



Neutral Citation Number: [2022] EWHC 126 (Ch)

Appeals No: CH-2021-000140

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
On Appeal from Deputy Master McQuail
Claim No: IL-2020-000079

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 17th January 2022

Before:

MR. JUSTICE MILES

Between:

ILLIQUIDX LIMITED

Claimant

- and -

(1) ALTANA WEALTH LIMITED

(2) LEE ROBINSON

(3) STEFFEN KASTNER

(4) BREVENT ADVISORY LIMITED

Defendants

MR. RICHARD SALTER QC and MR. RICHARD ESCHWEGE (instructed by
Waterfront Solicitors) for the **Claimant/Appellant**

MR. TOM MOODY-STUART QC and MR. BEN LONGSTAFF (instructed by **Fieldfisher**
LLP) for the **Defendants/Respondents**

Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE MILES:

1. This is an appeal by the claimant against an order of Deputy Master McQuail ("the Master") dated 25 May 2021 giving effect to her judgment of 19 March 2021. The Master refused certain proposed amendments to the particulars of claim in respect of the claims for breach of confidence. She allowed other amendments. The ones she refused fell under three heads. The first and second were amendments to paragraphs 18 and 19 of the draft amended particulars of claim (the "APOC") and draft amended confidential annex 1 ("ACA1") in respect of what are termed the Big Idea and the Detail respectively. The third head comprised paragraphs 28 and 28A of the draft APOC and ACA5 concerning misuse of the alleged confidential information by the defendants.

Background

2. The Master set out the background at [24]-[31] as follows:

"24. The Claimant, whose directors are Ms Galina Alabatchka and Mr Celestino Amore, says that it specialises in investing in illiquid securities and in recent years says it has dedicated its attention to potential Venezuelan investment opportunities, including Venezuelan government/corporate bonds and claims and other Venezuelan receivables, private equity and other Venezuelan related opportunities.

25. The First Defendant is an investment company and the Second Defendant is its Chief Investment Officer. The Fourth Defendant provides consultancy services to the First Defendant. The Third Defendant is a director of the Fourth Defendant. The First and Second Defendants say that they have specialist investment expertise relating to distressed debt and have maintained an interest in oil and petroleum companies and Venezuela for many years.

26. Between about April and November 2019 the Claimant and the Defendants discussed the possibility of a joint funding vehicle for the purpose of exploiting investment opportunities sourced by the Claimant. This was to have been a fund investing in Venezuelan investment opportunities called the Altana Illiquidx Canaima Fund ('AICF'). A promotional prospectus relating to this proposed fund was circulated from July 2019 onwards.

27. The parties entered into a non-disclosure agreement dated 8 July 2019 (the 'NDA') to cover any confidential information disclosed between themselves, save that the NDA did not apply to information that was in the public domain or was already known to a party or became public other than by breach.

28. The NDA defined 'Opportunities' as 'potential Venezuela related credit investment opportunities including (but not limited to) Venezuelan government/corporate bonds and claims and other Venezuelan receivables, private equity and other such Venezuela related opportunities' and defined 'Confidential Information' as 'any and all information relating to [the First Defendant] and/or to [the Claimant] and/or any Opportunities and which is considered by the disclosing Party to be of a confidential nature (or is marked or described as confidential).'

29. The joint venture came to nothing and the parties went their separate ways in November 2019.

30. In short, the Claimant says that the Claimant disclosed confidential information to the Defendants during the period of their discussions and that the Defendants misused that information in setting up their own Atlanta Credit Opportunities Fund ('ACOF') which invests in Venezuelan government/corporate bonds and within the ACOF Presentation used to market and launch the ACOF.

31. The Defendants say that the Claimant disclosed no concrete investment opportunity or any information not already in the public domain, already known by the relevant party or published in the AICF Presentation."

