Neutral Citation Number: [2024] EWHC 1160 (Comm)

Case No: CL-2021-000321

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

Rolls Building
7 Rolls Building Fetter Lane
London EC4 1NL

Date: 10 May 2024

Before :

THE HON.MR JUSTICE BRYAN

- -

Between :

(1) STEENBOK NEWCO 10 SARL

(2) IBEX RETAIL INVESTMENTS LIMITED

Claimants

- and -

(1) FORMAL HOLDINGS LIMITED

(2) MR MALCOLM KING

(3) MR NICHOLAS KING

Defendants

- -
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Andrew Ayres KC and **Tom Rainsbury**
(instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimants**
Alan Gourgey KC, Bobby Friedman and **Tara Taylor**
(instructed by **DLA Piper UK LLP**) for the **Defendants**

Hearing dates: 9 and 10 May 2024

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Approved Judgment

MR JUSTICE BRYAN :

A. INTRODUCTION AND BACKGROUND

1. The parties appear before the Court upon the hearing of the two day Pre Trial Review of the claims in this action, which is fixed for a 7 week trial starting in a mere 4 weeks time on 10 June 2024. In the context of the allocated one week's judicial pre-reading time (which is itself indicative of the complexity of the existing pleaded issues), the Skeleton Argument of the Claimants Steenbok Newco 10 Sarl and Ibex Retail Investments Limited ("Claimants") is to be served on 3 June 2024, followed by that of the Defendants Formal Holdings Limited, Mr Malcolm King and Mr Nicholas King ("Formal", "Malcolm King" and Nicholas King") on 5 June 2024. There are accordingly only **15 working days** after the PTR before the Claimants' Skeleton must be lodged, by which time, of course, all issues must be crystallised, all disclosure given and all relevant evidence, factual and expert must have been served, and all in good time before that so as to facilitate the preparation of such skeletons and to enable the (inevitably extensive and onerous) preparation for the trial itself. The parties are said to be trial ready in relation to the existing pleaded issues subject only to resolution of certain matters arising for consideration at the PTR and any necessary direction in relation thereto, none of which are likely to give rise to difficulties in the preparations for trial still less put the viability of the trial in danger.

2. However there is an extant substantive application before the Court, which must inevitably be determined first at the start of this PTR, and which has major potential implications for trial preparation and the trial itself, namely the Claimants' application dated 10 April 2024 (the "Amendment Application") for permission to make amendments to their Re-Amended Particulars of Claim ("RAPOC") with associated amendments to their Amended Claim Form (the "Proposed Amendments").

3. The Proposed Amendments are, on any view, very substantial and are made very shortly before trial. They run to no less than 53 pages of new text (rather more than Particulars of Claim are meant to comprise in the first place without prior permission of the Court). The parties are diametrically opposed in their stance to the Proposed Amendments. The Claimants submit in their Skeleton Argument that, "none of [the Claimants'] Amendments are (i) out of the ordinary at this stage of proceedings for heavy Commercial Court litigation, (ii) fundamentally change the nature of the claim in any way, (iii) require a re-run of disclosure, witness evidence or expert evidence, (iv) plead any new claims in German or Austrian law (which are the applicable laws for all claims being made) or (v) involve a re-write of the case".

4. In contrast, the Defendants submit that it is readily apparent from even a cursory read of the Proposed Amendments that the Claimants have effectively rewritten their case, ripping up important parts of their existing case and substantially recasting the case in the course of which it is said that they seek to advance new claims (after the relevant limitation periods have expired and so have no real prospects of success) which if CPR 17.4 might otherwise apply (which it is said does not apply to the vast majority of the claims) then all are reasonably arguably time barred and do not arise out of the same or substantially the same facts, and/or are not properly pleaded and/or have no prospects of success for other reasons, and which are in any event (fundamentally) made far too late (and should and could have been made much earlier, if at all), and would require further rounds of pleadings, and then disclosure (with fresh issues for disclosure), further witness

evidence (potentially including from new factual witnesses) and further expert evidence on German and Austrian law, none of which, it is said could be undertaken prior to trial, and which it is said would unfairly and prejudicially detract from the Defendants' proper trial preparation, and could not in fact be achieved within the time available, and would derail the trial in circumstances where an adjournment would not be appropriate in any event (even had the Claimants applied for one which they have not). As such, and save for minor deletions/corrections, the Defendants mount a root and branch opposition to the Proposed Amendments.

5. There is extensive witness evidence before me in support of, and in opposition to, the amendments, to all of which I have had regard. The application is supported by the 14th statement of Mr Kouchikali on behalf of the Claimants ("Kouchikali 14") and opposed in the eighth and ninth statements of Mr Brierley on behalf of the Defendants ("Brierley 8" and "Brierley 9") (the latter of which addresses confidential matters). Mr Kouchikali replies to the Defendants' evidence in his 15th statement ("Kouchikali 15"). I also have two very substantial Skeleton Arguments before me (the Claimants' condensed into 26 pages through, amongst other techniques, the use of narrow margins and the Defendants' at an uncondensed 39 pages). Even more recently (and after the allocated reading day), the Claimants served a further submission entitled, "Claimants' Note on the Relation Back Argument" (the "Claimants' Note") to which the Defendants responded in further submissions entitled, "Defendants' Response to Claimants' Note Concerning the Relation Back Argument" (the "Respondents' Note").

6. I have heard a full day's oral argument on the Amendment Application. In circumstances where the Amendment Application needs to be determined before the remainder of the PTR can be proceeded with today, and any necessary directions given, and in circumstances where to reserve judgment would itself prevent the PTR being completed and would not allow sufficient time before trial for any consequential trial preparation (and associated directions), it is necessary to give judgment on the Amendment Application at this time on an ex tempore basis, and within the inherent time constraints upon doing so. Whilst this necessitates a concise approach to the evidence before me and associated submissions, I confirm that I have given careful consideration to all the evidence before me, and all the submissions that have been made to me.

B. APPLICABLE LEGAL PRINCIPLES

7. Save in the context of whether the "relation back" provisions apply in the context of foreign limitation periods, the applicable principles in relation to the amendment of statements of case were, unsurprisingly, largely common ground albeit that there were differences of emphasis between the parties.

B.1 THE DISCRETION UNDER CPR 17.3

8. CPR 17.1(2) provides that, where a statement of case has been served, "a party may amend it only (a) with the written consent of all the other parties; or (b) with the permission of the court". CPR 17.3 contains a general discretion to grant permission.

9. The issue of whether to allow amendments involves the exercise of the Court's discretion – see *Quah v Goldman Sachs* [2015] EWHC 759 (Comm) at [38(a)]. This discretion is subject to CPR 17.4 (as addressed below). The circumstances in which amendments may be put forward are, as it has been put, *"infinitely variable"* and each application requires

the Court to take into account the particular facts of the case. Accordingly whilst previous decisions may be illustrative, they are seldom compelling – see *Vilca v Xstrata Ltd* [2017] EWHC 2096 at [22] and [25(v)]. As was stated in that case, "It is always a question of striking a balance and weighing all relevant factors".

10. In exercising the discretion, the overriding objective is of the greatest importance (see *Quah* at [38(a)]). In this regard the Court should have regard to the list of matters in CPR 1.1(2) (see *Scipion Active Trading Fund v Vallis Group Ltd* [2020] EWHC 795 (Comm) at [63]). The principles under CPR 3.9 do not apply: *Vilca* at [22].

11. Furthering the overriding objective includes "dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party" (CPR 1.1(2)(c)). This principle was applied in *Scipion* at [92].

12. CPR 1.1(2) provides that dealing with a case justly and at proportionate cost includes "ensuring that the parties are on equal footing" (CPR 1.1(2)(a)) and "ensuring that the case is dealt with expeditiously and fairly" (CPR 1.1(2)(d)). One aspect of this is the need to take into account the impact on a party's trial preparation. The parties need to be "on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence". This is relevant from the position of the party that has to respond to the amendments. The equal footing principle was applied in *Scipion* at [91]. The Defendants submit that this would not be the case here if the amendments were allowed, as it is said that the consequence would be to deny the Defendants' legal team the time that they require to prepare properly for a trial.

13. So far as fairness is concerned, a number of authorities recognise that amendments can be made to "catch up" with disclosure – see *Various Claimants v MGN Ltd* [2020] EWHC 553 (Ch) at [45], [48(c)], [60], [62(a)-(b)]; *Swain-Mason* at [72] and *Rose v Creativityetc Ltd* at [101] and also to provide further clarity about a generalised case – see *Various Claimants at* [42]-[49] and *Rose* [2019] EWHC 1043 at [110] in which it was stated that, "There are aspects of the proposed pleading which can readily be seen as properly permissible. Those are matters of clarification or expansion of the case already set out"). The fact that a Court will take into account if a matter has, for example, only become clear on disclosure is an incident of the fact that the reasons for the delay will be taken into account. Where (as the Defendants submit applies in the present case) most of the Proposed Amendments could have been made sooner, that is a point telling against the grant of permission – see *Various Claimants v MGN* at [45] in the context of the phrase "*catching up with disclosure*" where it is stated that that the material "*could not necessarily have been pleaded before*".

14. Permission may be granted where the pleadings bring the case in line with the witness or expert evidence. For example, in *Toucan Energy Holdings Ltd v Wirsol Energy Ltd [*2021] EWHC 895 (Comm), Henshaw J. identified at [9] (of the Annex to the judgment):

> "It is relevant to have regard to the degree to which the case sought to be advanced by the amendment is one that the parties have in fact already been addressing. In *Hawksworth v Chief Constable of Staffordshire* [2012] EWCA Civ 293 (CA), the Court of Appeal stated, *obiter*, that it might appropriate to permit an amendment at trial in respect of a matter which,

> although not raised in the pleadings, had nevertheless been raised in some of the witness statements and experts' reports served before trial. In *Ahmed v Ahmed* [2016] EWCA Civ 686, the claimants applied to have letters of administration revoked on the basis that the will annexed to them had not been duly executed or witnessed. At the start of the trial the claimants obtained permission to amend their particulars of claim so as to allege that the will had been forged. The Court of Appeal dismissed an appeal against that grant of permission: the amendment was no more than a formality bringing the claimants' case into line with what had been argued for at least six months; the appellants had not been taken by surprise by the amendment and, indeed, had themselves sought at the pre-trial review permission to call a handwriting expert."
>
> (emphasis added)

15. In this regard in *Various Airfinance Leasing Companies ("**VALC**") v Saudi Arabian Airlines Corporation* [2021] EWHC 2330 (Comm), Mr MacDonald Eggers QC (sitting as a Deputy Judge of the High Court) expressed the following sentiments at [15(5)] (with which I agree):

> "Particularly in complex litigation, it is not unusual for amendments to be made to the statements of case to reflect changes in the parties' understanding of the issues and the other party's case, the emergence of new evidence, or developments in the law. The parties may also wish to amend the statements of case to reflect the evidence that they have served for adduction [sic] at trial or to narrow or perhaps to reformulate the issues in the action. This is a consideration which the Court should take into account in deciding how to dispose of the application having regard to principles of active case management and the furtherance of the overriding objective..."

16. Amendments should be "properly formulated" (i.e. appropriately particularised and not an abuse of process) and "clearly formulated" (i.e. readily understandable) (see *VALC* at [15(2)] and *CIP Properties v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 at [19(d)]. However as was said in *Rose* at [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". Where the particulars of the plea are "*just adequate*" but could be further developed, the Court may allow an amendment but on the condition that further particulars are provided (see *VALC* at [15(c)]).

17. However particular considerations arise in relation to the making of allegations of fraud (which are equally applicable to allegations of improper and/or unlawful conduct generally). There are stringent requirements in relation to the pleading of fraud – see CPR r16.4(1) which requires particulars of claim to include "(a) a concise statement of the facts on which the claimant relies" together with the matters set out in PD16 (see r.16.4(1)(e)). These matters include, at paragraph 8.2 of PD16, "(1) any allegation of fraud"; and "(5) notice or knowledge of a fact". As is well established, and as I stated in *NBT v Yurov* [2020] EWHC 100 (Comm) at [50]: "fraud or dishonesty must be distinctly alleged and distinctly proved; it must be sufficiently particularised; and it is not sufficiently particularised if the facts pleaded are consistent with innocence. This means that a claimant who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and facts, matters and circumstances which are consistent with negligence do not do so…" (emphasis added).

