Neutral Citation Number: [2024] EWHC 2542 (Comm)

Case No: CL-2022-000072

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**COMMERCIAL COURT**

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

Date: **24 September 2024**

**Before** :

**The Hon. Mrs Justice Cockerill DBE**

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**Between :**

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| **BNP Paribas Trust Corporation UK Limited (in its capacity AS Bond Trustee, and Borrower Security Trustee)** | **Claimant** |
| **- and -** | |
| **Uro Property Holdings, S.A** | **Defendant** |

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**David Allison KC and Ryan Perkins** (instructed by **Baker McKenzie LLP**) for the **Claimant**
**Kevin MacLean KC, James MacDonald KC and Adam Rushworth** (instructed by **Humphries Kerstetter LLP**) for the **Defendant**

Hearing dates: **24th September 2024**

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# JUDGMENT

**The Hon. Mrs Justice Cockerill DBE** **Tuesday, 24 September 2024**
(**15:13** pm)

**THE HON. MRS JUSTICE COCKERILL DBE**

1. The proceedings in this case involve a claim by BNPP against the defendant, Uro, for the recovery of a secured contractual debt amounting to, it is said, around €250 million together with various declarations. The debt is payable under a contract known as the Loan Agreement which forms part of a complex securitisation structure involving inter alia Uro as the borrower and BNPP as the bond trustee, the issuer security trustee and the borrower security trustee. The debt payable by Uro is defined in the loan agreement as the "bond make whole premium" and represents the present value of future coupons on two series of bonds which were, owing to the circumstances of the case, redeemed many years prior to maturity.

2. The proceedings in this matter are brought by BNPP for the benefit of bondholders who, it is said, are entitled to receive the proceeds of the sums payable by Uro. Uro is a subsidiary of Banco Santander SA, and is effectively defending these proceedings for Santander's benefit. In the proceedings there is also a counterclaim by Uro against BNPP for damages for breach of contract in the sum of 20 million-odd.

3. Given the time, I do not propose to set out the facts in any detail. A fuller description of the factual background can be found in the judgment of Jacobs J dismissing Uro's application for reverse summary judgment and strike out, [2022] EWHC 3251 (Comm) between paragraphs 18 and 53 and in the case memorandum and list of common ground and issues which can be annexed to this judgment for the assistance of any other court.

4. The key matter to be addressed at this hearing, which is the PTR for the trial, is whether the court should grant permission for BNPP to amend its re-amended particulars of claim

(RAPOC). The existing version of that pleading is 34 pages. The proposed amendments are three-and-a-half additional pages of quite dense and complex material. The amendments, however, in essence, comprise a plea or pleas of estoppel covering estoppel by representation, estoppel by convention and contractual estoppel, a claim for breach of contract and a contractual construction point relating to the loan agreement.

5. In the course of dealing with the application and the PTR more generally, I have indicated that there are issues with the timetable which have been agreed. To an extent, those have a bearing on this decision and I'll advert to them as I progress.

6. The procedural history is that the original pleadings were served in February 2022 (for the particulars of claim) and April 2022 (for the defence). There was a CMC in May 2023. The parties gave disclosure in October 2023 and there was a round of re-amended pleadings in early 2024. Witness statements were served in May, the claimant having served two trial statements, the defendant four trial statements, none of which I gather are above the page length which is required under the new procedure.

7. The parties gained permission to adduce expert evidence on bond market practice and Spanish law, and the first round of expert reports were exchanged somewhat late in July 2024. Joint memoranda were produced in early September 2024 and supplemental reports are being worked on with a deadline of 11 October 2024 currently being intended.

8. The trial is listed for three Commercial Court weeks currently from late November finishing in mid-December. There is a lengthy list of issues. There are two lists of issues for the experts, a three-pager outlining five expert issues for the bond market experts and a Spanish law list that runs to nine issues with a number of sub-issues over about nine pages. Accusations of a “kitchen sink” approach to the points in issue have been raised by the claimants before me.

