although the relevant limitation period had expired the case had not progressed beyond the exchange of pleadings. It is also to be noted that although this is not an old authority the court did not address the impact on other court users which is now known to be a relevant factor. I have regard to the approval of the *Quah Su Ling* principles in *Nesbit Law Group* and to the terms of the principle set out at [38e] of *Quah Su Ling*. In the light of that I conclude that *The UB Tiger* is not to be taken as laying down a general rule that in the absence of proof of prejudice to the other party an amendment is to be allowed. The presence or absence of such prejudice will always be a relevant factor and will sometimes be a very significant factor but it is not the sole test.

The Intelligibilty of the Proposed Re-amendment.

49. Regardless of the stage reached in proceedings amendment will normally only be permitted if the proposed amended statement of case is properly pleaded. The amended pleading must comply with the requirements of a proper pleading in the sense of being drafted in a way which enables the court and the other party properly to understand the case which is being put forward. As explained in *Swain-Mason* the importance of this requirement increases the later in the process that permission for amendment is sought. At [73] Lloyd LJ emphasised that where a very late amendment was proposed the party seeking to make it was obliged to "put forward an amended text which itself satisfies to the full the requirements of proper pleading". In part this is because the later in the proceedings that an amendment is being made the less opportunity there is for the other party to seek clarification by way of a request for further information or otherwise.

50. The test is comprehensibility and not elegance. The drafting of almost any pleading could be improved with hindsight and the task for the judge in assessing whether this precondition has been satisfied is not to assess the

stylistic qualities of the draft but to see if it sets out the amending party's case in such a way that the other party knows the allegations it has to meet.

51. Here the Defendants contend that the form and drafting of the proposed re-amended Particulars of Claim is so opaque and difficult to follow that it is not possible for them to understand the case being put forward by the Claimants. I find that that criticism is not well-founded. The proposed re-amended Particulars of Claim does contain large blocks of narrative containing several allegations in the same paragraph. It would have been better if the pleading had been more precisely broken down with the separate allegations being identified individually. However, the nature of the Claimants case is put sufficiently clearly. The proposed draft makes it clear that the Claimants' case is that the First Defendant is the creature of Nicholas Henesy and that the mortgages are part of a fraudulent scheme to acquire the Claimants' assets. It sets out the matters which are said by the Claimants to constitute and demonstrate that scheme and which are said to have been the fraudulent conduct.

52. It follows that the proposed re-amendment does not fall at the hurdle of being so poorly drafted as to be incapable of being permitted. I will nonetheless return to consider the nature and drafting of the pleading when considering the exercise of my discretion more generally.

The Approach to be taken to the Lines of Defence.

53. The Defendants set out various lines of defence to the allegations made in the proposed re-amended pleading and say that these mean either that the Claimants are not entitled to raise the points made in the draft or that the claims set out therein will fail. I have to keep in mind the stage at which these matters are being considered. This is an application for permission to amend and so the primary question is whether the proposed pleading shows a claim with a real prospect of success (being determined by reference to the standard applicable on summary judgment hearings and making a contrast between claims with real prospects and those with only fanciful prospects of success). An amendment which has no real prospect of success is not permissible at any stage and so if the matters raised by the Defendants mean that the claims lack such prospects permission is to be refused regardless of any other considerations. However, if that hurdle is surmounted then the strength of the claim set out in the draft pleading is potentially relevant in the respects I have already described.

The Prospects on the Merits.

54. I deal first with the alleged fraudulent scheme. The Defendants say that this part of the re-amended claim has no prospect of succeeding. Mr. Aslett for the Defendants engaged in a detailed critique of the allegations with a view to establishing that the case did not hold up and that the assertions in respect of the creation of sham documents and the like were implausible.

55. I will not rehearse the detail of that critique. It suffices to say that the Claimants' allegations are very far from being clearly established and there are significant obstacles in the way of the Claimants persuading the court that their interpretation of the dealings is correct. It is, however, of note that Mr. Rose has

made detailed statements supporting the allegations. Moreover, there was evidence from Mr. Brook supporting the contention that some of the documents were questionable. Some of what they said could be answered by reference to the documents but other parts would depend on conclusions being reached as to what was said and in what circumstances on various occasions in the past. The Claimants were able to show that there was scope for question about some of the documents and some of the dealings. This followed not only from the evidence of Mr. Brookes but also from the analysis by Mr. Maynard-Connor showing, for example, that the paper trail in respect of an alleged payment of £140,000 was not complete. Mr. Maynard-Connor contended that it was of note that the Defendants had not sought to put in evidence from Mr. Henesy in particular to rebut the allegations made against him. I do not find that omission surprising nor do I attach any weight to it. Such evidence could only have amounted to a denial of fraud. It would have added little to the question of whether the Claimants' contentions were untenable and would have been likely just to have had the effect of indicating that there were competing versions of the conversations and dealings relied on by the Claimants. Moreover, the Defendants have put in evidence from Messrs. Clough, Kirkby, and Anderson contesting aspects of the Claimants' contentions in relation to the documents.