18. These points summarise what was said by Lord Millett in *Three Rivers District Council v Bank of England* [2003] 2 AC 1 at [185]-[186]. He went on to set out the importance of pleading the primary facts relied on in support of an allegation of fraud or dishonesty, including, importantly, because the Defendant is entitled to know the case he has to meet. Likewise, Lord Hope stated at [55] that: "Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out."

19. Of relevance in the context of the Proposed Amendments is the fact that fraud must be distinctly alleged and distinctly proved as against each Defendant so that it is clear what is said against each person. Where the same plea is rolled up against multiple individuals, it is not clear whether the particulars alleged do in fact relate to a specific Defendant. Likewise, where the rolled-up plea relates to multiple causes of actions, e.g. negligence and fraud, it is not clear whether a particular is said to support a case in (in this example) fraud, or merely negligence – in this regard see, for example, *McEneaney v Ulster Bank* [2015] EWHC 3173 (Comm), in which it is stated that rolled up pleas in the fraud context are "impermissible*"* (at [65]) and "unsatisfactory" (at [82]). See also what was said by May LJ in *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340 that: "It is ambiguous and thus demurrable, if fraud is relied on, to use the common "rolled up plea" that a defendant knew or ought to have known a given fact. If it is desired to allege and plead fraud and, in the alternative, negligence based on similar contentions, then the former must be pleaded first and clearly and the relevant part of the plea confined to fraud. The allegation in negligence can then be pleaded separately and as a true alternative contention".

20. If a proposed amendment raises a new claim, it will be refused if it does not have "a real prospect of success" (see *Toucan*, Annex, at [5(ii)]; *Quah* at [36] and *Rose* at [56]). "Real prospect of success" has the same meaning as in a summary judgment sense. Whilst this is a relatively low threshold, it is still a threshold that must be met, and there will be some contexts where this consideration is in play (for example if a claim sought to be advanced in an amendment is obviously time-barred).

21. The Claimants submit that there is a distinction between an amendment which raises a new claim and one which provides further particulars by reference to what is stated in

the White Book at [17.3.6], namely, "Distinction is sometimes drawn between whether the amendment: (i) introduces a new claim or alternatively (ii) provides further particulars, based on factual material, in support of an existing pleaded point. It is clear that the former will not be permitted if the new allegation carries no reasonable prospect of success. There is support for the proposition that the latter should not invite an assessment whether the particulars have a real prospect of success, these being matters for trial…" However it would be contrary to the overriding objective to allow amendments to be made which have no real prospects of success (not least as they would be liable to be struck out) – see also in this regard *Gerko v Seal* [2023] EWHC 63 (KB) at [190]. Also, and as was said in *Toucan* at [10], "the mere fact that an issue has received some attention in the preparation of the case and the experts' reports is not necessarily sufficient to make permission to amend appropriate".

22. A consideration of whether or not amendments are permissible is one that takes place at the date of the hearing of the amendment application – the question is not when the amendments were first foreshadowed or applied for – see *Holding* [2018] EWHC 852 (TCC) at 41(3): "Even after the application was made… where it was being opposed there was no reason, in my judgment, then for the claimant to take steps to meet the case that was being advanced in a proposed amended pleading, in respect of which no consent had been given and no permission provided by the court". That makes clear that the correct position as a matter of law is that a responding party is not obliged to divert themselves from their trial preparation to prepare to meet a case which is the subject of a contested application for permission to amend.

23. Lateness of an amendment is a relevant factor which should be weighed in the balance. Lateness is a relative concept; an amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the opposing party to revisit any of the significant steps in the litigation (e.g. disclosure, witness statements and expert reports) - see *CIP Properties* at [19(a)]. An application to make substantive amendments to a statement of case in the immediate lead up to a trial is, at the very least, a late amendment, and if it threatens the trial date itself it is a very late amendment (this is so even if, in contrast to the present case, the trial is still some way off).

24. A useful statement of the applicable principles in this regard was set out by Coulson J (as he then was) in *CIP Properties,* supra, in which Coulson J stated at [19] as follows:-

> "(a)… An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) ...
>
> (b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date, even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason.

> (c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise. In essence, there must be a good reason for the delay…
>
> (e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around', to the disruption of and additional pressure on their lawyers in the run-up to trial and the duplication of cost and effort at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments.
>
> (f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered. Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise."
>
> (emphasis added)

25. Accordingly, in considering the impact on a trial fixture, the Court is concerned not just with the ability to complete all the necessary steps consequential on the amendments, but also with the impact on the overall ability to prepare for the trial. Where there would be additional pressure on a party in the run-up to trial, that is a substantial reason why amendments should not be permitted. In this regard in *Donovan v Grainmarket* [2019] EWHC 1023 (QB) at [27], it was stated that the need to revisit previous trial steps "in conjunction with the intense preparation already required even if there is no amendment" constituted "substantial prejudice" (see also *ADVA v Optron* at [47]). The amendments were, in that case, refused, even though (in contrast to the Defendants' stance on the Proposed Amendments before me) the trial would not need to be adjourned if the amendments were permitted.

26. There is a particular onus on a party seeking to make a very late amendment to ensure that it satisfies to the full the requirements of a proper pleading. As was stated in *Swain Mason v Mills & Reeve* [2011] 1 W.L.R. 2735 at [73]: "...if a very late amendment is to be made, it is a matter of obligation on the party amending to put forward an amended text which itself satisfies to the full the requirements of proper pleading. It should not be acceptable for the party to say that deficiencies in the pleading can be made good from the evidence to be adduced in due course, or by way of further information if requested, or as volunteered without any request. The opponent must know from the moment that the amendment is made what is the amended case that he has to meet, with as much clarity and detail as he is entitled to under the rules" (emphasis added). In that case, the Court refused permission to amend because the pleading was "not in proper form"; which was said by the Court to be "*fatal*" (at [107]). See also *Galliford* at [16], referring approvingly to *Swain-Mason*: "It was also stressed that a late amendment cannot be insufficient or deficient". *Rijckaert v El-Khouri* [2023] EWHC 409 (KB) at [20]: "It is an elementary principle that the later the amendment, the greater the need for particularity… it is not for the Defendants to seek further particulars. At every stage a properly pleaded case must be set out; and particularly so when the application is made at this very late

date". The reason for this is obvious. Quite apart from the need for matters to be properly and sufficiently pleaded in the first, any need for further elucidation would itself give rise to (further) delay, and actual or potential prejudice to the other party. That a defective pleading can be cured later is misguided in the case of late amendments.

27. The existence or absence of a good explanation for any delay is one of the factors to be considered, although there is no rule that the absence of a good explanation is fatal (see *Vilca* at [29] and *Scipion* at [77]). Where "a very late amendment" is sought (i.e. "one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost"), the correct approach is not that the amendment ought in general be allowed so that the real dispute can be adjudicated upon; instead, a heavy burden lies on a party seeking a very late amendment to justify it and to show the strength of the new case and why justice requires it (see *Quah* at [38(b)-(c)] and *Swain-Mason v Mills & Reeve LLP* [2011] 1 WLR 2735 at [72]).

28. Even if the situation is one which would not result in the adjournment of the trial if the amendment was allowed, an amendment may still be refused merely because it is late, in the sense that it could have been advanced before, or requires the revisiting of pre-trial concepts. It is for this reason that lateness is a relative concept. For example, in *Hague Plant Ltd v Hague* [2015] C.P. Rep 14, there was a new pleading over 65 pages, where, "those parts of the original Particulars of Claim which had not been crossed out appear only intermittently". The Defendants submit that much the same can be said of the Proposed Amendments, given that not only does the new text come to 53 pages of new text in and of itself, but every single page of the previous pleading, over almost 100 pages, contains reworking. It is submitted that there is very little text that remains unscathed.

29. In *Hague*, no trial date had even been set, but the amendments were still considered to be late. As the Court of Appeal went on to state at [33], "Lateness is not an absolute but a relative concept". At [42], it was noted that, "The judge's main reason for refusing permission to amend upon proportionality grounds was, as I have sought to explain, mainly based upon his apprehensions about the further, duplicative and otherwise unnecessary work to which they would expose the defendants, and the knock-on consequences in terms of increasing the weight, cost and duration of the trial, and of further case management ahead of it". Briggs LJ then concluded that, "It strikes me as obvious that a quintupling in the length of Particulars of Claim, all of which would need to be pleaded to in Re-Re-Amended Defences, would threaten just such increases in work, length and cost, even if significant parts of the re-pleaded material could be found within Pt 18 exchanges, existing Defences, or statements and transcripts in earlier proceedings".

30. It is always a question of striking a balance between injustice to the applicant if the amendment is refused and injustice to the opposing party if it is permitted (*Swain-Mason* at [72]; *Quah* at [38(a)].) Prejudice to the amending party will include the inability to advance its amended case (see *CIP* at [19(f)] as quoted above). Prejudice to the opposing party will include being "mucked around", disruption/additional pressure before trial, or the duplication of cost and effort (see *CIP* at [19(e)]). As noted in *Vilca* (at [26]) there is a "broad spectrum of impacts" which "may fall somewhere between the negligible to the devastating".

31. In the present case the evidence of Mr Brierley is that it would simply be impossible to address the proposed amendments (in terms of instructions, pleading, disclosure and evidence) and prepare for trial at the same time in respect of the existing and new issues, with the result that the trial would have to be adjourned if the amendments were allowed. That is in issue between the parties. However, in circumstances in which the Claimants have not applied for an adjournment, and both parties wish the trial to proceed (and indeed say that they are trial ready on the existing issues), if the Proposed Amendments would necessitate the adjournment of the trial, it is common ground that the amendments should be refused.

B.2 AMENDMENTS UNDER CPR 17.4 AFTER THE END OF THE RELEVANT LIMITATION PERIOD

32. CPR 17.4(1)-(2) provides that, where a limitation period has expired under (inter alia) the Limitation Act 1980 or the Foreign Limitation Periods Act 1984, the Court may allow an amendment whose effect will be to add or substitute "a new claim" but "only if the new claim arises out of the same facts or substantially the same facts as are already in issue".

33. As was stated in *Geo-Minerals GT Ltd v Downing* [2023] EWCA Civ 648 at [25]:

> "25. The relevant principles in respect of amendments which are outside a statutory limitation period are governed by section 35 of the Limitation Act 1980 and CPR 17.4. There is a four stage test, as explained in Ballinger v Mercer Ltd [2014] EWCA Civ 996, [2014] 1 WLR 3597 at [15] and Mulalley & Co Ltd v Martlet Homes Ltd [2022] EWCA Civ 32 at [38]:
>
> (1) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?
>
> (2) Did the proposed amendments seek to add or substitute a new cause of action?
>
> (3) Does the new cause of action arise out of the same or substantially the same facts as are already an issue in the existing claim?
>
> (4) Should the Court exercise its discretion to allow the amendment?"

34. As was stated in *Diamandis v Wills* [2015] EWHC 312 at [48]-[49] at [48]-[49] (approved in Geo-Minerals, with citations removed):

> "48. As regards Stage 2 (new cause of action) from the recent analysis of the authorities by Longmore LJ in Berezovsky v Abramovich §§59 to 69, the following principles arise:
>
> (1) The "cause of action" is that combination of facts which gives rise to a legal right; (it is the "factual situation" rather

than a form of action used as a convenient description of a particular category of factual situation…

(2) Where a claim is based on a breach of duty, whether arising in contract or tort, the question whether an amendment pleads a new cause of action requires comparison of the unamended and amended pleading to determine (a) whether a different duty is pleaded (b) whether the breaches pleaded differ substantially and (c) where appropriate the nature and extent of the damage of which complaint is made… (Where it is the same duty and same breach, new or different loss will not be new cause of action. But where it is a different duty or a different breach, then it is likely to be a new cause of action).

(3) The cause of action is every fact which is material to be proved to entitle the claimant to succeed. Only those facts which are material to be proved are to be taken into account; the pleading of unnecessary allegations or the addition of further instances does not amount to a distinct cause of action. At this stage, the selection of the material facts to define the cause of action must be made at the highest level of abstraction…

(4) In identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading…

(5) The addition or substitution of a new loss is by no means necessarily the addition of a new cause of action: Berezovsky §64 and Aldi §26. Nor is the addition of a new remedy, particularly where the amendment does not add to the "factual situation" already pleaded."

49. As regards Stage 3, ("arising out of the same or substantially the same facts") a number of points emerge, particularly from Ballinger at [34] to [38]:

(1) "Same or substantially the same" is not synonymous with "similar".