It appears to me, having read these documents, that there is an argument that both parties have thrown the kitchen sink at this, which is perhaps not surprising, given the amount in issue.

9. The application to amend proceeds, of course, against the background of the legal test. The issue is whether the amendments proposed in this case should be allowed against a background where it is very evident that they either fall into the category known as "late", or the category known as "very late". The parties have referred, in particular, to *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs* [2023] 1 WLR 4335, also *CIP Properties v Galliford Fry* [2015] EWHC 1345 (TCC), *Tatneft and Boglubov* [2020] EWHC 623 (Comm) *ABP Technology Limited v Voyetra Turtle Beach* [2022] EWCA Civ 594 and the very recent *Steenbok Newco v Formal Holdings* [2024] EWHC 1160 (Comm).

10. Which category the amendments in this case fall into is to some extent a factor of what the amendments mean for the case. The essence of the point is that if an amendment is very late a heavy burden lies on the party attempting to make it. The definition of "late" and "very late" can be taken from *CNM Estates (Tolworth Tower) v Carvill-Biggs* at [67] where the Court of Appeal recently referred to Quah Su-Ling at [38], saying:

> "The courts have distinguished between late and very late amendments, a very late amendment being one which would cause the trial date to be lost ... the court is and should be less ready to allow a very late amendment than it used to be in former times and ... a heavy onus lies on a party seeking to make a very late amendment to justify it as regards his own position and that of the parties to the litigation and that of other litigants in other cases before the court".

11. Where an amendment is late, that is if it could have been advanced earlier or it involves the duplication of cost and effort or it requires the resisting party to revisit any of the significant steps in the litigation such as disclosure, provision of witness statements or experts' reports which had been otherwise completed, [76] of the same judgment becomes relevant. That says

> "If an amendment is on the cusp of being "late" and "very late", then it may be necessary to carry out a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done. Even if it is necessary to adopt that approach when the amendment is on the cusp of being "late" and "very late", it will never be appropriate to conduct a mini-trial ."

12. Reference was also made to [15] of *Tatneft,* itself quoting Stuart-Smith J in *Vilca v XSTRATA* [2017] EWHC 2096 QB, that if there is no good explanation as to why an amendment is being made at a late stage, it is not fatal to an application to amend, it is simply one of the factors which needs to be brought into the balance in deciding where to strike a fair balance.

13. Having reviewed the test, the first point to which I will turn is the question of late or very late. To decide on the category into which the amendments here fall, it is necessary to look at the agreed trial timetable and at the work involved in the amendment and its impact on trial. The current agreed trial timetable is before me. As I have said, it provides for three Commercial Court weeks, as agreed at the CMC. There is a long list of issues. It appears that most of those are still live and I have said there are separate lists of issues for the bond market experts and the Spanish law experts.

14. The consequence is that the amount of time available to argue all the points in the case, aside from a day of opening between the parties and the written submissions which must, of course, always be explained to the extent relevant orally, is two days of closing submissions. There is no other spare time. Counsel have assured me they consider they can properly argue the case on that basis. I have indicated that I think that some more time ought to be made available, but it is clear that there will be very little more available, and that the court cannot offer an open ended extension.

15. There is no doubt in my mind that there is very little room in the current trial timetable, if at all, and this makes this an amendment which, if it adds anything in terms of length to the trial, puts it firmly on the cusp of "very late". This is tacitly accepted by BNPP's suggestion, in the dying paragraphs of the skeleton, that the breach of contract claim certainly might be hived off, so that is the starting point. We are looking at a suite of amendments which are either late or very late.

16. The next is to ask the effect which those issues would individually have on the trial. The claimant's suggestion that there is absolutely no effect on the trial is obviously unworkable. Given the written arguments which have been addressed as to whether the issues in question are hopeless, I would estimate that even without any evidence there is a minimum of a half a day needed to deal with these issues, and I would expect probably more. To an extent, that may be accommodated in the slightly longer trial, but there will be limits to that.