56. In the light of the material before me the fraud claim is far from compelling but I am not able to say that it has no real prospect of success. The outcome at trial will depend on an assessment of the competing assertions in the light of the responses given to cross-examination and in the light of consideration of the contemporaneous documents in much greater detail than is appropriate at this stage. Depending as they do in large part of witness evidence of oral dealings in the past it cannot be said that there is no real prospect in the sense of the allegations being fanciful.

57. The Claimants put in issue the execution of the December 2016 mortgage. The Defendants point to the changes in the Claimants' position. Initially it was said that the Claimants had no recollection of executing the document but the case has developed and it appears now to be said that the document (or rather the purported execution of it) was a forgery. Although that is being said now in the past the Claimants, and in particular Mr. Rose, have repeatedly indicated that there was a valid mortgage. By way of example only there are two witness statements made previously by Mr. Rose which refer to the mortgage as having been effective. Mr. Rose's position now amounts to saying that he had not addressed his mind properly to the question at the time and that his earlier statements were mistaken.

58. This is a classic instance of an assertion which is weak and where the Claimants will have considerable difficulty in persuading the court that their current position is the correct one. There will be a wealth of material which will be put to Mr. Rose in cross-examination and where the court will view the likely explanation with very considerable scepticism. Nonetheless, the outcome will be dependent on the impression made by the oral evidence of Mr. Rose and Mr. Waxman. I remind myself that I do not have to take the Claimants' assertions at face value where they are inherently implausible in the light of the surrounding circumstances and/or the relevant documentation or by reference

to common sense and reality (to the extent that any authority is needed for that proposition it is provided by the decision in *National Westminster Bank v Daniel* [1993] 1 WLR 1453). Nonetheless, the challenge to the December 2016 mortgage although weak cannot be characterised as lacking any real prospect of success.

The Status of the First Two Claimants.

59. Mr. Aslett argued that the First and Second Claimants had not shown any proper status entitling them to apply for a declaration that the mortgages had been rescinded. It was accepted that the Fifth Claimant was not seeking redress in that regard. Mr. Aslett said that it was unclear whether the First and Second Claimants were acting as trustees on behalf of Dreadnought or in some other capacity and if so which. Moreover, if they were purporting to act as trustees for Dreadnought then account should be taken of the position of that company's receiver which was opposed to the approach being taken. Mr. Aslett also pointed out that if these claimants were seeking to rely on their status as guarantors then that did not assist because their liability under the guarantees was limited to the amount recovered from the property.

60. In my judgment this is not a good reason for refusing permission to re-amend. To the extent that it has force it would appear to apply equally to the original redemption action and to the amended claim made on the footing that the power of sale was being exercised improperly. It is not appropriate for the Defendants to seek to take that point at this stage. It is also of considerable relevance that the First and Second Claimants are the registered proprietors of the mortgaged properties. That capacity, if none other, gives them sufficient status to bring proceedings challenging the validity or enforceability of the mortgages.

Was there a Suite of Documents?

61. The Defendants contended that the mortgages, the loan agreement, and the other documents formed a suite or package of interrelated documents which stand or fall together such that an attack on one standing alone was not possible. Moreover, it was said that as there was already a judgment for payment of the indebtedness deriving from the loan agreement then the question of the validity of the mortgages had already been determined. In support of that proposition the Defendants referred me to the decision of the Court of Appeal in *Rivertrade Ltd v EMG Finance Ltd* [2015] EWCA Civ 1295. However, that did not assist me materially because there is no dispute that the effect for which the Defendants contend arises where there is a suite of documents in the relevant sense but the issue is whether the documents here formed such a suite.

62. For the Claimants Mr. Maynard-Connor accepted that the underlying debt was payable although there is challenge to what are said to be additional sums. However, the Claimants say that the documents here are not a suite or package. They say that it is open to them to contend that the securities can be set aside even if the underlying debt remains payable.

63. In my judgment whether there is a suite of documents for these purposes is a matter of the construction of the particular documents. The Defendants' position

that there is an interconnected suite or that the documents constitute a package standing or falling together is not so self-evidently correct that it can be said that there is no real prospect of the contrary interpretation being accepted. It is of note, albeit somewhat ironic, that at the hearing before me on 3rd August 2018 the Claimants, through Miss. Clare Stanley QC, sought to argue that the documents were to be seen as an interconnected suite such that demands were only valid if made against all parties and not just the First and Second Claimants. That argument was put forward in the context of the application for permission to amend the Particulars of Claim. I rejected that contention and concluded that it was not arguable with any real prospect of success that there was interconnexion such as to invalidate the demands. In the light of that conclusion it follows that there is real scope for argument about the degree of interconnexion and its effect such that this contention does not amount to a ground for refusing permission to re-amend.