3. I add some further comments about the NDA of July 2019. (a) The definition of "Confidential Information" is tied to information relating to the claimant or the first defendant or any Opportunities. (b) "Opportunities" are defined as potential investment opportunities. (c) By clauses 1.1 and 1.2, the undertakings in the letter do not apply to any information which is in the public domain at the time of supply or which enters the public domain other than as a breach of the undertakings. (d) By clause 2(b), if the parties elect not to pursue a business relationship related to any of the opportunities, none of the parties may use the other's confidential information. (e) By clause 3(b), the parties are free to compete with each other in the event that any of them decide to not jointly pursue the opportunities, except that they could not compete using the other's confidential information, including confidential information disclosed by the claimant to the first defendant. (f) The obligations in the letter were to continue for three years from the date of the agreement.

4. The Master then explained the existing pleadings in [32]-[33]:

"32. The key elements of the plea of breach of confidence and breach of trade secrets in the POC are as follows:

(i) the Claimant has since May 2017 dedicated time and resources towards gathering intelligence and expertise in potential Venezuela related credit investment opportunities including (but not limited to) Venezuelan government/corporate bonds and claims and other Venezuelan

receivables, private equity and other such Venezuela related opportunities defined as 'the Opportunities' (paragraph 6 POC);

(ii) the NDA defined the 'Opportunities' as set out above ... and defined 'Confidential Information' as 'any and all information that information relating to [the First Defendant] and/or to [the Claimant] and/or any Opportunities and which is considered by the disclosing Party to be of a confidential information (or is marked or described as confidential)'. There follows an illustrative list of examples of such information (paragraph 16 POC);

(iii) the express terms of the NDA on which the Claimant relies (paragraph 17 POC);

(iv) the reference to Confidential Annex 1 as containing a list setting out the Confidential Information asserted by the Claimant (paragraph 19 a POC);

(v) the list of 6 documents or groups of documents, the introduction of two named parties and 3 listed items of legal advice (Confidential Annex 1 to POC);

(vi) the plea that the Confidential Information is a Trade Secret (paragraph 20 POC);

(vii) the circumstances of confidence in which the Confidential Information was disclosed to the Defendants (paragraphs 22-25 POC);

(viii) the misuse of the Confidential Information and/or Trade Secrets set out in Confidential Annex 1 and further information in Confidential Annex 6 relating to the legal framework and strategies surrounding the Opportunities in setting up ACOF, within the ACOF Presentation and by the distribution of the ACOF Presentation (paragraphs 27 and 28 POC).

33. The POC go on to claim that misuse of the Claimant's Confidential Information and/or Trade Secrets by the Defendants thereby:

(i) breached the NDA;

(ii) breached obligations of confidence; and

(iii) unlawfully used or disclosed Trade Secrets."

5. The Master summarised the proposed amendments at [39]-[41]:

"39. The proposed amendments may be grouped as follows:

- (i) ones dealing with the Claimant company and its history (paragraphs 1, 3, 5-5E APOC);
- (ii) ones relating to the preliminary discussions between the parties (paragraphs 7-8 APOC);
- (iii) ones relating to the Joint Venture document (paragraphs 9-10 APOC);
- (iv) ones relating to the Non-Disclosure and Non-Circumvention Agreement consequential on the re-arrangement of the definition of 'the Opportunities' (paragraphs 13 and 14 APOC);
- (v) ones relating to the NDA including the express adoption of the term 'Opportunities' in the pleading as defined in the NDA (paragraph 16 APOC);
- (vi) ones specifying that the confidential information relied upon is now set out in Amended Confidential Annex 1 ('ACA1') (paragraph 18, reference in paragraph 19 to ACA1, and ACA1 APOC);
- (vii) refinements of the dates at which information is claimed to be protected in equity only or also by contract and clarification of the claim in relation to Trade Secrets (paragraphs balance of 19, 20 and 20A APOC);
- (viii) ones limiting the copyright claim to an earlier version of the document previously relied upon, namely one pre-dating any involvement of the Defendants (paragraphs 21 and 31 APOC);
- (ix) ones consequential on the proposed amendments to 19, 20 and 20A (paragraph 22 APOC);
- (x) ones clarifying how the dissemination of the ACOF Presentation came to the attention of the Claimant (paragraphs 27 a to c APOC) and ones pleading further information derived from the First Defendant's website about the ACOF (paragraph 27d APOC); and finally
- (xi) amendments to plead that the ACOF itself misuses the Confidential Information and/or Trade Secrets set out in ACA1 by misuse of the Big Idea and/or the Detail (paragraph 28 APOC) and amendments to plead that the ACOF presentation misuses the Confidential Information and/or Trade Secrets set out in ACA1 by misuse of the Big Idea and/or the Detail (paragraph 28A APOC) in the case of each paragraph by reference to the misuse set out in Amended Confidential Annex

5 ('ACA5') (original Confidential Annex 6 is no longer relied upon and ACA5 is essentially its replacement).