17. There needs to be some breaking down of the individual claims, as we have done during the course of oral argument. The position appears to be that it is clear that the construction argument alone is purely a late amendment. That could be dealt with within the current trial timetable, even probably without any extension of the trial. It requires little, in fact nothing, in terms of extra evidence.

18. The other arguments are rather different, and I will have to deal with the question to which they raise a need for further evidence as well as time for argument. So I will deal first with that question of prejudice aside from loss of any trial if amendments were allowed in.

19. The defendants say that there are effectively two sets of prejudice. The first is that if the breach of contract claim were allowed in, that would necessarily result in the loss of the trial because it

would require Uro to revisit disclosure and witness statements of the proceedings. In the witness statement of Ms Lyons at paragraphs 43 to 48 she covers the additional documentary inquiries that the defendant would wish to make, and this covers both documentary inquiries, inquiries of witnesses and inquiries of people, third parties, who have not yet given evidence, so that covers a very large amount.

20. In addition to that, even so far as one is not looking at positive evidence that needs to be gathered and dealt with and fitted into a timetable, she highlights very clearly the question of diversion of resources in the run-up to trial. This, of course is the PTR, but unhappily the evidence is not complete as it should be at this stage, the timetable having run somewhat behind. Hence the experts' reports are not fully complete as one would expect at the PTR. That being the case, there is obviously a lot of work to do; so a powerful case has been made that there is considerable prejudice to the defendants if all of these amendments are allowed in, particularly in relation to the breach of contract claim, and effectively that the trial would have to be lost if the breach of contract claim were allowed in.

21. The claimants, of course, say that the defendants have overblown what would be necessary on the facts. They say that the already searched-for period is one which has already been searched because it is the same time as the shareholders agreement. There is no suggestion that the understanding of the people in question had changed in the period in question. It is said that most of the directors now were in place at the time the prospectus was issued, and that they have already been asked questions, and that there is no real evidence to suggest that there is much from third parties and that on the terms of the contract only the knowledge of senior officers is relevant.

22. As a fallback it is said on behalf of the claimants that if it is necessary to go some way down the route urged by the defendants, the breach of contract claims cannot be fitted into trial one; then trial two, which has been scheduled currently to deal with quantum, is the answer, and there is no cross-over with trial one. This is said to be acceptable because breach of contract is a point which can be characterised as only arising if the claimants lose their Spanish law point. The point was made that balancing prejudice, the claim should not simply disappear if it cannot go into trial one, because it is a large claim, and there is a place to put it, effectively. It is said that although normally trial two would not necessarily be in front of the same judge, there is no need to have the same judge because it is a discrete issue, as are the other issues for that trial.

23. The main focus on prejudice was in relation to breach of contract. There is also something to be said in relation to prejudice in relation to estoppel which the defendants have highlighted, and that is a matter to which I will come back when I deal with the estoppel point. But overall in relation to prejudice my conclusions are that the defendants have the better of the argument by a very considerable margin here. There plainly is considerable prejudice. So far as breach of contract is concerned, it seems to me entirely right that if, at this point, it was decided that the breach of contract claim should be allowed, and that it should be allowed to run at the same time as the rest of the liability trial, there simply is not time, and that, effectively, makes the breach of contract amendment a very late amendment, save to the extent that one could roll it into trial two.

24. Then we come to explanation for the delay.

25. The history of the amendment, together with an explanation for its lateness, is on the authorities a matter which the amending party should deal with, and while it is not a decisive point, it is a not insignificant factor in the necessary balancing exercise. Generally, in order for

there to be a very late amendment permitted there must be a very good reason for the delay, and even for a late amendment the court will generally expect to see a good reason for the delay if any -- in order to give any real counterbalance to the considerable weight which must be given to the prejudice which is said to flow to the amending party as a result of any failure to allow amendment.