(2) Whilst in borderline cases, the answer to this question is or may be substantially a "matter of impression", in others, it must be a question of analysis.

(3) The purpose of the requirement at Stage 3 is to avoid placing the defendant in a position where he will be obliged, after the expiration of the limitation period, to investigate facts and obtain evidence of matters completely

> outside the ambit of and unrelated to the facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.
>
> (4) It is thus necessary to consider the extent to which the defendants would be required to embark upon an investigation of facts which they would not previously have been concerned to investigate: Ballinger §38. At Stage 3 the court is concerned at a much less abstract level than at Stage 2; it is a matter of considering the whole range of facts which are likely to be adduced at trial…
>
> (5) Finally, in considering what the relevant facts are in the original pleading a material consideration are the factual matters raised in the defence…"

35. In addition, as explained in *Aldi Stores Limited v Holmes Buildings Plc* [2005] PNLR 9 at [21], "a claim for damages is a new claim, even if in the same amount as originally claimed, if the claimant seeks, by amendment, to justify it on a different factual basis from that originally pleaded. But it is not, even if made for the first time, if it does not involve the addition or substitution of an allegation of new facts constituting such a new cause of action".

36. To similar effect see *Savings & Investment Bank Ltd (In Liquidation)* [2001] EWCA Civ 1639. A claim in fraudulent misrepresentation was held not to be a new claim, but only on the basis that the very same representation was relied on: see [35]. Where a new representation is pleaded this will be a new cause of action.

37. As explained in *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 "It is incontrovertible that an amendment to make a new allegation of intentional wrongdoing …where previously no intentional wrongdoing has been alleged constitutes the introduction of a new cause of action." It is therefore clear that where a person is accused of wrongdoing for the first time, this is a new cause of action.

38. A new claim cannot be included in a Reply - see *Martlet Homes Ltd v Mulalley and Co Ltd* [2021] BLR at [20]: "any ground of claim must be pleaded in the Particulars of Claim. New claims must be added by amending the Particulars of Claim and cannot simply be pleaded by way of Reply".

39. A specific issue that arose immediately before the present hearing concerning whether relation back applied in the context of claims under a foreign law emerged from the Defendant's Skeleton Argument that led to the Claimant's Note and the Respondents' Note.

40. The Defendants' position is that, as explained in *Brownlie v Four Seasons Holdings Incorporated* [2019] EWHC 2533 (QB) at [46]-[47], pursuant to s.8 Foreign Limitations Periods Act 1984 ("FLPA"), where foreign law applies pursuant to the application of Rome I or Rome II (as it does here), then relation back does not apply and CPR 17.4 also does not apply to such claims (see also *Vilca v Xstrata Ltd* [2018] EWHC 27 (QB) at [109]-[112] to the same effect). In this regard regulation 4 of the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations

2008/2986 (the "Regulations"), which coincided with the coming into effect of Rome II, introduced a new s.8 FLPA which it is said disapplies section 1 of the FLPA, thereby disapplying the application of section 35 of the Limitation Act 1980 to such claims (and see footnote 2 to the Explanatory Note to the Regulations (the "Explanatory Note") in this regard).

41. The Defendants recognise that *Qatar Airways Group QCSC v Middle Eastern News FZ-LLC* [2021] EWHC 2180 (QB) is a contrary decision, but the Defendants submit that it was (wrongly) decided per incuriam as *Brownlie* was not cited, and was decided in circumstances where the defendants were not represented and the Court did not hear contrary argument. Equally in *Lonestar v Kaye* [2023] EWHC 421 (Comm) at [226], it was not necessary to decide the point, but to the extent that the principle was doubted, it is said that this was on the basis of the decision in *Qatar* and the decision was again per incuriam.

42. In contrast, the Claimants submit that the relation back rule and CPR 17.4 apply to Rome II claims. It is acknowledged that section 35(1) of the Limitation Act 1980 creates an express relation back rule, allowing new claims to be deemed to be commenced on the same date as the original cause of action notwithstanding that they would otherwise be barred by limitation (see *PJSC Tatneft v Bogolyubov* at [71]), that section 1(3) of the Foreign Limitation Periods Act 1984 confirms that section 35 of the 1980 Act applies to foreign limitation periods, but that section 8 of the 1984 Act (inserted on 11.01.09) disapplies section 1 where the applicable law is determined by Rome I or Rome II.

43. However it is submitted that the periods of limitation under Rome II (and Rome I) fall within CPR 17.4(b)(1)(iii) (referring to *Tatneft* at [77]-[83]; *Qatar* at [15]; and *Lonestar* at [226(ii)]) on the basis that Rome II (being part of UK law) is an "enactment" which provides for the application of limitation rules but which "allows" amendment (leaving amendment to English rules of law). Whilst it is acknowledged that the Court of Appeal concluded in *Tatneft* that Rome II was an "enactment" because, as a European regulation, it was directly effective in the UK and formed part of UK law and the decision in *Tatneft* pre-dated the UK's withdrawal from the European Union on 31.01.20 it is said that the present position is that Rome II has been incorporated into UK law (and is accordingly still an "enactment"), as summarised in Dicey, Morris & Collins on the Conflict of Laws (16th edn) at [1-074]-[1-075]. It is submitted that the full provisions of CPR 17.4 accordingly apply to such claims (relying upon CPR 17.4(1) and *Qatar* at [15]). It is submitted that whilst CPR 17.4 does not expressly state that relation back applies to its provisions, it inherently operates on the basis of relation back and accordingly brings the rule within its provisions: *Qatar* at [15] (applied in *Lonestar* at [226]). It is said that this is supported by the approach in *Parsons v George* [2004] 1 WLR 3264 [AB/14] where it was held, under the RSC predecessor of CPR 17.4 (and 19.5), that an amendment under such rules implicitly brought with it "relation back" (even without an underlying statute like s.35(1)(b) of the 1980 Act to create relation back) (see *Qatar* at [15]). It is said that it is also supported by the (obiter) reasoning in *Tatneft.* Whilst the Court of Appeal did not "spell out word for word" that relation back applied to CPR 17.4 it is said that this was the clear effect of its decision (relying upon Qatar at [18]-[20]).

44. The stance of the Defendants is in any event that if the Defendants were wrong about this principle, and CPR 17.4 could potentially apply, the position would be that the Claimants do not satisfy the requirements of CPR 17.4 and as such the Proposed Amendments

should be refused on this basis. In this regard the Defendants submit that the four-stage test would not be satisfied (the burden being on the Claimants - see White Book 17.4.2) were CPR 17.4 to be considered. There is in each case, a new cause of action and that cause of action does not arise out of the same or substantially the same facts. In this regard they rely upon what was said in *Trump v Orbis Business Intelligence* [2024] EWHC 173 (KB) at [76]: "The new claim does not arise out of the facts on which the old claim was based if, in order to prove it, new facts have to be added". As to the meaning of "substantially the same", this is limited to, "something going no further than minor differences likely to be the subject of inquiry but not involving any major investigation and/or differences merely collateral to the main substance of the new claim, proof of which would not necessarily be essential to its success".

45. The question as to whether the new case falls within CPR 17.4 is not a case management decision, but a substantive question of law, which should be based on analysis – see *Akers v Samba Financial Group* [2019] 4 W.L.R. 54 at [41]. There needs to be an evaluation of the new case as against the old case (*Samba* at [47]), looking at whether there would have had to have been the same degree of investigation of the detailed factual case advanced by amendments (*Samba* at [45]-[46]); and "Broadly similar allegations, implicitly made or understood will not do" (*Samba* at [50]). Where new pleas are "highly sensitive to their legal and factual context", this makes it more likely that the amendments will not meet the test (*Samba* at [43]-[44]).

46. In determining what is already in issue, regard should usually be had to the pleadings alone: *Samba* at [52]. As explained in *Martlet Homes Ltd v Mulalley and Co Ltd* [2022] EWCA Civ 32 at [60] (quoting from a previous decision of the Court of Appeal), it is permissible to take into account the matters in the Defence, but only where a claimant "did not need or propose to introduce any additional facts or matters beyond those which the defendant himself had raised in his pleaded defence"; see also [103].

47. It is well-established that claims based on fraud and dishonesty are not based on the same facts as claims of mere negligence or incompetence: *Paragon* at 418G-H: "In the Thakerar case Chadwick J observed that it would be "contrary to common sense" to hold that a claim based on allegations of negligence and incompetence on the part of a solicitor involved substantially the same facts as a claim based on allegations of fraud and dishonesty. I respectfully agree."

C. THE CLAIM AS CURRENTLY PLEADED

48. The Claim is a fraud claim relating to 17 payments – in the total sum of €92,872,000 and £3 million – that are alleged to have been made in the period from September 2009 to July 2017 by certain entities within an international group of retail companies known as the Steinhoff Group to the Swiss company Fihag Finanz-Und Handels AG ("Fihag" and the "Fihag Payments"). The Claimants say they are the successors in title to the Steinhoff Entities. It is alleged that the Fihag Payments were then used to make payments from Fihag to Formal, in the sum of €88,886,397.00 and £3,088,566.30 (the "Formal Payments", together with the Fihag Payments the "Payments"). The Claimants' claim is now for €54,140,000 and £3,000,000 following their acceptance that their claims in respect of the first eight Payments were all time-barred. Malcolm King owns Formal and is also its director. Nicholas King is Malcolm King's son, who acted as a nominal director of Fihag for a time. The Defendants deny the Claim in full.

49. The specific case that is pleaded by the Claimants in the RAPOC (and which has been the subject matter of disclosure and factual and expert evidence) is as follows. Paragraphs 1 to 26 describe the Steinhoff Group, the parties, and certain other individuals who worked for the Steinhoff Group. At paragraph 2 it is stated that the companies identified were the "victims of a fraud". At paragraphs 6 and 7, the Claimants plead a restructuring of the Steinhoff Group and assert that the Claimants have title to sue. Accordingly, and from the outset, the Claimants have been alive to proving that they have title to sue. At paragraph 11 it is pleaded that certain companies are linked to Mr Markus Jooste and are said to have links to the Kings. At paragraph 13 the Claimants plead that Fihag was used as "*nominee and/or agent and/or messenger and/or representative*" to "*funnel*" funds to "the Kings and/or Formal during the fraud". At paragraphs 16 and 28, the Claimants' case is that the Payments to Fihag are to be treated as payments to Formal and/or the Defendants on the basis that the corporate veil of Fihag is to be pierced and Malcolm and/or Nicholas King lie behind the veil.

50. At paragraphs 23 to 25 various Steinhoff employees are identified namely Mr Michael Eggers, Mr Siegmar Schmidt and Mr Stephanus Grobler. At the time of this pleading only Mr Schmidt was said to be part of the fraud. As part of the proposed RRAPOC these individuals are proposed to be defined as the "Steinhoff Managers"). Paragraph 26 and following relates to employees who it is proposed are now to be defined as the "Steinhoff Employees".

51. At paragraph 27, under a heading that provides, "The Payments asserted to have been made fraudulently" the Claimants plead the Payments. |In the RAPOC it is alleged that the employees listed in Appendix 3 made the payments in the mistaken belief that there were valid or proper legal bases for doing so. Those Steinhoff Employees there listed, include employees who in contradistinction to that plea, are now said to be part of the fraud.

52. At RAPOC paragraph 29B the Claimants plead that (i) the "**Steinhoff Loan Agreements**", a series of loan agreements entered into between the Steinhoff Entities and Fihag; and (ii) the "**Formal Loan Agreement**", a loan agreement entered into between Formal and Fihag, were shams and void ab initio.

53. At paragraph 29C it is pleaded as follows:-

> "The Alleged Steinhoff Loan Agreements and the Alleged Formal Loan Agreement were only concluded for the sake of appearance. They were intended, and/or used, to cover the Defendants' and Mr Jooste's fraudulent scheme to extract funds from the Steinhoff Entities to the Defendants through at least the use of circular or layered payments, via Fihag as nominee and/or agent and/or messenger, under which it was at all relevant times intended that the Steinhoff Entities would be repaid less than they advanced and so would suffer loss (the "**Fraudulent Scheme**"). Based on the Fraudulent Scheme and the loss suffered by the Steinhoff Entities, the Defendants and Mr Jooste intended to enrich themselves and to secure to each other this enrichment at the expense of the Steinhoff Entities."

54. This paragraph is important as it states and defines what is said to be the "Fraudulent Scheme". At paragraph 29D it is pleaded that the Defendants were party to and/or knew or should have known of the Fraudulent Scheme. As will be seen this is replaced with a differently defined scheme (defined as the "Unlawful Scheme" in the proposed amendments).