Res Judicata **and the related Lines of Defence.**

64. The Defendants' position is that the default judgment obtained on the Debt Claim against Dreadnought means that the validity of the mortgages has already been determined and that the reopening of that issue is precluded. This is said to be capable of being described as *res judicata* or cause of action or issue estoppel or because the attack on the validity of the mortgages would be a collateral attack on the default judgment. The First and Second Claimants accepted that as trustees for Dreadnought they are to be regarded as its privies and subject to any *res judicata* defence which could be raised against it (see *Lemas v Williams* [2013] EWCA Civ 1433). However, they say that they have an interest other than that of being trustees namely that of guarantors and that in such capacity they are not the privies of Dreadnought. I was not persuaded that this contention advanced matters because the guarantees limit their liability to the assets they hold as trustees.

65. Nonetheless, I am not persuaded that it is clear that the default judgment in the Debt Claim is an end of matters. In reality the Defendants' argument in this regard stands or falls with their argument that the various documents form a suite or package with a determination of the validity of any one part operating as a determination that the entirety of the package is valid. If the documents formed a suite in the sense for which the Defendants contend then the default judgment in relation to the Debt Claim is a conclusive judgment about the securities as a whole. Conversely if the documents are not a suite in that sense then the default judgment in relation to Dreadnought's indebtedness does not operate to create an estoppel whether by way of cause of action or issue estoppel in relation to a challenge to the validity of the mortgages. I have already said that there is a real scope for debate as to whether there was a suite of documents and the same conclusion must apply here. There is scope for the Defendants to contend that the default judgment created an estoppel but that contention is by no means bound to succeed and the Claimants have real prospects of defeating such an argument.

66. I was referred to Lord Sumption's analysis of the effect of *res judicata* in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 at [17] and following. However, that was of little assistance here. Where there

is a cause of action estoppel or where a matter is *res judicata* then that is, indeed, an absolute bar to the bringing of fresh proceedings within the ambit of the matters already litigated. The question for me is not whether there is an absolute bar when such an estoppel arises but whether there is an argument with a real prospect of success that no such estoppel operates here and I have concluded that there is.

Abuse of Process and the Application of the Rule in *Henderson v Henderson.*

67. The Defendants' argument in this regard was that the challenge to the validity of the mortgages on the grounds of fraud was a matter which could and should have been raised in defence to the Debt Claim and that for the Claimants to seek to raise it now rather than then is an abuse of process by reference to the rule in *Henderson v Henderson* (1843) 3 Hare 100. Many of the arguments which the Defendants put forward as establishing cause of action estoppel (such as the contention that a collateral attack is being made on the default judgment) are more appropriately seen as elements in this head of abuse.

68. This has rather more force than the argument based on strict *res judicata*. The question is whether the current assertions are matters which could and should have been raised in the earlier proceedings. In addressing that question I have to take a broad merits-based approach as explained in *Johnson v Gore-Wood & Co* [2002] 2 AC 1.

69. Mr. Aslett is correct to say that it is no answer for the Claimants to say that the reason the matter was not raised in the earlier proceedings is that the District Judge declined to allow the proposed defence and counterclaim making the point to be relied upon. A party whose default or delay means that it is not permitted to raise an argument cannot say that it could not have raised the argument because the reality is that it would have been able to but for that delay or default. Here the proposed defence and counterclaim did make reference (though in rather less detail than now) to the alleged actions of Mr. Henesy but the reason why the court did not allow that to be put forward was apparently because of the late stage at which the point was raised.

70. There is considerable force in the Defendants' argument but it is not unanswerable. On analysis it really comes to the same thing as the suite of documents point. If there was not a suite of documents then the alleged fraud might be both a good defence to the Debt Claim and separately a sound basis for challenging the validity of the mortgages. In the absence of an interconnected suite of the relevant kind a failure to raise the point in defence of the Debt Claim does not mean that it is an abuse of process for the Claimants now to use it to challenge the mortgages. It follows that the point is debateable and it cannot be said that it means that the proposed re-amendment has no prospect of success.

Abuse of Process by Reference to *Hunter v Chief Constable of the West Midlands Police.*

71. The Defendants said that the court has a wide power to control abuse and to decline to entertain abusive proceedings with this power extending beyond

cases of *res judicata* and beyond those within the ambit of the rule in *Henderson v Henderson.* The speech of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536 was relied on for that proposition.