26. The position here is that the claimants have characterised this suite of amendments as coming out of the experts' reports. Essentially the way it was put is that until the full detail of the defendants' expert report was in the hands of the claimants, they did not appreciate that a particular Spanish law point as to Article 123 was really a serious point, and one that might have real effects.

27. The reality is, however, that that is not a good explanation. As I said in the course of argument, it is an explanation. It is an explanation with which one may have a degree of sympathy. But it does not fall within the ambit of a good explanation. The defendants forcefully pointed out that the idea that it was not apparent is delusive. Before the pleadings were issued and throughout the proceedings Uro has made clear that it raised the issue of whether there was an enforceable right under the shareholders agreement to block the acquisition. That can be seen to some extent in the pre-action correspondence in which Uro expressly stated that its position was that there was no right to block the Santander transaction, and even if it did it would be unenforceable under Spanish law. So Spanish law was explicitly mentioned.

28. Then one can see the pleadings which, of course, came in in 2022. In the pleadings the point is clearly raised, even if not at great length. Article 123 is explicitly pleaded in the original

defence and counterclaim. Its companion piece, Article 29, only makes its way that the pleadings and the list of issues at the beginning of this year, but it is apparent that the vast majority of the skeletal statement of what the point is has been there since the first round of pleadings.

29. I say "skeletal" because, of course, as a pleading it need only state the essence of the case, and it is fair to say that it is not apparent from the pleading that it will take on quite the dimensions that it has done in the expert report which has now been served. So the point was there. Further it is accepted that the point has always been in issue, and that the agreed list of issues and agreed list of expert issues make it clear that whether Uro was entitled to block or prevent the completion of the acquisition was in issue, and that the Spanish law issue was live. The defendants also pointed out that the claimant's own skeleton argument, at the first CMC, identified this as a "fundamental issue", and explicitly identified that there was a point that, as a matter of Spanish law, and under the terms of the shareholders agreement, Uro had no entitlement to block or prevent the Santander acquisition. Thus:

> "Uro's pleaded case (as set out in paragraphs 33 to 37 of the Amended Defence and Counterclaim …) can be summarised as follows:
>
> (1) As a matter of Spanish law (and under the terms of the SHA), Uro had no entitlement to block or prevent the Santander Acquisition…"

30. It is fair to say that the responsive evidence does not really contradict any of this, and it is for that reason that I say that this is not a good explanation. The attempt to say that this is introduced as a means of assisting the court to cut through Spanish law evidence is also not credible. the skeleton identifies nothing specific in the Spanish law evidence that caused the Claimant to think of a new case or to propose a "cut through". Nor would the amendments even in principle be capable of being a "cut through" of the Spanish law evidence unless the

Claimant was to abandon its primary case that Uro had an enforceable Spanish law blocking right.

31. The bottom line is that this is a point which has been on the pleadings. If there are answers to it, they really should have been advanced before this. It is perhaps understandable why, given the range of issues, and how one expert may see things differently from another, a line was drawn which involved not raising responsive arguments before, but the truth is that the responsive points have occurred late. All of this could have been pleaded at the outset. Instead we are now in a position where it is being sought to be pleaded, scant weeks before trial.

32. I come, then, to the merits of the amendments. The defendants have made a determined attempt to persuade me that the construction argument has no real prospects of success. This is a point with which I will not deal in any detail. I see entirely the criticisms which are made of this as a matter of construction. However, an argument of construction which does not, by itself, come remotely close to being anything other than a late amendment, and perhaps does not even count as that because it does not incur any redoing of work at all, is one which, unless it is self-evidently on its face bad, should be allowed to proceed and be argued. That is particularly so in circumstances where, as we all know, arguments of construction are somewhat sensitive to the wider matrix of, in this case, agreements as well as facts.