55. In the RAPOC at paragraph 29E.9 it is pleaded that, "In the alternative that the Alleged Steinhoff Loan Agreements are not sham agreements, it is averred that they were void ab initio on the basis of fraudulent misrepresentations and/or mistake, as to which they rely on the alleged implied fraudulent representations that "The Defendants intended to and would procure that Fihag would perform its obligations in accordance with their strict terms; and/or Fihag intended to and would perform the… Steinhoff Loan Agreements in accordance with their strict terms"" (defined as the "**Performance Representations**") (see paragraph 29E.9.2).

56. At paragraph 29E.9.3 it is pleaded that Mr Schmidt, prior to 2012, and Mr Schreiber after 2012 relied upon those representations when they signed the Alleged Steinhoff Loan Agreements and when the Factual and Claimed Payments to Formal via Fihag as a nominee and/or agent and/or messenger were made (the plea in relation to Mr Schreiber is in the context of its alternative case, its primary case is that he was part of the Fraudulent Scheme at all material times).

57. As to mistake, it is said that "Mr Schmidt, prior to 2012, and Mr Schreiber, after 2012, entered into the Alleged Steinhoff Loan Agreements mistakenly believing the Performance Representations when Fihag had no such intentions" (RAPOC 29E.9.8).

58. In the further alternative, it is alleged that the Steinhoff Loan Agreements and the Formal Loan Agreement are void for immorality and/or abuse of power due to the fact that (i) Fihag and/or Formal and/or Malcolm and/or Nicholas King "*played an active role in the Fraudulent Scheme*"; (ii) by virtue of the Performance Representations Mr Jooste abused his powers and breached his duties to safeguard pecuniary interests of the Steinhoff Entities; (iii) the Defendants aided Mr Jooste in such abuse of his powers through collusive behaviour and bringing about the Formal Loan Agreement; (iv) Mr Jooste and Malcolm and Nicholas King intended to enrich themselves and secure this enrichment at the cost of the Steinhoff Entities (see RAPOC at paragraph 29E.10).

59. As already noted, the "Fraudulent Scheme" referred to is defined at RAPOC paragraph 29C as a "scheme to extract funds from the Steinhoff Entities to the Defendants through at least the use of circular or layered payments, via Fihag as nominee and/or agent and/or messenger, under which it was at all relevant times intended that the Steinhoff Entities would be repaid less than they advanced and so would suffer loss" (emphasis added). Of relevance in the context of the proposed amendments it is to be noted that the only parties to the Fraudulent Scheme are said to be Malcolm and Nicholas King, Mr Jooste, Ms Walder and Mr Schmidt.

60. At paragraph 29E.12 it is pleaded that:

> "As a result of the above, there was no valid, legal or proper basis for any of the Factual and Claimed Payments, because the Alleged Steinhoff Loan Agreements and the Alleged Formal Loan Agreement were void ab initio on the basis of their being

> sham documents, alternatively because they were induced by fraudulent misrepresentation or mistake on the basis of the false Performance Representations or immorality or abuse of power."

61. The Claimants allege a further "express, alternatively implied" misrepresentation at RAPOC paragraphs 30-33 that in "sending, or causing to be sent, the Payment instructions, or otherwise participating in conduct to cause the Payments to be made, Mr Jooste and/or the Kings expressly, alternatively impliedly, represented on each occasion that there was a legal or proper basis for the payment instruction" (which is defined as the "Payment Instruction Representation"); it is pleaded that "each such express, alternatively implied, representation was false, because none of the Payments had a valid legal or proper basis". Therefore the Payment Instruction Representation is stated to be one representation, and made only by Mr Jooste and/or the Kings.

62. At RAPOC paragraph 34, there is an important plea given the amendments that are now proposed. It is pleaded that, "each of the Steinhoff Entities, acting through **Mr Schreiber, Mr Eggers, Mr Schmidt, Mr Grobler, Ms Joosten, Mr Pooth, Ms Fielder and/or Mr Knippelmeyer, relied upon the representations** made by Mr Jooste and/or the Kings by making each of the Payments and received nothing of value in return" (emphasis added). Therefore, the Claimants' pleaded case is that Messrs Schreiber, Eggers and Grobler (amongst others) were innocent parties induced to act by fraudulent conduct on the part of the Defendants.

63. At RAPOC paragraph 34A (under the heading "Conspiracy") the Claimants allege that there was a conspiracy, with the plea being predicated on the Fraudulent Scheme as defined; it being pleaded at paragraph 34A that "the Fraudulent Scheme, which involved fraudulently inducing the Steinhoff Entities to make each of the Payments, was the product of concerted action in accordance with a combination, understanding and/or agreement reached in or around 2009 (and continuing in time) between at least Mr Jooste, the Kings and/or Formal".

64. The Claimants bring the above claims pursuant to various German, Austrian and/or Swiss law provisions, in respect of all of which the key allegation of facts relied on is the participation in the Fraudulent Scheme and the Performance and Payment Instruction Representations as defined. These elements accordingly lie at the heart of the Claimants' claims as currently pleaded because they are the foundation for the foreign law claims pleaded, as well as the central part of the Claimants' case regarding the invalidity of the Steinhoff and Formal Loan Agreements. The foreign law claims are set out in Annexes A and B of the RAPOC, are predicated upon such pleas, and are addressed in detail in Brierley 8 at paragraphs 221-237.

65. As to the Claimants' German law claims, in respect of each claim they rely on the acts of unparticularised "*co-offenders*" (RAPOC Annex A paras 2(a); 3; 4; 5) on which the Claimants place reliance in the context of their proposed amendments to suggest that the (existing) alleged wrongdoing is not limited to Mr Jooste, the Defendants, Mr Schmidt and Ms Walder. However aside from the fact that the pleading of unparticularised "co-offenders", especially in the context of a fraud claim, is not a proper plea, I agree with the Defendants' submission that it can clearly not encompass individuals who are concurrently pleaded to have <u>not</u> been involved in the wrongdoing and to have in fact been induced into various acts by the alleged representations. This includes the Steinhoff

Managers (other than Mr Schmidt) as to be defined. Accordingly any reference to "*other co-offenders*" can never have been to them.

66. As to the Defendants' position, they dispute the Claim in its entirety. All of the Defendants deny that they had control of Fihag or perpetrated the alleged fraud. As for Nicholas King, he says that he had no involvement whatsoever in the matters alleged. Formal and Malcolm King's case is that the Formal Payments were legitimate payments, most of which were loans. In any event, all of the sums loaned by Fihag to Formal have been repaid by Formal to Fihag. As to the Fihag Payments, the Claimants have disclosed documents providing and evidencing a legitimate basis for their payment by the Steinhoff Entities i.e. the Steinhoff Loan Agreements. While the Claimants allege in the RAPOC that these documents are shams, further or alternatively are void for "*immorality (Sittenwidrigkeit) and/or abuse of power*" as a matter of German and Austrian law, that is denied by the Defendants. In any case, even if there was a fraud, the Defendants say that they did not know this and were not part of it. It is pleaded that to the extent relevant, Fihag has in any event repaid to the Steinhoff Entities at the very least the vast majority of the sums claimed in these proceedings. The Defendants also say that the Claims are all barred by limitation.

67. Disclosure has been given on the basis of the claims in the RAPOC, witness statements have been served on the basis of the claims in the RAPOC, expert evidence as to foreign law has been served on the basis of the claims in the RAPOC, and the action is said by the Claimants and the Defendants to be trial ready in relation to the claims set out in the RAPOC, set against the backdrop that there are only 15 working days before the Claimants are directed to serve their Skeleton Argument for the trial (again predicated upon the claims set out in the RAPOC), which is the subject matter of the trial.

D. THE PROPOSED AMENDMENTS

68. On any view the Proposed Amendments are extensive, abandon parts of the Claimants' existing case and significantly alter the Claimants' case. The Claimants' submissions to the contrary do not bear even superficial examination, as is readily apparent from a consideration of the proposed amendments. Most substantively, the Claimants seek to introduce five changes to the Claimants' case which I am satisfied are both wide-ranging and fundamental:-

    (1) First as to the alleged misrepresentations relied on which underpin the Claimants' case.

    (2) Secondly there is reliance on a newly pleaded and newly defined, "Unlawful Scheme" (replacing the previous Fraudulent Scheme) which relies on extensive new assertions of unlawfulness (both fraud and otherwise);

    (3) Thirdly there are fundamental changes to the identity of the parties to the alleged fraud (to include individuals previously said to be induced by the previous representations) ;

    (4) Fourthly, Formal is alleged to be liable regardless of the role of Malcolm King and Nicholas King – as a result of the alleged fraud of Paula King (who was never previously said to be a wrongdoer); and

(5) Fifthly entirely new claims relating to the Talgarth Settlement pleaded at paragraphs 34HA-34HD which go directly to the Claimants' title to sue (and which the Defendants say the Claimants could have pleaded long ago, the burden always having been on them to prove title to sue).

69. I will consider each of these changes in turn. First, the previous centre pin, the defined "Fraudulent Scheme" has been replaced by what is defined as the "Unlawful Scheme" (see at paragraph 29A). This is, I am quite satisfied, not a question of a change of label (as the Claimants have attempted to portray the change of plea) but a different scheme. The Unlawful Scheme is defined as a scheme to extract funds "*in circumstances where there was no lawful basis for making such payments*" (at paragraph 29C) which is alleged to have involved numerous additional individuals and specifically the "Steinhoff Managers" – defined at paragraph 25A as Messrs Grobler, Schmidt, Schreiber and Eggers – as well as Paula King and Alan Evans (all of whom, except Mr Schmidt, were never previously alleged to be wrongdoers) and as already noted some of these are currently pleaded as those who were induced or placed reliance on the current representations. It is said that the Unlawful Scheme was the product of "*concerted action*" between these individuals, including by "*successive aiding…through the provision of bank and stockbroking accounts, onward distribution and investment and other enablement and assistance*" (paragraph 34A). The allegation of "successive aiding" is itself a new plea. The unlawfulness is not just fraud, but an alleged "*abuse of power and/or breach of duty by Mr Jooste and/or the Steinhoff Managers*" – again now turning individuals who previously were said to be innocent into the alleged wrongdoers. It includes misappropriation, and "*infringing the sense of decency and/or by not conforming with the fundamental values of legal and moral order*".

70. Accordingly I am satisfied that, as the Defendants submit, the very foundation of the Claimants' case has undergone a fundamental change, not least because the allegation at the heart of the Fraudulent Scheme currently alleged, namely a scheme for extraction of funds "*under which it was at all relevant times intended that the Steinhoff Entities would be repaid less than they advanced and so would suffer loss*" has been abandoned and secondly Mr Eggers, Mr Schreiber and Mr Grobler are now said to be part of the wrongdoing (at paragraph 25A) when the Claimants' previous case was that they had been innocently induced by the fraudulent representations (see the RAPOC at paragraphs 29E.9.3 and 34). The Unlawful Scheme is founded on numerous and extensive newly pleaded allegations of unlawfulness, and on extensive newly pleaded facts including those at paragraphs 10; 11.11-13; 15.1-15.2; 19A; 22; 23; 24; 26C; 28A; 29A.2; 29C; and 29D.9A-B of the Proposed Amendments. In such circumstances the Claimants' assertion that all that has occurred is a re-naming of the Fraudulent Scheme to the Unlawful Scheme as "*a question of labelling and not substance*" is simply not correct, and fails to recognise the numerous associated new factual pleas all of which would have to be pleaded back to, and in relation to which disclosure would have to be given, and consideration given as to further witness evidence (in the light of the pleaded issues once fully crystallised after the Reply).

71. Secondly, I am satisfied that the Proposed Amendments introduce new causes of action based on misrepresentation notwithstanding the Claimants' valiant, but ultimately hopeless, attempts to suggest the contrary. As already identified, the Claimants previously relied on the two implied Performance Representations. Whilst the Claimants maintain these two representations in full, they now plead three new and substantive implied

representations at (paragraphs 29E.9.2.3-29E.9.2.5) that in the case of each Payment (i) the purpose of the loan was lawful; (ii) the purpose of the loan was to advance the commercial interests of Fihag; and (iii) the beneficiary of the loan was Fihag.