72. I accept that the court has such a power and that it is a wide power. It is nonetheless concerned with conduct which is an abuse of the process of the court. It is not some form of sanction for bad behaviour in general and the question must at all times be whether the particular proceedings or application are properly to be seen as an abuse of the court's process.

73. The raising of the fraud claim at this stage and against the background of the earlier comments made to the court and the Defendants is said to be abusive. I do not accept that analysis. What was previously said on behalf of the Claimants and the stage at which this application is made are very relevant to the exercise of the court's discretion to grant or refuse permission for the proposed re-amendment but the conduct is not an abuse such as of itself to preclude permission.

Would permitting the Re-amendment be a pointless Exercise?

74. Mr. Aslett argued that allowing the re-amendment would be a pointless exercise and that permission should be refused as a matter of discretion and/or case management on that basis. The contention was that even if the mortgages were to be set aside the First Defendant would still be able to secure control of the properties because of the debentures in its favour and because of the willingness of the receivers of Dreadnought to work with it.

75. In a very clear case the court may refuse permission to amend if the points which are to be raised are wholly academic but that would only be appropriate in the clearest of cases. This is not such a case. The point made by Mr. Aslett may be relevant to the extent to which the proceedings will be of financial benefit to the Claimants but even that is not as clear cut as is asserted. If the mortgages were obtained by fraudulent deception and if the mortgagors are saying that they have been rescinded then it is hard to see how it can be said that it is not appropriate to litigate that issue even if there is other security in favour of the alleged fraudster. The Defendants' point can be answered by noting that if the contents of the proposed re-amended Particulars of Claim had been in the original claim form then there would have been no question of the court concluding that the matters raised were academic and refusing to allow the case to proceed on that basis.

76. At most this contention is a very minor element to be taken into account in the exercise of the court's discretion. To the extent that it has any impact it is by way of an element in the consideration of the extent to which there will be injustice to the Claimants if they are refused permission to raise the contentions in the draft re-amended pleading.

The alleged true Motive of the First Claimant.

77. The Defendants say that Mr. Rose's real purpose in seeking to re-amend the Particulars of Claim and to challenge the validity of the mortgages is to acquire

the assets of Dreadnought in breach of trust. They say that the proposed sale to the Fifth Claimant is at less than the true value of the properties. They say that it is a device for Mr. Rose to acquire the value of the properties at the expense of the companies for whom he holds those properties on trust.

78. The making of this allegation shows the level of suspicion which the Defendants have as to Mr. Rose's motives. There is, however, no basis on which I could come to such a conclusion at this stage. I am assessing matters on the papers without cross-examination or oral evidence and in circumstances where Mr. Rose has disavowed any intention to act other than in accordance with his obligations as trustee.

79. In any event this allegation is irrelevant to the exercise in which I am engaged of determining whether or not to permit re-amendment of the Particulars of Claim. If the mortgages are liable to be set aside on the ground of fraud then the potential intention of Mr. Rose *vis-à-vis* those for whom he is a trustee is irrelevant and would not preclude the setting aside of the mortgages. Similarly, it should not preclude re-amendment to allow such an argument to be raised. Even if I am wrong in that regard and Mr. Rose's motive could be said potentially to be relevant to the exercise of my discretion I could only take it into account if an improper motive were to be clearly established and as just explained there is no basis on which I could reach such a conclusion at this stage.

Election.

80. The Defendants say that the redemption of a mortgage and the rescission of a mortgage are incompatible rights. They say that by bringing proceedings for redemption the Claimants elected between those two rights and that they are not now entitled to reverse that election and to seek a declaration that the mortgages have been rescinded as an alternative to redemption. The Defendants contend that the commencement of proceedings for redemption was itself an act of election which has been reinforced and confirmed by repeated actions since then.

81. There was ultimately little dispute between counsel as to the applicable law. Election between inconsistent rights is different from election between alternative remedies. If a party is potentially entitled to alternative remedies for the same wrong then there is no election until judgment is obtained on one or other of those remedies. However, if there are inconsistent or incompatible rights then there is an election if a party with knowledge of the rights in question chooses to act on the basis of one of those rights in a way which is inconsistent with the other. In that regard see *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 18 per Lord Simon and 29 – 30 per Lord Atkin and *Oliver Ashworth Ltd v Ballard Ltd* [2000] Ch 13 at 28 per Robert Walker LJ. The party electing has to have knowledge of both the rights at the time of the alleged election with that knowledge and the intention to exercise the particular right being crucial: *Peyman v Lanjani* [1985] 1 Ch 457 at 482 and 487 – 488 per Stephenson LJ and at 501 per Slade LJ. Although there has to be knowledge of the different rights a party can be held to have elected even if he did not know

that the act in question operated as a binding election (see *Evans v Bartlam* [1937] AC 473 at 479).