40. The amendments in groups apart from (vi), (viii) and (xi) are not controversial. Had they been controversial, I would have allowed those amendments as refinements and clarifications of the Claimant's case made at an early procedural stage helping better to identify issues and promote the just disposal of this case at proportionate cost.

41. The amendments in group (viii) are only opposed to the extent that details of the employment status of the three authors of the work in which the Claimant asserts copyright have not been pleaded. During the course of the hearing Mr Campbell QC offered to refine the pleading in this connection so that these details would be included. These amendments are therefore no longer controversial."

The controversial amendments

6. The controversial amendments were therefore paragraph 18 and ACA1, and paragraphs 28 and 28A and ACA5.

7. Paragraph 18 of the APOC says this:

"Following the signing of the NDA, the Parties sought to progress the set-up of the Canaima Fund. The Claimant imparted confidential information to the Defendants in respect of the Opportunities (orally and/or in writing), namely that set out in Amended Confidential Annex 1 (the 'Confidential Information')."

8. ACA1 may be summarised as follows:

i) Paragraph 1 sets out the claimant's case as to what information provided by the claimant to the defendants had the necessary quality of confidence. The claimant says that it relies upon: a. "The Big Idea, as explained below; and further or alternatively, b. The Detail, as also explained below".

ii) Under the heading "The Big Idea" paragraph 2 says:

"The Claimant provided the Defendants with a single, composite piece of confidential oral and/or written information (the 'Big Idea'), namely the fact that the Opportunities were (a) an attractive and (b) available investment proposition; in respect of which (c) the Claimant provided a recipe of application while explaining the problems that existed and the solutions for them; thereby allowing the Defendants to see the potential thereof and use the same in the ACOF Fund."

- iii) Paragraph 3 says "[w]ithout prejudice to the generality of the foregoing, the Big Idea satisfied each of (a), (b) and (c) for the following reasons:" There is then a footnote which states: "By way of example only and without limitation, only a few explicit cross-references to the documents and/or introductions below are shown in bold."
- iv) Under paragraph 3 there are three main sub-paragraphs and a number of sub-sub-paragraphs. The main sub-paragraphs are headed "Why invest in Venezuela", "What to invest in, investment and recovery strategies", and "The fund and its terms".
- v) Paragraph 3 recites a number of facts, including some of the factors that an investor might take into account in deciding whether or not to invest in securities. An example is in paragraph 3(ii)(1):

"The Directors explained what bonds to look at (ISINs) in terms of bond features, such as coupon rates and maturities, as well as capital structure / credit maturity curves, given the themes of prescription and limitation, acceleration, Collective Action Clauses (CACs), cramdown, holdout, exit consent and choice of jurisdiction. These features individually and/or collectively, dictated the potential investment value of a bond."
- vi) Another example, which gives a flavour of the pleading may be found in sub-paragraph (i) under the heading "Why invest in Venezuela":

"The key factors underlying the attractiveness of the Opportunities, which included investing in Venezuelan government/corporate bonds (including PDVSA) and other Venezuelan corporates, based on Venezuela's fundamental wealth in resources and assets. The Directors explained the lack of US investors due to OFAC sanctions and the importance of sanction compliance and how to manage the relevant risks for non-US investors, including the difficulty of finding a custodian and clearing/settlement agent, who would accept the Venezuelan risk at the time."
- vii) There is then a section headed "The Detail", in which paragraph 4 states:

"Further or alternatively, the Claimant provided the Defendants with a great number of pieces of confidential information (which, taken together, form the single, composite, piece of confidential information identified above). Such confidential information is identified and detailed below."
- viii) There is then a list of documents running from a. to t., a heading "Introduction of parties" and two items of legal advice.
- ix) The documents, contacts and items of legal advice are then itemised. The pleading sets out various features or passages from the relevant documents,

which are relied upon by the claimant in support of its case that the information was confidential.