72. The Claimants also previously relied on the express (and/or implied) Payment Instruction Representation i.e. that there was a legal or proper basis for the payment instruction. By way of the Proposed Amendments at paragraph 29A.1 the Claimants plead a new and entirely distinct case of fraud, namely that the Payments were procured by fraud on the basis of five further previously un-pleaded express (and/or implied) representations, in addition to the Payment Instruction Representation (which is maintained at paragraphs 29A.1(vi)). Whilst the Claimants attempt at paragraph 38 of their Skeleton Argument to characterise these as "*further particulars…by identifying the different ways in which the payment instructions did not have a 'legal or proper basis'*", they are clearly not further and better particulars but separate, and entirely new, representations. They are representations pleaded in addition to the original representation. Indeed, they are alleged express representations so it could not be otherwise (albeit that the pleas fail to identify what amounts to each express representation (which should have been specifically pleaded) or who it is said made that express representation (which also should have been pleaded).

73. Thirdly, and quite apart from the fact that these are new claims (which I am satisfied do not arise out of the same or substantially the same facts) based on discrete and separate new representations there have also been changes in the identity of who it is said made the representations. Indeed it is pleaded that these representations were made by an additional four parties: Mr Grobler, Mr Schreiber, Mr Eggers and Mr Schmidt (the "Steinhoff Managers"), with the effect that (other than in the case of Mr Schmidt) the very individuals now alleged to have made the representations are among those who the Claimants had previously pleaded had innocently relied on the Payment Instruction Representation.

74. The new alleged misrepresentations feed into numerous allegations going to the heart of the Claimants' case, which is unsurprising given that so much of the case in the RAPOC was predicated on the Fraudulent Scheme, whereas what is now advanced is predicated on the Unlawful Scheme, including that the Alleged Loan Agreements are void or void ab initio on the basis of fraudulent misrepresentation (see paragraph 29E.12 and also paragraphs 29E.9; 29E.10.2; 29E.12; 29E.9.6; 29E.101A). The Proposed Amendments in the latter two paragraphs plead a new standard of intent and causation respectively, which go to the Claimants' claims under (i) S.134 of the Austrian Criminal Code, Ss.263 and 266 of the German Criminal Code; and (ii) Ss.12, 146 and 147 of the Austrian Criminal Code.

75. The Claimants refer to Annex A and the pleas advanced under German law (and Annex B under Austrian law). Two of the claims (based on liability for fraud under section 823(2) of the German Civil Code in conjunction with section 263 of the German Criminal Code and liability for fraud under section 1311 of the Austrian Civil Code in conjunction with section 134 of the Austrian Civil Code) are most obviously new claims for fraud based on the new pleas. Mr Ayers KC, on behalf of the Claimants sought to argue that as the new pleas of fraud still asserted claims under the same provisions of the German and Austrian Civil Codes these were not new claims, but this was, with respect, a hopeless argument. It is (as Mr Gourgey KC pointed out on behalf of the Defendants) akin to saying that if there is a misrepresentation claim under section 2(1) of the Misrepresentation Act 1967 in

respect of a pleaded representation, it is the same claim if a further claim is made under section 2(1) of the Misrepresentation 1967 in respect of an entirely separate and previously un-pleaded representation, or (as I put to Mr Ayers), very many different factual scenarios could lead to a claim under section 823(2) of the German Civil Code, but that does not mean they are the same claim – they are different claims based on different pleaded facts each of which (separately) may give rise to a claim under section 823(2) of the German Civil Code.

76. The reality, however, is that the proposed amendments infect all the claims in Annexes A and B given that they all incorporate and repeat the new pleas set out in paragraphs 27-34FH (including as to the Unlawful Scheme and all the other new pleas).

77. Fourthly, whilst Malcolm and Nicholas King, Mr Jooste and Mr Schmidt were the originally pleaded parties to the Fraudulent Scheme (see the RAPOC at paragraphs 29C and 29E.9.1), it is now said that the Steinhoff Managers were also participants in the fraud, alongside Paula King and Alan Evans. The addition of five further participants in the alleged fraud or unlawful scheme is itself a significant change, all the more so in circumstances where three of those individuals were previously positively pleaded to have been the innocent victims of the fraud alleged. The need for such issues to be pleaded back to, with associated disclosure issues, and the potential need for further factual evidence (from the Kings and potentially Paula King) is obvious.

78. In particular it is now said, amongst other matters, that the Steinhoff Managers "participated in and/or facilitated the fraud on and/or embezzlement and/or misappropriation and/or violation of public policy. They instructed, procured, processed, and/or accounted for unlawful transactions and/or created false documents*"* (at paragraph 25A); that they contributed to the Unlawful Scheme by *"successive aiding"* (at paragraph 34A); that they instructed the Steinhoff Employees to make the Payments (at paragraph 327); that they expressly or impliedly made the false representations outlined at paragraph 29A.1; that they are guilty of an abuse of power and/or breach of duty amounting to embezzlement (at paragraph 29A.2); and that they "fraudulently induced the Steinhoff Entities to make the Payments and/or embezzled and/or misappropriated the Payments and/or violated public policy, and/or facilitated such conduct" (at paragraph 34E).

79. As to Mr Evans, the Claimants allege (for the first time) that he "also participated in and/or facilitated the fraud on and/or embezzlement and/or misappropriation and/or violation of public policy. They managed companies controlled by Mr Jooste and/or Mr M King, signed fictitious documents including loan and settlement agreements, and were described in the German criminal proceedings as "Unterschrifts-Automaten" (signing machines)" (at paragraph 26C). Mr Evans is now also pleaded to be a former director of Fihag who had a close personal/business relationship with Malcolm King (at 14A). Further new pleas are made in relation to Mr Evans at paragraphs 26A; 26B; 11.15; 11.18; 12A; 20.3B; 21; 34HC(2); 34HC(4)). These are all matters that would need to be pleaded back to.

80. In relation to Paula King (Malcolm King's daughter and a former employee of Formal), it is now alleged, for the first time, that she was part of the alleged fraud and unlawful scheme (see paragraph 34B.2A). In reliance on that allegation, the Claimants advance a new claim that liability against Formal can be established on the basis of Paula King's actions alone (effectively on the basis of vicarious liability). No such claim has been pleaded previously, nor have any substantive allegations been made against her in these

proceedings to date. In such circumstances I am satisfied that the Claimants' suggestion at paragraph 27 of their Skeleton Argument that the claim advanced pursuant to the Proposed Amendments "*remains a claim against the Defendants only and the addition of other name co-offenders (including D1's employee, Paula King) does not alter this*" fails to recognise the altered basis on which Formal is said to be liable. This new claim, in turn, relies on new allegations as to Paula King's specific role in relation to Mr Jooste and the Payments (see paragraphs 19A; 34A; 34B.2A as well as Appendix 4 at paragraphs 66.3; 68 and 69).

81. The Proposed Amendments also include a new Appendix 4, entitled "*Known money flows from the Formal Accounts*" which comprises an additional 18 pages of text and addresses the use of the payments made by Formal. As I put to Mr Ayres KC in the course of his oral submissions it is far from clear what its purpose is, and it is only linked into the main body of the pleading by virtue of paragraph 28B which is in a section entitled "the Payments asserted to have been made unlawfully" (when the "Payments" are those set out in Appendix 1).

82. None of the matters pleaded in Appendix 4 have been pleaded before, nor was the use of funds by Formal ever a pleaded issue forming part of the Claimants' case. As the Defendants point out this is unsurprising, in circumstances where the allegation (in the RAPOC) of a Fraudulent Scheme is that it was "*intended that the Steinhoff Entities would be repaid less than they advanced and so would suffer loss*" (RAPOC ¶29C). Accordingly, the onward use of funds by Formal did not need to be pleaded by the Claimants on their currently pleaded case. That is different for the Unlawful Scheme with its new case of successive aiding and of, "*onward distribution and investment and other enablement and assistance*".

83. If (as appears to be the case) Appendix 4 is intended to support only the Proposed Amendments it is a case which is intrinsic to and flows from the changed nature of the claim and the introduction of the alleged Unlawful Scheme. On any view it is a mammoth pleading that would need to be specifically responded to at length if the amendments were allowed which on any view would take a considerable period of time. Yet further, embedded within it are specific allegations in relation to various payments (including the purchase of a helicopter and a private hunting trip) all of which would need to be pleaded back to, and potentially raise disclosure issues, and the need for further witness evidence (even if Mr King did not previously have detailed recollection about specific Payments, the new allegations might well refresh his memory on such specific matters).

84. To the extent it is simply being used as a vehicle to foreshadow cross-examination of the Kings in relation to matters arising from disclosure, that would not necessitate pleas such as those in Appendix 4, nor indeed would a refusal of permission to amend to include Appendix 4 prevent such matters being put in cross-examination subject to relevance (and as Mr Gourgey KC expressly confirmed as one would expect).

85. There are also various additional payments from the Steinhoff Entities to Fihag which are also now pleaded in the Proposed Amendments – see paragraph 15.2 which pleads "five payments totalling €4,605,304 made by Tau, Polster and SEGS to Fihag between October 2008 and October 2011 which were falsely described on invoices as "management fees", despite Fihag never providing such services and there being no agreement for the same". This is an entirely new plea which would have to be pleaded back to and give rise to associate disclosure.

86. Fifthly, at paragraphs 34HA-34HD pleas are made as to the Assignments of Debt and the Talgarth Settlement by which the Claimants seek to introduce over three pages of new claims pursuant to which the Court is asked to determine that fifteen agreements (11 of which are referred to in the Defence, and four of which have never been mentioned by any party before) are void or void ab initio on the basis of being "*shams and/or entered into on the basis of mental reservation and/or fraudulent misrepresentation and/or for immorality and/or abuse of power and/or breach of statutory prohibition*" (see paragraph 34HD). These agreements constitute (i) eleven contracts pursuant to which the relevant Steinhoff Entities had between 2009 and 2017 assigned the outstanding sums owed by Fihag in relation to the Payments at the date of each assignment to two, third party companies Talgarth and Top Global (the "Alleged Assignments of Debt"); and (ii) four contracts pursuant to which monies owed by Talgarth to the Steinhoff Group, including the assigned Fihag debt, were settled (the "Alleged Talgarth Settlement", together with the Alleged Assignments of Debt the "Talgarth Agreements"). The Claimants rely on seven newly pleaded grounds on the basis of which it is said the relevant contracts are invalid, including that the Alleged Talgarth Settlement was unilaterally "reversed" in the restatement of Steinhoff's Annual Report for the year ended 30 September 2017 on the ground that it lacked economic substance. These matters all go to the question of whether the Claimants have title to sue which has always been in issue. Such matters have long been known to the Claimants and their witness Mr White and the associated PwC investigation. Any such pleas could have been made long ago in circumstances in which the Claimants have long been aware of the relevant matters.

87. I have already foreshadowed that the Claimants' amendments to the foreign law annexes are also significant and involve not only fresh pleas as to the content of foreign law but also fresh allegations of fact regarding additional parties owing various duties, as well as to the alleged breach of such duties. Each and every one of the Claimants' foreign law claims in the Annexes refers to and relies on the Unlawful Scheme (in place of the Fraudulent Scheme as defined) and/or the involvement of the Steinhoff Managers (i.e. including Messrs Eggers, Schreiber and Grobler), such that all of the foreign law claims are new in this regard. The Claimants also rely on six newly pleaded provisions of foreign law as set out in Brierley 8 at paragraph 238.

88. The Claimants advance a new claim of embezzlement under Austrian and German law based on the Payments constituting an "abuse of power and/or breach of duty by Mr Jooste and/or the Steinhoff Managers" which are in turn founded on twelve separate grounds of abuse and/or breach. Each of these grounds is previously un-pleaded, as is the allegation that the Steinhoff Managers acted in breach of duty and/or abuse of power.

89. As already noted, the Claimants now seek to pursue their claims in fraud under Austrian and German law on a different basis to the one originally pleaded. As to the German law claim pursuant to S.823(2) of the German Civil Code in conjunction with S.263 of the German Criminal Code, it is now said at Annex A paragraphs 3(a)-3(a)(i) that the fraud was committed through the Unlawful Scheme; that the Steinhoff Managers in addition to the Defendants and Mr Jooste intentionally committed fraud; and that the Steinhoff Managers deceived the Steinhoff Employees through implied and/or express misrepresentations. It is further alleged at paragraph 3(f) that the Kings helped to "siphon off monies through fabricating that the funds were to be used for legitimate projects of Formal" which has never previously been pleaded. As to the Austrian law claim pursuant to S.1311 of the Austrian Civil Code in conjunction with Ss. 12, 146, 147 of the Austrian

Criminal Code, it is now said at Annex B paragraphs 3(a)-3(e) that in addition to the Defendants, Mr Jooste, Mr Schreiber and/or Mr Eggers intentionally deceived the Steinhoff Employees through express and/or implied acts; acted with the intention of unlawfully obtaining a gain; and intended to commit an offence and unlawfully obtain a gain or to enrich a third party.