82. Redemption of a mortgage and the rescission of a mortgage on the ground of fraud or misrepresentation are incompatible rights rather than alternative remedies: see *Oliver Ashworth Ltd v Ballard Ltd* at 28 per Robert Walker LJ and *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 20 at [79 – 80] per Lord Neuberger. Thus redemption is predicated on the mortgage in question being valid because the right to redeem derives from the fact of there being a mortgage. Conversely rescission brings a mortgage to an end and seeks to set it aside from the outset. Clearly when a mortgage has been set aside any rights (such as that to redeem) which are dependent on a mortgage being in place also fall away.

83. The burden of proving that there has been an election falls on the party alleging that there has been an election. Given that knowledge is a prerequisite of election a party alleging election has to show knowledge of the inconsistent rights on the part of the allegedly electing party. However, as Colman J explained in *Moore Large & Co Ltd v Hermes Credit & Guarantee Plc* [2003] EWHC 26 (Comm) at [98 – 105] where the act alleged to have amounted to an election was effected by a legally represented party then it is normally to be inferred that the action was taken with the party's authority and after legal advice as to its effect. That inference can be displaced but in order to do so the allegedly electing party will normally need to call evidence of the advice which was or was not given.

84. Mr. Maynard-Connor accepted that the actions on the part of the Claimants were capable of effecting an election but said that the presence of the requisite knowledge was in issue. He emphasised the context in which this question is being considered. If the proposed re-amendment were to be permitted then election would have to be pleaded as a defence to the re-amended Particulars of Claim and the burden would be on the Defendants to establish that there had been an election. He said that if election were to be asserted then Messrs Rose and Waxman would deny that they had knowledge of the competing rights. I declined to allow the Claimants to adduce a witness statement from Mr. Rose denying the requisite knowledge because this statement was put forward part way through the second day of the hearing. Mr. Maynard-Connor does not seek to go behind that ruling but does say that I should take account of the prospect that if the question of election were to be raised as a defence then evidence would be put forward denying knowledge.

85. It is right that I have to take account of the exercise I am engaged in, namely determining whether to give permission for proposed re-amendment, and of the fact that it would be for the Defendants to plead and prove election. The potential for an argument that election precludes the assertion of rescission for fraud can only preclude permission if there is no real prospect of the Claimants overcoming that line of defence. The question is whether it is fanciful for the Claimants to contend that there was a lack of knowledge such that their actions did not amount to an election. However, even if it is not fanciful to assert such a lack of knowledge then the strength or weakness of the contention will remain a factor relevant to the exercise of my discretion by reason of its impact on the

strength of the proposed case as explained above. In assessing whether the Claimants' denial of knowledge is fanciful I must remember the scope for matters to look very different after the court has heard oral evidence and that in cross-examination a person may be able to give persuasive answers to points which appeared on paper to be unanswerable. In that regard I note the point made by Slade LJ in *Peyman v Lanjani* at 501 saying that in many cases the requisite knowledge will be inferred from the circumstances but saying that in an appropriate case "however strong that prima facie inference may be, it will still be open to the court at trial, after hearing evidence as to [the party alleged to have knowledge]'s true state of mind, to hold on the balance of probabilities that he did not in fact have the requisite knowledge."

86. Even when account is taken of those qualifications the Claimants' position has a number of serious weaknesses which make it difficult to foresee any outcome other than a finding that Messrs Rose and Waxman knew that they had a choice between rescinding (or claiming to rescind) the mortgage and seeking redemption and that with that knowledge they chose the latter course. In that regard a number of matters are of particular significance.

87. Thus the fourth witness statement from Mr. Jones in which he explains the reason why the Claimants initially sought redemption rather than rescission and the reason for the decision to seek to re-amend is very telling. It is very hard to interpret that statement in any way other than as indicating that a conscious and informed choice was made between the two alternative courses. It is of note that Mr. Rose has made a witness statement saying that the matters set out in Mr. Jones's statement were within his (Mr. Rose's) knowledge and that they are true.

88. It is of note that the draft Defence and Counterclaim which was sought to be put forward in response to the Debt Claim and which had a statement of truth signed by Mr. Rose made allegations of fraud against Mr. Henesy. It cannot be, and is not, suggested that the knowledge of Mr. Henesy's alleged actions has only just come to light. The Claimants knew the case which is now contained in the draft re-amended pleading at the time which the decision was made to bring proceedings for redemption.

89. Not only did Mr. Polli QC make it clear in his skeleton argument for the hearing before the Vice-Chancellor that an election was being made but he confirmed this in oral exchanges at a time when Mr. Rose was in court. Mr. Rose will have considerable difficulty in persuading any court at a trial that he did not understand what was being said. In that regard the detailed terms of Mr. Rose's witness statements demonstrate the extent and depth of his knowledge of the matters in question here. It is also of particular note that Mr. Rose signed the Statement of Truth on the Reply which gave a plain indication of the Claimants' stance.