33. The position in relation to the other points requires more detailed consideration. So far as the breach of contract point goes, the claimant asserts a new alternative case for breach of clause 6.14. It alleges that if Uro did not have an enforceable right to block any sale by Ziloti it follows that the statements which were made in the agreements were misleading, and untrue. That is paragraph 50I(1) of the draft amendments which says if the veto right did not exist or

was not legally enforceable by Uro, then the information set out in the prospectus was misleading and was not true, complete or accurate in all material respects.

34. The claimant then alleges, in paragraph 50K, that it is entitled to damages to put it in the position as though the statements were true, and that is said to be the value, effectively, of the bond make whole premium, ie. the value of the claim made. The defendant has made a very strong attack on the merits in reply to this case.

35. The first point made is that it is not a complete plea, and in the absence of a proper basis should not be allowed. The point is essentially this: it is clear that the case made depends on knowledge or belief. It depends on an allegation as to whether Uro could or could not have known or believed, after due and careful inquiry, that the wording in the contract, that the statements were true, such that Uro was in breach of clause 16.14.

36. The problem with this on its face is that one would expect that to be a case of fraud because if it arises out of a plea that Uro could not have known or believed the statements to be true, logically one would expect that to be a case that the offering circular (or prospectus) was known to be untrue. That case has not been pleaded out. It is rather, clearly, said that this is not a case of fraud. No facts are given as to the basis on which it is said that Uro could not have known or believed after due and careful inquiry the statements to be true, in relation to any facts which relate to the time. That is the kind of factual pleading that one would expect to see, and it is not there.

37. To the extent that there is a pleading, it is a pleading which relates instead to the legal arguments advanced by Uro in the current case already at paragraphs 24 to 28 of the re-

amended defence and counterclaim. So it is said that the fact that Uro has in 2022 there pleaded (i) that the SHA was never intended to confer any rights, (ii) manifestly did not have the effect of conferring rights, (iii) that this is consistent with Uro's subsequent conduct and (iv) the contrary analysis would be commercially absurd, drives the conclusion that Uro in 2015 could not have known or believed after due and careful inquiry that the veto right existed and was legally enforceable.

38. Although I might be persuaded that that is just about a complete plea, it is certainly an unusual one. Normally a factual basis must be pleaded, otherwise one is in the realm of a speculative pleading to open up disclosure. And of course to some extent that pleading does, on analysis of the plea, end up in a place where one must without a positive factual basis give disclosure of knowledge and belief in 2015; so it does have that result.

39. Nor is that factual basis compelling on analysis: legal arguments advanced by Uro in these proceedings from 2022 do not seem to say anything about whether in 2015 and long before the Santander Acquisition took place Uro did not believe the contents of the Offering Circular to be true in 2015.

40. Thus the plea as it is constructed is not one which has got a conventionally pleaded factual basis, and the only factual basis which is provided is one which does not logically result in the answer which is sought.

41. The second answer to the claim is that it is time barred in that a claim for breach of contract must be made within five years of the date of cause of action, see the Limitation Act 1980 section 5.

42. The claimant makes three arguments in its skeleton. It says that the court would have to determine the claim in order to determine whether the security held by the claimant could be redeemed. That argument is on a basis which is not advanced in the amendments, that the damages claim is what is called a "borrower secured obligation". Here we have two points. First of all, I can only decide this application to amend on the basis of the pleaded case, and there is authority to that effect. The "borrower secured obligation" analysis cannot therefore save the proposed amendment.

43. The second is that even if I ignore that rule, to the extent that this does hinge on a question as to whether the damages claim does arise out of a "borrower secured obligation", it seems to me that the argument that it is a borrower secured obligation is one which is fanciful. That is simply on the wording of the relevant provision which states that it means:

> "any and all present and future monies, obligations, liabilities and all other amounts due, owing, payable or owed by the Borrower to the Issuer under the Loan Agreement and/or the Borrower Finance Documents, as applicable, and references to Borrower Secured Obligations include references to any of them, as applicable."