90. The Claimants also seek to advance two previously un-pleaded claims based on "mental reservation" (seemingly advanced pursuant to S.116 of the German Civil Code (see the Kröck Report at paragraph 298). The Claimants' previous plea in relation to S.116 was limited to an unparticularised assertion that it was relied on "to the extent necessary" alongside other provisions of the German Civil Code (RAPOC paragraph 29E.11). The Claimants now bring the new claim that all of the Alleged Loan Agreements (see paragraphs 29E.10; 29E.12) and the Talgarth Agreements (see paragraph 34HD) are void or void ab initio for mental reservation.

91. As to the Alleged Loan Agreements, this relies on the previously un-pleaded allegation that "Mr Schmidt and/or Mr Schreiber entered into each of the Alleged Loan Agreements making a mental reservation that he/they did not intend the legal consequences that he/they had declared, and the recipient (including Ms Walder and the First and/or Second Defendants) knew of this reservation" (paragraph 29E.10.1). This, in turn, is founded on the new allegations that Mr Schreiber *"implemented everything that Mr Jooste wanted"* (at paragraph 22); and was one of the Steinhoff Managers who participated in the alleged fraud (at paragraph 25A). As to the Talgarth Agreements, no particulars are given at all (and as such the Defendants submit that it can have no real prospect of success in any event).

92. There are also proposed amendments in relation to the Claimants' claim for misappropriation under S.1311 of the Austrian Civil Code in conjunction with Ss.12 and 133 of the Austrian Criminal Code, at Annex B paragraph 5. The Claimants now plead that it was Mr Jooste, rather than the Defendants, who intended to unlawfully enrich themselves. It appears that this is a material change as the intention of the perpetrator to unlawfully enrich is a material fact to be established under S.133 (see Pollak Report at 236).

F. THE HISTORY OF THE AMENDMENTS

93. The Claimants first informed the Defendants of their proposal to further amend their pleadings on 1 March 2024 which was in fact in a response to a letter from the Defendants saying that the Defendants intended to make some amendments to their pleadings (which were provided to the Claimants and which the Claimants consented to albeit issues arose as to whether such consent was unconditional and I approved the defence amendments at a previous hearing in April 2024).

94. Whilst the Claimants seek to contrast their approach to the defence amendments (effectively consenting to the defence amendments) with the Defendants' approach (making a root and branch attack on the amendments), the reality is that the Proposed Amendments fall to be considered in their own right and on their own merits, based on the well-established principles that I have identified, whilst the defence amendments have long since been pleaded back to in Re-Re-Amended Replies, and were on a completely different scale (running to only 8 pages).

95. The Claimants initially suggested that the Amendment Application could be dealt with in half a day. That was a wholly unrealistic estimate. In reality at least a day if not more was required. It is inherently unlikely that such a hearing date could have been found before trial (certainly before the PTR), and I ordered that it be considered at the PTR (which was itself only possible as a result of the case management directions I made with a very tight timetable for evidence and skeleton arguments). As it was oral argument has taken place over an extended court day that I was prepared to countenance to assist the parties.

THE PROPOSED AMENDMENTS : DISCUSSION AND DECISION

96. I consider that all the Proposed Amendments could, and should, have been made by the Claimants much earlier (not least in circumstances where I do not consider that the timing of the Proposed Amendments, with the possible exception of some of matters pleaded in Appendix 4, can be tied to the completion of disclosure). I address this further in due course below. The Proposed Amendments are made late, they would involve duplication of costs and effort and they would require the revisiting of significant steps in the litigation (pleadings, disclosure and witness statements). In such circumstances I consider that the Amendment Application is properly to be characterised as a late application for the purposes of the applicable principles that I have identified.

97. However whether the Amendment Application is merely a "late" application is academic, as I am satisfied that the Amendment Application is in any event rightly characterised as a very late application for the purpose of the application of the applicable principles that I have identified due to the proximity of the trial, and the steps that would need to be taken between now and the trial (in reality in the 15 working days before the Claimants' Skeleton Argument for trial). In this regard I consider the principles identified by Coulson J in *CIP Properties* at [19] (as quoted above) to be apposite in relation to the Amendment Application and to militate against the granting of permission. In this regard the Proposed Amendments threaten the trial and would necessitate the adjournment of the trial (which neither party advocates). On the facts of the present case, this is an overwhelming reason to refuse the Proposed Amendments.

98. In this regard I am satisfied that the extent of the Proposed Amendments means it would be impossible to deal with them before trial, still less could preparation for the trial take place at the same time (let alone fairly to the Defendants or so as to ensure that the parties were on equal footing). The acid test is to consider what would need to be done between now and trial (in reality between now and the lodging of Skeleton Arguments for trial). Even before considering the unfair burden that would place upon the Defendants in attempting to prepare for trial and deal with all such matters, it is absolutely plain that the necessary steps could not be done within such timescale as to allow the maintenance of the trial date.

99. The steps are first taking instructions from the Defendants, secondly the pleading back to the Proposed Amendments, thirdly the Claimants' replying to the amended Defence, fourthly disclosure which would involve consideration of existing disclosure, and the definition (and agreement) of further disclosure issues, and then the disclosure exercise itself, fifthly consideration of, and likely service of, supplemental witness statements (specifically from the Kings). Notwithstanding the fact that Paula King has not served a witness statement to date, it is also possible that her stance might now be different given that she is now accused of involvement in a fraud that would be tried and determined in open court. Sixthly, all such matters would then have to be addressed in the parties'

respective skeletons which could not be finalised until all the preceding steps had been taken.

100. In the course of the oral hearing I asked what timescales the Claimants were suggesting such matters could be done within. It was suggested on behalf of the Claimants, wholly unrealistically in my view, that the 53 pages of new allegations raising new causes of action, new factual pleas, new representations, and differing roles for existing players (all as further addressed in detail below), could be done within 14 days (10 working days). I consider that at least 6 weeks would have been required at the very minimum. That itself would be a death knell for the matter being ready for trial. That would be even before the Claimants replied thereto. Even if they could do that in 7 days (as they said they could), then even on their own estimate of time for the amended defence that would leave no time for disclosure (which is based on the crystallised issues) to be completed (even if it could be started earlier), still less for preparation and service of supplemental witness statements (which would seem inevitable, and which even the Claimants acknowledged would be a possibility, and in reality a certainty). I address such matters in more detail below, but none of this could be done before Skeleton Arguments, or indeed the start of trial. The case would simply not be trial ready and would have to be adjourned. As that is not the Claimants' application and not what either party wants, the Proposed Amendments stand to be refused in such circumstances.

101. In this regard (and as already noted) the Defendants were not under any obligation to take steps to respond to the allegations before the Amendment Application was determined, quite apart from having been fully engaged initially in preparation of experts' reports due on 12 April 2024 and a contested hearing on that date, and subsequently engaged on the Amendment Application and other matters for the PTR (as well as counsels' other professional commitments).

102. However additionally, and fundamentally, quite apart from it not being possible to undertake all necessary work in the time available, I am quite satisfied that any attempt to do so would create a serious procedural unfairness towards the Defendants and would deny the Defendants' substantive justice, for the reasons set out in Mr Brierley's evidence, which I accept, not least in circumstances where the Defendants will be fully engaged between now and trial in final trial preparation, preparation of the Skeleton Argument for trial and preparation of cross-examination. I accept that the effect of allowing the Proposed Amendments would be to "drive a coach and horses through the Defendants' trial preparation and would deny the Defendants the chance to properly defend themselves at trial" (as it is put in the Defendants' Skeleton Argument). Contrary to the overriding objective the parties would not be on an equal footing and such an approach would not be proportionate, nor would the case be dealt with fairly.

103. In the above circumstances the Proposed Amendments are refused.

104. Notwithstanding such refusal there are amendments which the Defendants have already indicated that they will consent to, and further amendments were discussed in the course of oral argument in the course of which consent was indicated (for example as to the proposed amended Appendix 1 and the claim for relief in relation to interest as a matter of German law). There are also deletions of a previous fraud case, and withdrawal of certain previous averments that I consider permission should be given for (each as addressed towards the end of this judgment). I also directed that the Defendants respond overnight to indicate what further amendments would be consented to should the Amendment

Application as a whole be dismissed. A document entitled "List of Agreed Amendments" has now been provided in that regard. Such further amendments, and any associated directions, can be addressed as part of the remainder of the PTR.

105. In the light of my over-arching reason for refusing the Proposed Amendments the other particular bases why it is said that it would have been inappropriate to grant permission are academic. They have, however been fully argued before me and I will therefore deal with them, albeit more briefly than might otherwise have been appropriate, and also within the time constraints of this ex tempore judgment, and the need to address the further matters that arise on the PTR during the course of today. They are further substantive and substantial reasons as to why the Amendment Application should be refused.

106. Before doing so, I will first address what further would need to have been done before trial and why it could not have been done in the available timescale, as further particulars supportive of my overall reasoning above.

107. First as to the pleadings, it is common ground that there would need to be two further rounds of pleadings the Re-Re-Re-Amended Defences ("RRRADs") from the Defendants, and then Re-Re-Re-Amended Replies from the Claimants ("RRRARs"). The Defendants would also need to produce two separate RRRADs, because Nicholas King's Defence is separate to that of Malcolm King and Formal; and I am told that distinct instructions are required from Nicholas King (so the Defendants would in fact have been required to produce two documents, each of which would have had to deal with each and every allegation made across all 53 new pages of the Claimants' pleading, in accordance with CPR 16.5(1)). As already noted, at least six weeks would be required for the RRRADs, which is already well beyond the start of trial. The Claimants would then need time to amend their extensive Replies, which currently stand at approximately 28 pages each. The Defendants would then need to have the opportunity to consider and take instructions on the RRRARs produced by the Claimants. On any view, the pleadings phase itself could not be completed until well after the trial is due to commence, let alone allowing for a proper opportunity to prepare for trial on the basis of the pleaded case. Moreover, the concerted work required on the pleadings would deny the Defendants the opportunity to prepare for trial and prevent the parties being on an equal footing.

108. As for disclosure, the existing disclosure process is addressed in Brierley 8 at paragraphs 40-52. The disclosure process has been protracted and, I am satisfied, carefully managed lasting at least 10 months prior to the deadline for Extended Disclosure. It took around four months of significant correspondence and a full day without prejudice meeting for the parties to agree on the majority of the issues for disclosure. Three separate Court hearings were required prior to the deadline for extended disclosure to resolve disputes. The disclosure that was ultimately ordered was tailored to the pleaded issues. Extended disclosure was given by the Defendants on 6 October 2023. Following disclosure, significant disclosure applications were issued by both sides; these were dealt with by consent shortly prior to the hearing on 25 March 2023 (only the Claimants were obliged to disclosed.

109. The effect of allowing the Proposed Amendments on disclosure would, I am satisfied, have been substantial. Firstly, there would have been the need to create new issues for disclosure to capture the new allegations which were not previously in issue – and therefore not covered by the disclosure issues in the DRD. There would also need to be

new searches dealing with the new matters in issue. I do not accept that all such issues would have been caught by existing issues and search terms (contrary to the Claimants' submission in that regard). Secondly, there would have to have been a re-review of all documents that have already been disclosed (Mr Brierly's evidence is that the Defendants had carefully prepared for trial by thoroughly reviewing the 22,000 documents disclosed by the Claimants, specifically reviewing for relevance by reference to the pleaded issues, so as to produce a manageable document set for the senior members of the team to use for the purposes of trial preparation). The reviewers in question consider (unsurprisingly) that they will not have marked as relevant documents that are in fact relevant to the Proposed Amendments but not relevant to the current case. That process took months not weeks and would have to be rerun. The same exercise would also need to be undertaken in relation to the Defendants' own document universe over which search terms have been applied and responsive documents marked for relevance and disclosed accordingly (see Brierley 8 at paragraph 101). Thirdly, it would not have been possible at this stage to set out the full ambit of the additional disclosure required given that the Defendants have not yet given instructions or pleaded to the relevant matters, and so the Defendants were not yet in a position to say what additional matters would be raised by way of Defence. Fourthly, there would also have needed to be a process of: (1) agreeing disclosure issues and search terms; (2) having any disputes determined by the Court; (3) giving disclosure; (4) reviewing disclosure; (5) challenging any missing disclosure and having any disputes determined by the Court. Steps (1)-(3) previously took 10 months, and steps (1)-(5) some 18 months. There is no way all of this could have been done before trial (even had the pleading stage been concluded by then, which it would not have been).