90. Finally, in this respect, it is relevant to remember that the Claimants have been legally represented throughout and that they were in receipt of legal advice at the time the proceedings were commenced seeking redemption rather than rescission. In accordance with the *Moore Large* approach this gives rise to an

inference that the step was taken with the benefit of legal advice and the details of the advice given will have to be established for that inference to be refuted.

91. In my judgment the contention that the Claimants lacked the requisite knowledge escapes being fanciful by only the narrowest of margins. In reaching that conclusion I take particular account of the fact that the necessary knowledge is subjective knowledge and it is just conceivable that the Claimants will be able to give a credible explanation consistent with such knowledge having been absent at the time of the relevant decisions. However, the prospects of them doing so are poor.

92. It follows that the potential line of defence based on election is not so overwhelming that it can be said that the proposed re-amendment does not show a claim with a real prospect of success such as to fall at the first hurdle. However, the prospects of the Claimants overcoming the election defence are poor and this will be a very material factor when I come to consider the exercise of my discretion.

93. The Defendants relied on substantially the same material which was said to have demonstrated an election as giving rise to a promissory estoppel. They say that the Claimants' actions operated as representations and that these could give rise to a promissory estoppel regardless of the Claimants' intention and knowledge. This is a narrow distinction because in most instances words or conduct showing that a party was proceeding down one route rather than another if made without knowledge of the choice between those courses would not give rise to an estoppel. This is because without such knowledge the words or conduct would not normally be in terms or in a context such as to amount to a representation. However, there can be such cases as was made clear in *Peyman v Lanjani* at 495 per May LJ and at 501 per Slade LJ and there can be instances where an assertion made on a party's behalf can operate as a representation to another party even where the first party did not know of the choice between the competing courses of action. Even in those circumstances the court would have to consider whether there had been reliance such as to make it inequitable for the first party to resile from the representations and it would also have to consider the nature and effect of the estoppel, if any, which arose. Moreover, the burden of establishing an estoppel lies on the party alleging it. It follows that the question of an estoppel arising from the words and actions of the Claimants and their representatives may well need to be explored at any trial but the potential for such an estoppel being alleged by the Defendants does not mean that the proposed re-amendment has no real prospects of success.

The Exercise of the Court's Discretion.

94. I turn to the exercise of my discretion. I have to consider where on the continuum already referred to this case falls and the consequent weight to be given to the particular factors. In that exercise, I have to assess the stage which the proceedings have reached; the effect on the proceedings of allowing the re-amendment with particular regard to the work which will have been wasted and the further work which will need to be done; the reason why the claim now being put forward was not put forward either at the start of the proceedings or at some other stage before now; the articulation and pleading of the re-

amendment; and the strength of the case which is put forward in the proposed re-amendment. I must do so in the light of the Overriding Objective and all the circumstances of the case bearing in mind the potential injustice to a party who is not allowed to put forward a potentially meritorious claim.

95. No trial date has been fixed in this case. A date should have been fixed and would have been if the Claimants had complied properly with the order made at the Case Management Conference. The predominant failing is that of the Claimants in that regard but I accept that there was fault on the part of the Defendants as well as the Claimants and that the failing was the result of a misunderstanding of my order rather than anything more sinister. Although a trial date has not been fixed a window for the trial has been identified running up to the end of December of this year. Mr. Maynard-Connor contends that even if allowing the re-amendment were to increase the length of the trial beyond the current estimate of 10 days (which he does not wholly accept it will) then it would still be possible for the trial to take place this year. In my judgment that is over-optimistic and unrealistic. If the re-amendment is allowed there will have to be substantial further pleadings and further case management. The scope of the necessary disclosure and of the witness evidence which will be required will be markedly expanded. I do not accept that the 20 day period suggested by the Defendants will be needed for the trial but I do accept that the current estimate of 10 days will be exceeded. I accept that it is likely that all the necessary preparation could be completed this year though that is by no means certain and further thought would need to be given at a renewed case management hearing. However, the prospect of court time being available to deal with the trial of the expanded case this year is diminishing with each passing day. At the very least the re-amendment will create a real risk that it will not be possible to conclude the case this year.

96. Six days of court time have already been spent on this case and a trial of the matter has already been vacated with the vacating of trial listed for August 2018. The Claimants are not to blame for all of those matters. Thus the loss of the August 2018 trial and at least some of the hearings were caused by the actions of the Defendants such as their actions in entering a contract for the sale of the property and deliberately doing so without reference to the Claimants. Nonetheless it is relevant that court time and the time and expense of the parties has already been taken up.