- x) It is a theme of this and other parts of the pleading that the words "without prejudice as to generality" appear a number of times. At the hearing before the Master counsel for the claimant accepted that the use of that phrase was inappropriate and should be deleted.

9. Paragraph 28 of the pleading states this:

"The ACOF Fund misuses the Confidential Information and/or Trade Secrets set out in Amended Confidential Annex 1. In particular it misuses:

- (a) the Big Idea;
- (b) further or alternatively, the Detail."

10. Paragraph 28A states:

"Further or alternatively, the material in the ACOF Fund Presentation misuses and/or reproduces the Confidential Information and/or Trade Secrets set out in Amended Confidential Annex 1. In particular it misuses:

- a. The Big Idea;
- b. Further or alternatively, the Detail.

(In respect of paragraphs 28 and 28A above, see Amended Confidential Annex 5 for further details)."

11. ACA5 does this:

- i) It starts by referring back to paragraph 28 of the APOC and sets out a number of respects in which it is alleged that the defendant or defendants misused the Big Idea.
- ii) Then as a separate pleading, it states the case in relation to misuse of the Detail - which is said to be further or in the alternative as follows:

"In pursuing and implementing the ACOF Fund, the Defendants also misused the Detail referred to in **Amended Confidential Annex 1**. The precise use made of the Detail in this context is presently unknown to the Claimant pending disclosure herein, but the Claimant will rely on the use of the Detail made by the Defendants in the ACOF Fund Presentation as evidencing that the same Detail will have been used in pursuing and implementing the ACOF Fund itself."

- iii) There is then a separate pleading in respect of paragraph 28A of the APOC, which again is broken down into allegations concerning the misuse of the Big Idea and misuse of the Detail.
- iv) In relation to the allegations concerning misuse of the Big Idea, in broad terms the claimant contends that the defendants used the information said to constitute the Big Idea in implementing and running the ACOF Fund as well as in producing the ACOF Fund Presentation.

The Master's decision

- 12. After setting out the background and the disputed pleadings, the Master summarised the legal principles concerning amendment and the pleading of claims for misuse of confidential information. She summarised the parties' submissions and then came to her conclusions.
- 13. As to paragraph 18 and ACA1, she concluded as follows. The pleading of the Big Idea was not intelligibly pleaded. The Big Idea in paragraph 2 was not properly identified. It was not clear how the matters set out in paragraph 3 related to the definition of the Big Idea. The pleading referred to both oral and written information but without giving particulars of any oral information. It was unclear how paragraph 2 related to paragraph 3, whether these were intended to make up the Big Idea or be particulars of it. The recipe of application within paragraph 2 was not properly identified or specified as no specific recipe was alleged. It was not possible to understand what it consisted of, nor was it possible to discern what combination of elements in the Detail made up the Big Idea.
- 14. The Master next concluded that the relationship between the Big Idea and the Detail was not clear. The particulars given in relation to each element of the Detail did not condescend to identifying which parts are said to be confidential. It would be extremely onerous for the defendants to answer ACA1 in full detail.
- 15. As to the misuse allegations, the Master decided that there was insufficient particularity to enable the defendants to understand the proposed case.
- 16. The Master drew these threads together at [62]-[63] and decided that insofar as they sought to define the confidential information, the draft amendments in ACA1 were insufficiently particularised or clear. She said that the pleading of some of the concepts used obscured their possible meaning, so that the defendants could not understand the case they had to meet. She said that the draft amended allegations of misuse did not amount to a case which the defendants could be expected to meet. She also said at [64] that the proposed amendments did not plead a claim which has real prospects of success.
- 17. The Master refused permission to appeal. On 5 August 2021 Zacaroli J ordered on the papers that the application for permission to appeal should be adjourned to a rolled-up hearing with the appeal to follow if permission was granted.