110. In the Defendants' Skeleton Argument at paragraphs 79 to 88 the Defendants gave nine examples of further disclosure that would have been required. I am satisfied that all such further disclosure would have been required, and that disclosure would have taken a considerable period of time.

111. Turning to the witness evidence, witness statements were filed on 5 February 2024, with supplemental witness statements filed and served on 1 March 2024. The Defendants served statements, and supplemental statements, from Malcolm King and Nicholas King. There are numerous matters where further witness evidence from the Kings would have been likely, most obviously in relation to the allegation that they made eight newly pleaded express fraudulent misrepresentations. By the time of the Claimants' Skeleton it was accepted that the Defendants might need to serve at least four further witness statements. The suggestion that, "there is no reason for this to be a "time consuming" exercise" did not bear examination, and on any view could not be accommodated before trial. Matters on which further evidence from the Kings would be likely to have been required included the new allegations of fraudulent misrepresentation, including express representations, the new allegations that Paula King was involved in the fraud, the new allegations as to the "nature of the Payments", that the Defendants sent and received multiple communications concerning the Payments, the allegations of the making of false statements by Malcolm and Nicholas King and the specific allegations in Appendix 4 including as to the matters set out in relation to the onward use of the Payments by Formal. As the Claimants accept, the Defendants would also have needed to consider whether they wished to and, if so, whether they could obtain witness evidence from third parties including Paula King. Whilst she previously was not prepared to provide a witness statement as she no longer enjoys a close relationship with her father and did not wish to become involved in these proceedings, it is possible that she might have now taken a

different view given that she is accused of fraud. In that regard the Defendants would also have been required to inform her that she might also have wished to seek independent legal advice given that Formal is said to be liable on the basis of her fraud, which would itself have taken time. As the Claimants accepted, the Defendants would also have needed to consider whether they wished to and, if so, whether they could obtain witness evidence from Alan Evans in circumstances where he is alleged for the first time to be party to the alleged fraud among other allegations. That would also have taken time. Ultimately the Defendants would not have been in any position to know what witness evidence was required until after instructions had been taken, pleadings were closed and disclosure is completed.

112. It is well known and self-evident that approaching witnesses, proofing and producing a witness statement is a lengthy process (for example four weeks were allowed in the timetable for the drafting of supplemental factual witness evidence alone). In relation to the Proposed Amendments, that process could not have been meaningfully progressed until after the revised pleadings and, probably, not until after completion of disclosure (all well beyond the trial date on any realistic timetable).

113. As to expert reports, the Court ordered there be expert evidence in (i) forensic accounting; (ii) German law; (iii) Austrian law; (iv) Swiss law. The Claimants served three foreign law reports by the deadline of 15 March 2024 but did not serve a forensic accounting report (instead relying on a factual witness statement from Mr White, which had been served on 5 February 2024). The Defendants served expert reports in all four disciplines on the deadline of 12 April 2024. Supplemental foreign law expert reports are due to be filed on 24 May 2024. I am satisfied that the Proposed Amendments would have required further expert evidence. Foreign law input would have been required generally in respect of the Proposed Amendments to ascertain what impact they might have on the foreign law position, in relation to the six newly pleaded provisions set out in Brierley 8 at paragraph 238, in relation to certain new allegations such as that Mr Evans participated in the fraud/embezzlement/misappropriation/violation of public policy and the new duties alleged on the part of Mr Eggers and Mr Grobler. These are not matters that could have been shoe-horned within the supplemental reports (even had the experts had availability and capacity to do so) not least given that the pleadings would need to be completed first, and some aspects might require entirely fresh evidence (for example as to BVI law).

114. In this regard given the claims that the Talgarth Settlement is a sham and/or void on a variety of grounds, foreign law evidence would have potentially also been required in relation to the Talgarth Agreements pleaded at paragraphs 34HA-34HD, which go beyond the scope of the current principles concerning limitation in issue. In particular, two of the Talgarth Agreements contain no governing law clauses; this would have to be determined and could well have involved questions of BVI law as Talgarth is BVI incorporated (there being no BVI law evidence currently before the Court), whilst Mr Kouchikali states that he does not accept that BVI law would apply it would have been a matter to be pleaded by the Defendants and would have required expert evidence.

115. So far as forensic accounting is concerned, the forensic expert accounting phase has completed and there is no further report due. However, if the Proposed Amendments had been allowed, I am satisfied that this would have required significant additional expert evidence. At the very least the current remit of this evidence would have to be extended to include the issues raised in Appendix 4. There would also have needed to be further

evidence in relation to the nature of the Payments pleaded at paragraphs 28A and 29A.2, as well as the further payments set out at paragraph 15 of the Proposed Amendments and the new allegation that "there was no business reason for assigning debt" in the way structured pursuant to the Talgarth Agreements (see paragraph 34HD.4). It would clearly have been impossible for such an additional report to be prepared prior to trial (quite apart from the disruption to the Defendants' trial preparations).

116. Additionally and notwithstanding the pre-trial steps having now been largely completed, the agreed trial timetable and the trial bundle would have needed to be reopened and the List of Common Ground and Issues and the Case Memorandum would have needed to be rewritten. None of this could have been done before trial not least as all the above steps could not have been completed before trial.

117. On prejudice to the Defendants, a further point would have been that the Defendants had previously been awarded security for costs (despite resistance from the Claimants). The Defendants would have faced a further exposure in costs in circumstances where further security might well have been resisted necessitating an application that it would have been unlikely to have been heard before trial.

118. In circumstances where I am satisfied that the Proposed Amendments were very late given the proximity of the trial, it is somewhat academic as to whether they were in many instances late in any event, and should have been made (much earlier). However I do consider that they were also late in that in almost all instances, the pleas ought to have been advanced much earlier if they were to be advanced at all. This would include amendments that arise out of the PwC investigation (as also reflected in Mr White's evidence, Mr White of PwC having from 2017, conducted investigations on behalf of Steinhoff into accounting irregularities and suspect transactions, including investigations into Fihag and Formal, which culminated in two draft reports, namely a Formal Report and a Fihag Report which were issued in March and August 2020 respectively and were accordingly available to the Claimants well before the Claim was issued. Mr White clarifies that his findings remain as set out in these two draft reports, save for any corrections or clarification in his statement. The only respect in which Mr Kouchikali alleges that PwC did not have the "*full picture*' is in relation to the onward use of funds now pleaded at Appendix 4 of the Proposed Amendments – and therefore this would have no bearing on any other category of amendment. Accordingly all other amendments arising out of White 1 could have been pleaded at the outset, including the extensive amendments set out in paragraphs 29-40 of the Claimants' Skeleton.

119. Other relevant factual issues that I am satisfied could have been pleaded before are addressed in Brierley 8 at paragraph 148 but include, the matters pleaded in relation to the Talgarth Agreements at paragraphs 34HA-34HD and the nature of the Payments pleaded at paragraph 28A. (see White 1 Section 4B; Draft Fihag Report at 4.0069; 4.0128; 30.07.19 Schreiber interview.

120. So far as foreign law evidence is concerned, the Proposed Amendments to the annexes setting out the German and Austrian law claims were not only significant but in many cases also involved fresh allegations of fact regarding additional parties owing and breaching duties, not just the content of foreign law. The factual matters could all have been addressed before.

121. Equally the claim that Paula King was a fraudster, and that Formal was (in effect) vicariously liable could have been pleaded many years ago, the Claimants having at all material times been aware of Paula King's employment at Formal and her involvement in processing Formal's payments. In this regard, most of the documents now relied on by Claimants to evidence Paula King's alleged role came from the Claimant's own disclosure and were provided to the Defendants as early as 2021 (and so could have been pleaded when the Claim was first brought).

122. As for the recasting of the fraud, the Claimants have provided no explanation for why the involvement of further individuals, in addition to Paula King, (namely the Steinhoff Managers and Mr Evans) in the fraud were not pleaded earlier. I am satisfied that these allegations could have been made on the basis of PwC's investigations and the Formal and Fihag reports, and much earlier than they have been.

123. Much of Appendix 4 could have been pleaded a long time ago, but seemingly is only pleaded now as it was not part of the old, Fraudulent Scheme case, but it is part of the proposed new, Unlawful Scheme case. In any event, the issue of the use of funds was raised by the Claimants by way of an RFI on 7 February 2022 when the Claimants asked Formal and Malcolm King for "full details of what the alleged loans were used for by Fihag and Formal." The Defendants responded on 8 April 2022 confirming that "the Formal Payments were predominantly used to make investments in stocks and shares*"*. Accordingly, I am satisfied that as early as 8 April 2022 i.e., over two years ago associated pleas could have been made. In any event the onward payments could have been pleaded far sooner given that the substantial majority of the documents relied on have come from the Claimants' own disclosure, and were provided very early on in the proceedings in 2021 or 2022, or in some cases on 6 October 2023. The Claimants were also provided with further information concerning the onward use of funds on 6 October 2023.

124. As already addressed in Section B, there is a particular need for late amendments to be properly formulated. I do not consider that the Claimants' Proposed Amendments were. In this regard I consider that there are numerous amendments in respect of which the Defendants would have been entitled to seek Further Information or which constitute impermissible rolled up pleas (which has already been touched upon above). Examples are identified in Brierley 8 at paragraphs 180 and 183. That further particulars would be required is effectively acknowledged in paragraph 65.1 of the Claimants' Skeleton Argument in which it is contemplated that further particulars be provided within 48 hours of the PTR. As addressed above, and as was made clear in *Swain-Mason* this is not the right approach. Where amendments are made late, they should be fully and properly particularised when served. The provision of Further Information might also result in further issues necessitating an application to Court (causing further delay).

125. The position is *a fortiori* in relation to the numerous examples in which allegations of fraud or dishonesty are made without proper particulars (as identified in Brierley 8 at paragraph 182). Again this has already been addressed as a matter of principle above. It suffices to give two examples at this point. The first is the allegation at paragraph 26C that "Mr Evans and Ms Walder also participated in and/or facilitated the fraud on and/or embezzlement and/or misappropriation and/or violation of public policy. They managed companies controlled by Mr Jooste and/or Mr M King, signed fictitious documents including loan and settlement agreements" without any plea as to the companies they are said to have managed; the loan or settlement agreements in question; on what basis they

are said to be fictitious; or what is specifically alleged against Mr Evans and Ms Walder individually. Likewise in relation to the pleading at paragraph 34HD to the effect that the Talgarth Agreements are void, inter alia, for fraudulent misrepresentation yet no particulars whatsoever are provided as to any of the elements of the causes of action. That would have been a further reason to refuse permission.

126. Yet further, the vast majority of the Claims are likely to be time-barred for the reasons given in Brierley at paragraphs 186-197. In addition to Payments 1 to 16, the nine Alleged Assignments of Debt pleaded at paragraphs 34HA.1-34HA.9 are governed by German law and are also time barred. The remaining two Alleged Assignments of Debt, and the final two Talgarth Settlements, are said by the Claimants to be governed by Austrian law but the Claimants have not pleaded any case that would mean that the three-year relative limitation period is not engaged, such that they are also unarguably time barred (the Defendants accept that the Claimants have a reasonably arguable pleaded case that Payment 17 is not time barred). The first two Talgarth Settlements are governed by English law and so (while they are now time barred), CPR 17.4 could potentially apply to them. However I am satisfied that these are new claims not arising out of the same or substantially the same facts and so they are not permitted under CPR 17.4.

127. Where there are new causes of action and new claims I am satisfied that this would have been a complete answer to the vast majority of the Amendment Application in circumstances where I am satisfied that such claims do not arise out of the same or substantially the same facts (even if there is a doctrine of relation back in the context of foreign law, it being unnecessary to determine whether there is any such doctrine of relation back in relation to the foreign law claims given my primary reason for refusing the Proposed Amendments and my findings that such claims do not in any event arise out of the same or substantially the same facts).