97. The delay between the making of the application in October 2018 and the hearing of the application in April 2019 is not the fault of the Claimants. Part of that period was taken up with consensual and mutual extensions of time. However, the bulk of it was due to the need to find the necessary judicial time to determine the application. I have already referred to the volume of material. The matter was listed for 2 days before me with one day of pre-reading. As it turned out the hearing lasted well into a third day. The delay between the conclusion of the hearing and the giving of judgment was in large part because of the unavailability of counsel in the period around Easter. The Claimants did not cause those delays but it was inevitable that an application of this substance would require significant judicial time to be set aside and also inevitable that some delay would result as a consequence. So the fact that the application is

being determined at this stage rather than in late 2018 is at least in part due to the nature of the application.

98. There is considerable significance in the fact that the proposed re-amendment puts the claim on an almost entirely new basis. The previous claim for redemption is retained but only as an alternative to the rescission claim which is put at the forefront of the Claimants' case. This is an almost complete recasting of the case which will require substantial work. The Defendants are right to say that the case will be taken back if not to "square one" then to a stage very close to that.

99. Substantial new work will be needed by way of pleading of a defence together with the investigation of and obtaining of evidence in relation to wholly new matters. I am not, however, persuaded that the re-amendment would, if permitted, necessarily lead to other parties being joined. The Claimants do not seek to join Mr. Henesy or others as defendants and Mr. Aslett failed to persuade me that Mr. Henesy or others would be joined whether on their own application or by the court or at the instigation of the Defendants. In short it would not be necessary for such persons to be parties in the way envisaged in CPR Pt 19.

100. What is proposed is a re-amendment. The Particulars of Claim have already been amended once and even now what is proposed is different from the re-amendment originally intimated namely the identification of conduct said to be similar to that alleged in respect of the sale proposed here such as to support the contention that that the power of sale was being exercised in bad faith. This is relevant because the more bites of the cherry a party seeks to have by way of amendment the less sympathetic the court will inevitably be to the suggestion that a refusal of permission will cause injustice to the party seeking to amend.

101. It is a highly significant factor that the proposed re-amendment is not based on factual matters which the Claimants have only recently discovered nor even on a fresh assessment of the merits of claim. As Mr. Jones frankly accepted in his fourth witness statement the reasons why the assertion of conspiracy and misrepresentation is being made now and why it was not made earlier are that a commercial decision was made to seek only redemption initially and that the Claimants' assessment of the commercial merits has changed. The Claimants made a deliberate decision (on commercial grounds) not to seek rescission at the outset. They changed their minds only when they learnt the level at which the Defendants were pitching the secured debt. A party who makes a deliberate decision not to put forward a particular line of claim because of that party's assessment of the commercial benefits of not doing so and who then changes his mind because of a changed assessment of those commercial benefits is not well placed to say that he will suffer injustice if he is not allowed to put the case on the changed basis. Parties should put their claims and defences forward fully at an early stage. A party who deliberately chooses not to do so (as the Claimants have done) runs the risk of not being allowed to do later in the life of the case and of being told that he has brought any adverse consequences upon himself.

102. The proposed re-amendment is adequately pleaded and enables the Defendants to know the case they have to answer. It does, however, make a large number of allegations which are pleaded in lengthy narrative passages rather than as

they should have been in a series of particular averments each of which could be pleaded to seriatim. It is also relevant to take account of the nature of the proposed re-amended claim. It is not simply a wholly new cause of action but it is one involving numerous factual allegations in relation to complicated dealings over a lengthy period of time. Responding to this will inevitably involve the Defendants in obtaining and considering substantial quantities of documents and detailed witness evidence. The situation is very different from that which would apply if the proposed re-amendment made reference to a single incident or even to a single series of dealings.

103. The previous statements made on behalf of the Claimants that they would not be seeking rescission are highly significant. In that respect I have particular regard to the skeleton argument and the oral submissions of Mr. Polli and to the Reply. Those are relevant to the prospect of the court finding that there was election on the part of the Claimants or an estoppel in favour of the Defendants. However, even without reference to such a finding those statements are relevant to the exercise of my discretion and to the question of whether permission should be given. Not only did the Claimants make a deliberate decision not to assert rescission at the outset of this case but they told the court and the Defendants that they were proceeding on the basis that rescission was not being sought and could not be sought. That is a potent factor and makes it considerably harder for them now to say that it would be unjust if they are not now able to re-amend and to bring forward a line of claim which they formerly disavowed. It is also of note albeit of rather lesser weight that there was some delay in putting forward the proposed re-amendment. The information as to the value which the Defendants put on the debt was revealed in Mr. Cawson's comments on 3rd August 2018. However, it was not until 12th October 2018 that the proposed draft re-amendment was put forward and only at the hearing before HH Judge Pearce on 5th October 2018 that there was any suggestion that the Claimants would be seeking to put forward a case going beyond alleging similar fact evidence in support of the alleged bad faith in the exercise of the power of sale. This was not a long delay in the context of the case as a whole but where the Claimants are seeking to recast the whole nature of the case going back on the previous indications and to do so at a late stage it was appropriate that they should have acted with the utmost expedition and I am not satisfied that they did so.