Legal principles

18. These were largely undisputed. Helpful guidance about the approach to amendment of pleadings was given by Pepperall J in *Essex County Council v UBB Waste (Essex) Limited* [2019] EWHC 819 (TCC) at [11]. There is no need to set it out here, but for present purposes I highlight that the core principle is that parties should be allowed to amend their statements of case to bring forward intelligible and apparently credible claims or defences where the balance of injustice to the applicant if the amendment is refused outweighs the injustice to the other party and to litigants in general if the amendment is permitted.
19. There was no suggestion that the present amendment was a late one.
20. In *Elite Property Holdings Ltd v Barclays Bank PLC* [2019] EWCA Civ 204, Asplin LJ explained at [41] that the appellants had to show that they had a real as opposed to a fanciful prospect of success which is more than merely arguable and carried some degree of conviction. She said this standard would not be met where the factual basis of the claim was fanciful or the claimant did not have material to support at least a prima facie case or the claim had pleaded insufficient facts. She went on at [42] to say that it is appropriate to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon.
21. If the amendment otherwise passes these requirements it may be appropriate to allow it, subject to the ability of the other party to request further information about it: see for example *Advanced Control Systems, Inc v Efacec Engenharia e Sistemas SA* [2021] EWHC 914 (TCC) at [56].
22. This is an appeal, not a hearing de novo. As the Court of Appeal explained in *The Law Debenture Trust Corporation (Channel Islands) v Lexington Insurance Company* [2001] EWCA Civ 1673 at [5(4)], the decision whether or not to grant an application for permission to amend involves the exercise of the court's discretion. The court will not interfere with the exercise of a discretion unless the judge erred in principle or was plainly wrong.
23. The principles concerning the substantive law of abuse of confidence include the following (see e.g. *CF Partners v Barclays Bank Plc* [2014] EWHC 3049 (Ch)):
 - i) While the basic attribute that must attach to information for it to be treated as confidential, is in inaccessibility, it is not necessary to show that no one else knew or had access to the information. A special collation or presentation of information, the individual components of which are not themselves or individually confidential may have the quality of confidence.
 - ii) Information of commercial value about a business opportunity may have the necessary quality of confidence. An idea may be capable of having that quality of confidence and the simplicity of an idea is not an obstacle: again, see *CF Partners*.
 - iii) The parties may by contract agree and identify specified information that is or is as between the parties to be treated as confidential or protected under the

terms of their agreement or they may simply agree that information may not be used whether or not otherwise it would have the quality of confidentiality.

24. It is well-known that claims for misuse of confidential information have to be pleaded with care and particularity. In *Ocular Sciences v Aspect Vision* [1997] RPC 289, Laddie J explained why pleadings in such cases need to be properly detailed and particularised. The information passed by one side to the other may be partly publicly available and partly confidential; the defendant to a claim, particularly one for an injunction, needs to know what is alleged so that it can prepare its case properly and also know what it can and cannot use without complaint by the claimant; and, further, any injunction sought must be capable of being framed by reference to the confidential information as properly defined in the pleadings. It is potentially oppressive to a defendant to allow very broad allegations of confidentiality and proceedings risk being unduly amorphous and prolonged if the information said to be confidential is not properly defined.
25. These principles and strictures have been applied many times. They were recently reaffirmed by the Court of Appeal in *Celgard, LLC v Shenzhen Senior Technology Material Co Ltd* [2020] EWCA Civ 1923 at [32] where Arnold LJ cited *Ocular Sciences*. He also said at [48] that he did not wish to diminish the importance of proper particulars being provided but observed that what amounts to proper particularisation must depend on the circumstances of individual cases and the stage that the proceedings have reached.