128. It would have been for the Claimants to show that there was no new cause of action but they were unable to do so. As already identified, each of the Payments is predicated on (i) the new alleged misrepresentations; (ii) the new "Unlawful Scheme" and/or (iii) the involvement of the Steinhoff Managers. For one or more of these reasons, each constitutes a new cause of action arising out of different facts. These include each of the German and Austrian law claims as set out in Annexes A and B, as well as the English law remedies sought.

129. As has also already been addressed, the Claimants sought to advance a further three substantive and previously un-pleaded implied representations (at paragraphs 29E.9.2.3–29E.9.2.5), and sought to advance a new case of fraud in reliance on five previously un-pleaded express representations which are said to have been made by an additional three parties, all of whom were previously said to have relied on the earlier pleaded express Payment Instruction Representation. It is well-established (as already addressed above), that a cause of action is every fact which is material to be proved to entitle the Claimant to succeed. In a case of fraudulent misrepresentation the material facts include (i) the specific representation made; (ii) whether it was false; (iii) the identity of the representor; (iv) whether the representation was knowingly false; (v) the identity of the person to whom the representation was made; and (vi) whether he was induced by it. Accordingly, where, as here, a new representation is pleaded this will be a new cause of action. The position is a fortiori where the fraudulent misrepresentation is said to have been made not only by a different party but by a party that was previously said to have been innocently induced by the misrepresentation. Accordingly I am satisfied that each of the new

representations that were sought to be pleaded (whether implied or express) constitutes a new cause of action, and not one arising out of the same or substantially the same facts as the existing (and separate) misrepresentation pleas.

130. Further, the claims pursuant to the Talgarth Agreements on any view constitute new causes of action in circumstances where the contracts in question have never been pleaded by the Claimants before, and have never been suggested to be shams or void before. They would, on any view, have been new claims.

131. The allegations, made for the first time, that (1) Paula King was part of the alleged fraud and (2) that liability could be established against Formal on the basis of her actions alone are also new claims in circumstances where a material fact to be proved in establishing vicarious liability is the identity of the person through whom a company is said to be liable. Moreover, alleging wrongdoing for the first time constitutes a new claim.

132. As already addressed, the principal fraud relied on by the Claimants in the RAPOC, namely the Fraudulent Scheme was transformed in the Proposed Amendments into a different Unlawful Scheme, which is alleged to involve numerous other individuals and new and previously un-pleaded allegations of unlawfulness. Each and every one of the Claimants' existing claims is predicated on the Fraudulent Scheme. Pursuant to the Proposed Amendments they would have been predicated on the Unlawful Scheme and would, I am satisfied, have constituted a new cause of action in circumstances where the nature of the specific wrongdoing lies at the heart of the Claimants' claims.

133. In relation to the proposed definition of the "Steinhoff Managers", it was proposed to be alleged (at paragraph 34E) that pursuant to a conspiracy, *"the Steinhoff Managers fraudulently induced the Steinhoff Entities to make the Payments and/or embezzled and/or misappropriated the Payments and/or violated public policy, and/or facilitated such conduct."* These would have been new claims given that no such claims had previously been brought against the Steinhoff Managers (and three of whom were never alleged to have been part of any fraud at all). Such pleas would clearly have given rise to new causes of action - a decisive factor by itself in there being a new cause of action.

134. The proposed embezzlement plea, that the Payments constituted an abuse of power and/or breach of duty by Mr Jooste and/or the Steinhoff Managers amounting to embezzlement, founded on twelve separate grounds of abuse and/or breach that have not previously been pleaded would clearly have been new claims. The allegation that the Steinhoff Managers had such a duty or power that was breached/abused is an entirely new one and I am satisfied that the identity of the individuals said to have breached (or owed) a duty is itself a material fact underpinning the cause of action.

135. Further and so far as Mr Jooste is concerned, it was previously only said that by exercising control over the Steinhoff Entities "as de jure or de facto director, and in his role as group CEO, he abused his powers and breached his duties to safeguard the pecuniary interests of the Steinhoff Entities", and the breach of duty or abuse of power was not specified or tied to the Payments or anything amounting to the twelve new separate grounds of abuse identified, which also constituted a new cause of action.

136. Further in relation to the Claimants' Austrian law claim in embezzlement pursuant to S.1311 of the Austrian Civil Code in conjunction with Ss.12, 14 and 153 of the Austrian

Criminal Code, the Claimants sought to allege, for the first time, that Mr Schreiber had a power of representation in relation to SEAG Austria to process legitimate payments and knowingly abused that power as part of the Unlawful Scheme (see Annex B at paragraph 2(b)-(c)). The identity of the party owing and breaching any duty would be a material fact to be proved by the Claimants, and I am satisfied that the new allegations concerning Mr Schreiber constituted a new cause of action (not least in circumstances where he was not previously accused of wrongdoing).

137. I am satisfied that the Claimants' proposed claim in respect of intentional damage contrary to public policy under S.826 German Civil Code also constituted a new cause of action given it is now alleged that it was the Defendants' conduct, rather than the Fraudulent Scheme, that was contrary to public policy (see Annex A paragraph 5(c)). I am satisfied that the conduct and/or facts giving rise to the breach of public policy would be material facts to be established by the Claimants. The Claimants also sought to advance an entirely new claim that the Payments themselves were "*contrary to public policy*" which was not previously pleaded and I am satisfied would have amounted to a new cause of action.

138. As to the Claimants' claim for misappropriation under S.1311 of the Austrian Civil Code in conjunction with Ss. 12 and 133 of the Austrian Criminal Code, it was sought to be alleged that it was Mr Jooste, rather than the Defendants who intended to unlawfully enrich himself or the Defendants (see Annex B at paragraph 5(c)). The intention of the perpetrator to unlawfully enrich is a material fact to be established under S.133 of the Austrian Criminal Code (see Pollak Report at paragraph 236). In such circumstances I am satisfied that a change in the identity of the perpetrator for these purposes was material and resulted in a new cause of action.

139. The Claimants also sought to advance two previously un-pleaded claims based on "mental reservation" (seemingly advanced pursuant to S.116 of the German Civil Code), whereas the Claimant's previous plea in relation to S.116 German Civil Code was limited to an assertion that, "To the extent necessary, the Claimants rely on (i) Sections 116…of the German Civil Code…*"* (see the RAPOC at paragraph 29E.11). By way of the Proposed Amendments the Claimants sought to set aside both the Alleged Loan Agreements and the Talgarth Agreements for mental reservation. I am satisfied that these also amounted to new causes of action.

140. As already identified it is the Defendants' case that CPR 17.4 does not apply to causes of action governed by foreign law. The point is academic given that I am satisfied that the new claims do not arise out of the same or substantially the same facts as are already in issue (and given my overall basis for refusing permission). I am satisfied that in relation to each and all of the new causes of action identified above, a new investigation would need to be embarked on which would be outside the ambit of the facts which the Defendants could reasonably be assumed to have investigated for the purpose of defending the unamended claim. As to the Talgarth Agreements, the relevant agreements were never in issue and only came to the Defendants' attention following disclosure by the Claimants, and only some of the Talgarth Agreements are pleaded in the Defence. I am satisfied that the plea that they are ineffective or void would have required an entirely new factual investigation.

141. As to the claims involving Paula King, the new allegations of wrongdoing necessarily involve new facts, and in any event no substantive allegations of fraud were previously

made against her (with only tangential references to her in the RAPOC). In such circumstances her involvement in processing the Payments, her central role in dealings with Mr Jooste and allegedly creating false invoices would each have involved a real investigation.

142. As to the new claims in misrepresentation, and as already addressed I am satisfied that such new claims in misrepresentation did not arise out of the same facts as those previously alleged. It is axiomatic that where a misrepresentation is alleged, the investigation will necessarily be tailored to the specific representation made on the specific occasion alleged by the specific party alleged to the identified recipient and that recipient's specific reliance. This is true of both the alleged express and alleged implied representations sought to be advanced which bear no resemblance to the originally pleaded representations. By way of example, the express representations now alleged at paragraph 29A include that "the Payment furthered the pecuniary interests of the Steinhoff group, when in fact it furthered the private interests of Mr Jooste, Mr King and/or other third persons", in contrast to the originally pleaded representation that the Payment had a "lawful and proper basis". As to the new implied representations, and as already addressed, these were originally limited to the fact that the Defendants would procure that Fihag would perform its obligations in accordance with their strict terms. Now it is proposed, amongst other matters, that the representation was that "the purpose of the loan was to advance the commercial interests of Fihag".

143. The facts are also different in circumstances where it is said, for the first time, that the express representations were made by the Steinhoff Managers, two of whom were previously said to have been fraudulently induced by the representations. It cannot be said that the Defendants would have been put on inquiry as to representations in fact made by those individuals, or as to their fraud and dishonesty, when they were not said to have made any representations and were not said to be dishonest. This point applies to all of the claims now predicated on the involvement of the Steinhoff Managers.

144. As to the Unlawful Scheme, that is predicated on the additional misrepresentations and the involvement of additional parties, discussed above (as well as the involvement of Alan Evans in respect of whom the same analysis as with the Steinhoff Managers applies – the new allegation of wrongdoing necessarily means there are new facts). There are also new and extensive allegations of breaches of power and/or duty at paragraphs 29A.2 which I am satisfied are all material new facts. Further, the scheme itself is founded on numerous and extensive newly pleaded facts including those at paragraphs 10; 11.11-13; 15.1-15.2; 19A; 22; 23; 24; 26C; 28A; 29A.2; 29C; 29D.9A-B of the Proposed Amendments.

145. As for the Claimants' foreign law claims and English law remedies, these are all predicated on the new misrepresentations; the new Unlawful Scheme and the involvement of additional parties including the Steinhoff Managers who are now said to have owed and breached various duties, such that they are founded, I am satisfied, on a substantively new factual matrix. They are also predicated on numerous new allegations of fact that are essential to their success and which would require investigation.

146. Finally there are also Proposed Amendments that would have had no real prospects of success (as already addressed) and would also have stood to be dismissed on that basis had that been necessary. These include the pleading at paragraph 34HD to the effect that the Talgarth Agreements are void inter alia for "mental reservation and/or fraudulent

misrepresentation and/or for immorality and/or abuse of power and/or breach of statutory prohibition", in circumstances where no particulars whatsoever were provided of any of the elements of those alleged causes of action. I am also satisfied that the Proposed Amendments insofar as Nicholas King is concerned did not have any real prospect of success either.

147. For completeness I noted that the Defendants also argued that a number of the Proposed Amendments were in breach of the well-established rule that foreign criminal convictions are inadmissible in English civil proceedings: see *Hollington v F Hewthorn &Co Ltd* [1943] 1 KB 587; the rationale for which is explained in *Rogers v Hoyle* [2015] QB 265 (per Christopher Clarke LJ) at [39]. While there is a statutory exception to the rule in *Hollington* in relation to convictions before courts in the United Kingdom, that exception specifically does not apply to convictions before foreign courts: see s.11 of the Civil Evidence Act 1968; *Benyatov v Credit Suisse Securities (Europe) Ltd* [2022] 4 W.L.R. 54 at [355] and *Daley v Bakiyevi* [2016] EWHC 1972 (QB) at annex, [25] and [26].

148. In the event there is no necessity for me to opine on such matters given my reasons for dismissing the Proposed Amendments as a whole. However in the course of oral argument it emerged that the Claimants considered that other evidence could be relied upon for their purposes with the result that I did not understand such amendments to be pursued in any event.

149. An issue also arose in relation to paragraphs 29D.1 and 29D.2 of the Proposed Amendments which amounted to the withdrawal of averments previously made. Whilst the Defendants sought to submit that these amounted to the withdrawal of admissions and that it was not only necessary for the Court to consider the same factors as with any application to amend, but also to take into account the particular factors at CPR 14.5, I am satisfied that such principles do not apply to the withdrawal of averments in a claim (as to which see *Bayerusche Landesbank Anstalt Des Offentlichen Rechts* 2017 EWHC 131 (Comm) at [20] to [21] and *Moyses Stevens Flowers Limited v Flower Station Limited* [2024] EWHC 4 (Ch) at [51]). In any event I consider that those amendments ought to be permitted notwithstanding the refusal of the Application itself.

150. The Claimants have also now agreed to delete allegations of fraud in relation to Wanchai. An issue has arisen as to the costs consequent on deletion of such pleas. I consider that that is a separate issue to be determined, absent agreement, in due course (the correspondence on this is ongoing between the parties). As for the deletions themselves I grant permission for such amendments.

151. In the above circumstances, and for the reasons given, the Application is dismissed.