104. The Defendants have not put forward evidence of any particular prejudice which will be caused if the re-amendment is permitted. Mr. Aslett invited me to accept that the value of the security was likely to diminish but I am not able to reach such a conclusion in the absence of evidence. The absence of particular prejudice to the Defendants is a relevant factor but it does not carry anything approaching the substantial weight which Mr. Maynard-Connor sought to persuade me to place on it. This is especially so when it is clear that the proposed re-amendment would change the nature of the case; would inevitably require considerably more work to be done; would require further court time to be allocated to the case; would mean the waste of at least some of the court time and the work of the parties already given to the case; and would do so at a late stage in the proceedings. I have already indicated that the courts accept that such

consequences can amount to genuine prejudice to the other party and to other court users even when the precise effects cannot be readily quantified.

105. I am to have regard to the merits of the claim in its proposed re-amended form. As already explained the later in the life of a case that permission to amend is sought then the more care will be taken in considering whether the proposed amendment has a real prospect of success. Moreover, the strength of the case is of increasing importance the later the decision is being taken in relation to amendment. Here the application is made at a late stage. It will require considerable further work; it takes matters back to close to "square one"; and will at best jeopardize the prospect of and more likely preclude a trial taking place this year.

106. There are two key limbs to the proposed re-amendment. Those are the challenge to the execution of the December 2016 charge and the contention that the securities have been properly rescinded by reason of the alleged fraudulent conspiracy. Both are of sufficient strength to avoid being defeated by a summary judgment application and, therefore, show a case with a real prospect of success. However, both are contentions where the prospects of success at trial are poor.

107. In respect of the challenge to the execution of the December 2016 charge I have already explained that the changes of tack by Mr. Rose and the unlikelihood of the assertion being made mean that the prospects of the court at trial finding that the charge was not executed by Mr. Rose and Mr. Waxman are poor.

108. Turning to the alleged fraud the material put forward on behalf of the Claimants is sufficient to show a real prospect of establishing the alleged conspiracy. The claim is nonetheless far from clear cut and there are very potent counter-arguments. The best assessment which can be made at this stage is that there are real prospects of a finding that there was fraud along the lines alleged but that such a finding is by no means bound to be made. However, even if there were to be such a finding it would only assist the Claimants if they also overcame the defence that there had been an effective election precluding rescission. I have already explained that the Claimants' stance that there was no election because of the lack of the required knowledge is not to be characterised as fanciful. However, as already stated I reached that conclusion by the narrowest of margins. The prospects of the Claimants escaping a finding that there was an election are poor. Accordingly, I approach the exercise of my discretion in the light of the assessment that the proposed re-amended claim although arguable would be likely to fail at trial. Even if matters are stated less starkly this is a case where the case which the Claimants now seek to put forward is a weak one.

109. The decision as to whether to permit the re-amendment requires a balancing of those considerations. No one factor is conclusive by itself but in the light of the factors taken together it is not appropriate for permission to be given for the bulk of the proposed re-amendment. Standing back the position is as follows. The Claimants are seeking to put forward serious allegations and an entirely different basis of claim which they deliberately chose not to assert when they commenced the proceedings. This is in circumstances where the Claimants repeatedly told the court and the Defendants that they would not seek to rescind and where the change of approach comes from a changed assessment of the

commercial merits and not from the discovery of any new facts. They seek permission for a re-amendment which would take the case back to square one or almost square one at a late stage in the proceedings. Moreover, the case which they seek to advance although arguable is weak. In such circumstances the interests of justice do not require permission to be given rather they require permission to be refused and that is what I do.

Conclusion.

110. The proposed re-amended Particulars of Claim is a substantial document. I have explained why I am refusing permission for the key elements of it. In my judgment it would not be an appropriate exercise generally to go through it seeking to see if some particular elements standing alone might be permissible and I do not propose to do that subject to a modest exception. There are some aspects of the proposed pleading which can readily be seen to be properly permissible. Those are matters of clarification or of expansion of the case already set out (either originally or in the permitted amendment). Accordingly, I will permit the re-amendments proposed in respect of the following paragraphs 20A, 23, 23B, 23C, and 25. Some reformulation of those paragraphs will be needed in the light of the refusal of permission for the balance of the proposed re-amendment and I will hear submissions on that at the handing down of this judgment.