The grounds of appeal

26. These are rather over-long and repetitive, but the main points may be summarised as follows:
 - i) Ground 1 is that the Master erred in law in holding that the amendments lacked a real prospect of success. It is said that she misapplied the legal test or misunderstood it.
 - ii) Ground 2 is that the Master erred in law in her treatment of the draft amendments in circumstances where the defendants had already pleaded back to many of the matters which were the subject of the draft amendments.
 - iii) Ground 3 is that the Master erred in law in confusing the relevant test to determine whether to permit the draft amendments.
27. Under these broad heads there are then a number of particular complaints.
28. The grounds overlap with one another and it is more convenient to consider the three groups of proposed amendments, namely the pleading of the Big Idea, the pleading of the Detail and the allegations of misuse.

The Big Idea

29. I have already set out the terms of paragraph 2 of the proposed ACA1 and explained its relationship with paragraph 3 of that schedule.

30. Counsel for the claimant, who did not appear in the court below, submitted in outline that:
- i) The analysis of the confidential information as a Big Idea deriving from the Detail, echoed the pleading in *CF Partners*. It was a convenient way of expressing the composite effect of the whole corpus of confidential information.
 - ii) The structure of the pleading was clear and intelligible. Paragraph 2 defined the Big Idea and paragraph 3 explained the basis of it. That in turn was derived from the totality of the Detail.
 - iii) The recipe of application is intelligible. The Claimant explained to the defendants the potential problems of investing in Venezuelan debt securities and claims and the solutions for them. It explained for instance that there were problems with prescription under Venezuela bonds and how to address these problems. It explained what features to look out for in deciding whether and what to invest in. It explained how to structure a US sanction compliant fund.
 - iv) The Master erred in failing to accept that there was an intelligible case. She wrongly distinguished *CF Partners* on the basis that it was concerned with a single investment opportunity rather than a number of potential investments and that led her to the wrong conclusion about the current pleading.
 - v) The Master misunderstood the legal test, which is concerned essentially with the merits threshold. In the present case the pleading passes the merits threshold of a real case.
 - vi) Any want of particularity could be cured by answering a request for further information.
31. Counsel for the defendants submitted in outline that:
- i) This is an appeal. The appellate court must be satisfied that the Master was plainly wrong, even before giving permission to appeal.
 - ii) The Master followed the right test. A draft amendment must (inter alia) be intelligible in the sense of allowing the defendant to know properly the case it has to meet. This is particularly so in a case of confidential information for the reasons set out in *Ocular Sciences*.
 - iii) The pleading of the Big Idea is not intelligible. There is no specification of a recipe of application, a key feature of the claim. It is unclear how paragraphs 2 and 3 of ACA1 interrelate.
 - iv) The pleading under paragraph 3 refers to a number of features or facets of the investment decision and some potential issues that might arise, but does not say what special insight the claimant is said to have provided.
 - v) The Master applied the right test and was not misled by the discussion of *CF Partners*. In that case the claimant had explained what was special about

its insight and therefore confidential. The draft pleading in the present case does not do that.

32. I prefer the submissions of the defendants on this issue. The following points seem to me to be particularly important:
- i) I do not think the Master misunderstood or misapplied the legal test. She used the concept of a real prospect of success as shorthand to include all of the requirements for proposed amendment, including that it is intelligible and properly particularised as well as meeting the merits threshold.
 - ii) I consider the Master was entitled to conclude that the draft amendments do not adequately set out an intelligible and properly particularised case:
 - a) the starting point is that the pleading in paragraph 3 clearly includes a good deal of information that cannot sensibly be regarded as confidential at all. It lists various commonplace features of bonds such as their coupon, maturity and terms and the differences between a fiscal agent and trustee structure. This is well shown by paragraph 3(ii)(1) which I have already set out. The last sentence of that paragraph indeed appears self-evident. Any investor would no doubt take into account the features of bonds.
 - b) I do not think that in the way the matter is pleaded at the moment a realistic case of breach of confidence can be advanced simply on the basis that the claimant told the defendants to consider such features. It seems to me to be something any investor would do. For there to be an intelligible case of the kind found in *CF Partners*, the claimant would have had to provide some special insight or set of ideas which were not otherwise accessible to the defendants. That is perhaps hinted at in the opening words of paragraph 3(ii)(1) but it is not properly identified.
 - c) A similar comment may be made about paragraph 3(ii)(2) (see above) where it is said that "prescription" was explained, but next to nothing is said about any special insight that the claimant is said to have disclosed about this issue. I accept, of course, that a special insight might arise from a combination of features which are otherwise commonplace, but it seems to me that for there to be a proper case of breach of confidence something more is needed than an enumeration of the features of the securities.
 - d) In his persuasive oral presentation, counsel for the claimant said there was specific advice about the preference for fiscal agent bonds over trustee bonds and specific advice about making claims by a specific deadline in order to avoid problems of prescription. He gave these as examples of the recipe of application and said that these pieces of explanation or information were at least part of a special insight that was given. But that is not the way things are actually pleaded in paragraphs 2 or 3 of ACA1. I consider the Master was entitled to conclude that the draft fails properly to identify the so-called recipe of application.