44. The Borrower is defined (essentially) as Uro. It follows that this is simply not wording which is apt to capture a claim for damages for breach of clause 16.14.

45. The other arguments which the claimant advances in relation to this are either predicated on that borrower secured obligation analysis, or are fanciful.

46. So the Claimant argues that the claim for breach of clause 16.14 is a claim to recover a principal sum of money pursuant to section 20(1) of the Limitation Act 1980, and so a 12-year limitation period applies and it jumps free of the six-year limitation period. That is an argument

which proceeds on the basis that it is a breach of a clause to cover a principal sum of money - and is thus predicated on the borrower secured obligation analysis. Again it should be added that if it did not fail for this reason, the challenge to the merits (ie that the claim is not for repayment of the principal but a damages claim) appears compelling.

47. The third argument on which the claimant relies is that it has a parallel claim for indemnity which has the effect of reviving a time-barred damages claim. Again, that is not a pleaded claim, and, therefore, it cannot avail the claimant. There is also a point about whether the damages claimed by the claimant do not follow from the alleged breach. That was not the subject of much argument, and I do not think that it would affect my analysis.

48. Before passing on to the overall balancing exercise and conclusions on the merits of the application, I will deal with the merits of the estoppel point.

49. I was initially minded to think that this was a point of the sort which should be allowed to proceed within the trial if it could properly do so. Even looking at it at first, before hearing argument, it seemed to me the only way that could be done would be if the evidence base were severely constricted such that the claimants had to run it purely on the basis of the documents in the case without any further disclosure, and without any statements on reliance and so forth. That was tacitly conceded by the Claimants who expressed their willingness to proceed on that basis.

50. However, as the day and the argument have progressed, I have been persuaded that that would be a wrong course of action – and a delusive short cut which would only lead to trouble.

51. The starting point is that it effectively is the jumping-off point for adding a whole new representation case based on the prospectus. That has not previously been substantially in issue in the trial, with a handful of references in passing to it in the pleadings. Further it introduces potentially three layers of estoppel arguments to an already crowded case. Those points necessitate a good look at both the merits and the prejudice issues.

52. I have therefore looked more closely at the merits of the case than I was initially minded to and I am not impressed. The new prospectus case is needed by the claimants because it is the only way that they get an unqualified representation on the documents. The prospectus could, on one analysis, be said to give an unqualified representation, where the other transaction documents do not – clause 16.14 of the Loan Agreement (the current focus of the representation case), stating that, *"[t]o the best of its knowledge and belief (after due and careful inquiry) …."*.

53. On further analysis (and looking at fuller passages of the document than those quoted in the draft pleading) the prospectus, in fact, almost certainly does not contain any unqualified representation; it is a narrative summary of the SHA, not addressed to the claimants, which does not grapple squarely with the issue. But in any event it seems to me on analysis that the true argument on representation must lie within the clause 16.14 representation, that being within the document which is the current basis for the dispute and which is the later in time and which is the key document. Once one gets here it is clear that the words of clause 16.14 do create a clear qualification. Essentially, therefore, I come to the view that the merits of the prospectus case in relation to estoppel is one is fanciful.

54. So there is no representation in the prospectus, and if there were an unqualified representation in the prospectus, the prospectus is not a document addressed to the claimants, and, therefore, it cannot avail them in the light of the fuller transaction documents. Thus what is left is a qualified representation within the loan agreement.

55. That has implications for the way forward. That is because if it was an unqualified representation, one could see that the case could be run on a basis which did not involve disclosure or witness evidence and so forth. But as soon as you have a qualified representation which involves to "*the best of Uro's knowledge and belief after due and careful inquiry*", one is straight back into the same kinds of issues of evidence and hence prejudice that bedevil the breach of contract claim. Once the prospectus case drops out, the representation can only be a qualified one, and once one gets there, you get into a reliance case which cannot be based on the documents. One would need somebody to say as to understanding of what was known and believed. Then, in any event, in relation to reliance, it is very hard to understand how a case on reliance on either analysis could succeed without anybody being called. At the end of the day however much there might be an undertaking to proceed on the basis of the documents only in relation to estoppel, that would be an artificial basis, and as such it would inevitably be impractical.

56. Further this approach would open up an unacceptable fracture between this claim and any Trial 2 breach of contract claim: it would effectively be unfair to witnesses who might be asked questions on something on one basis in this trial, with the spectre of disclosure and other matters coming up in the second trial if one were to allow the breach of contract claim to go into trial two.

57. For completeness I should note that:

    a. The contractual estoppel case is effectively one which cannot work because there is no representation in the contract.

    b. An estoppel case by convention pursued on the limited basis adverted to (ie without disclosure or evidence) would be bound to be hopeless based on an absence of documentation as to shared understanding.

    It is fair to say that the argument as to the merits of contractual and estoppel by convention was not much argued by the claimant with the central point being estoppel by representation.

58. So estoppel cannot sensibly and properly go into trial 1. That leaves us in a position where the options are effectively these: the first is to refuse permission in relation to estoppel and potentially also breach of contract altogether. The second is to put estoppel and/or breach of contract over into trial two, leaving just the construction argument proceeding in trial one, thereby making trial two effectively a hybrid of stage two liability and quantum.

59. Bringing the strands together: these proposed amendments are borderline late/very late to the extent that what one is looking at is something which is either going to put off the trial or disrupt the trial or take us into a stage two trial when the parties have been preparing for a stage one liability and stage two quantum. In those circumstances I do have to balance all of the factors, including the strength of the case which is proposed, why justice to the person seeking amendment might require it to be brought on, what the requirements of justice to the opponent and to the other court users also means.

60. In this case, as I have indicated, I'm going to permit the construction argument to proceed because it causes not prejudice. I am far more troubled by the other elements of the case. The

balance is very, very different to that which pertains to the construction argument. We have here arguments, all of which are put forward very late in the day. There is no good explanation for why they were not brought forward earlier. They cannot be brought into this trial without causing it to go off or bifurcate or causing an intolerable burden on the other party. They must effectively result in the loss of a final decision as to liability if either or both were permitted to proceed. That is very similar to the loss of a trial date, in that finality on liability goes off to some distant date, rather than the date fixed.

61. In those circumstances although I resist the temptation to conduct a mini trial, I am bound to look at the merits of the arguments to see whether, on balance, that is a result which is justified. Bearing in mind the arguments which I have weighed, I take the view that the argument as to breach of contract as pleaded lacks real prospects of success. It is fanciful/hopeless. The responsive arguments which fill it out and meet the criticisms are not yet pleaded. Proceeding as I must on the basis of the properly pleaded case I form the view that it is not an arguable case and should not be allowed to proceed. And as I have noted, even taking into account the recently developing arguments on potential unpleaded points, I would take the view that the breach of contract case is probably still the wrong side of real prospects of success. On that basis even postponement of the issue to a second trial is a course which is on balance the wrong outcome, given the lateness, the prejudice in loss of finality and increase in burden of preparation versus the tenuous merits albeit in the context of a very large claim.

62. In relation to estoppel, a similar situation exists. The pleaded case, which effectively hinges on the prospectus point in order to get an unqualified representation, is not one which has a real prospect of success. To the extent that it hinges on an qualified representation, it is extraordinarily difficult. Whether qualified or unqualified, even if you get the representation

established, one asks what is the answer to the question of reliance. That question is one which, (on the basis on which it is proposed to be put forward without any further disclosure or evidence) I consider there is no real prospects of success. The claim would be one which is speculative or fanciful.

63. In those circumstances, even bearing in mind the size of the claim involved, I form the view that I should refuse permission in relation to those aspects of the amendment, though I allow the amendment to proceed in relation to construction.