- iii) I consider that the Master was also entitled to conclude that the pleading of paragraphs 2 and 3 was unclear for other reasons. Paragraph 3 says that the Big Idea satisfied each of the three specific elements of the Big Idea set out in paragraph 2 for the reasons given in paragraph 3. That is circular and more or less meaningless. An idea cannot satisfy its own elements. It may be that this is intended to say that paragraph 3 furnishes particulars of paragraph 2, but the pleading does not say that. Moreover, it starts with the words "Without prejudice to the generality".
 - iv) This also has to be read with the reference at the beginning of paragraph 2 to the Big Idea being a single, composite piece of oral and/or written information. There do not appear in fact to be any oral communications pleaded, although one of the documents in the section concerning the Detail refers to a meeting. The draft seems to me to seek to keep everything open rather than providing a properly particularised case.
 - v) I do not think that the pleading of the Big Idea is saved by the few cross-references there are to the Detail. Paragraph 1 pleads that the Big Idea is further or alternative to the Detail, so the factual basis of the Big Idea may be intended to be broader than the Detail, and that view is supported by footnote 1, which does not tie paragraph 3 to the Detail. Moreover, and just as importantly, the reader cannot spell out what is meant by the recipe of application from the descriptive passages set out in the Detail.
 - vi) I do not accept the submission of the claimant that any shortcomings in the pleading could be cured by answering requests for further information. The problem identified by the Master was essentially one of intelligibility rather than particularity.
 - vii) The defendants have not sought to argue that the claimant would not be able in principle to seek to produce a further draft amendment seeking to set out the composite effect of the Detail. Indeed, their counsel repeatedly emphasised that point during the appeal. The Master was entitled to conclude in the exercise of her discretion that the current pleading was inadequate, and should not be allowed but was not thereby shutting the claimants out of seeking in the future to plead an adequate case.
33. Overall, in relation to this issue, I am satisfied that permission to appeal should be refused, as I do not consider there to be a reasonably arguable case that the Master erred in the exercise of her discretion.

The Detail

34. The second part of the ACA1 sets out the Detail. The Master dealt with this part of the argument very briefly. She said that the claimant had failed to identify the confidential parts of the documents and that it was unfair for the defendants to be expected to plead back to it.
35. The claimant submitted in outline that:

- i) The Master had ignored the important procedural history. Some of the documents already pleaded (indeed simply listed) in the existing CA1, are repeated in ACA1. The defendants have already pleaded back to them. They did so despite the lack of any further specification in the pleading. Further documents have been added to the list. Some of the added documents are simply further versions or iterations of those already pleaded, and there is no reason why the defendants should not be able to plead back to those.
- ii) The draft amendments also identify specific passages or features of the document said to contain the confidential information. The claimant offered in the court below to delete the phrase "without prejudice as to generality" where it appears in the draft. With that deletion, the amendments would have the effect of specifying features or passages said to be confidential. Any doubt about this can be cured by the defendants asking for further information.
- iii) In any event, the claimant's case is that the entirety of the listed documents were confidential, and that is a case it is entitled to bring.
- iv) The Master erred, and clearly erred, in not addressing this aspect separately from her conclusion in relation to the Big Idea. It appears the Master simply addressed this second point as if it followed on from the first.

36. The defendants submitted in outline that:

- i) The Master was entitled to reach the conclusion she did in the exercise of her discretion. She did not go wrong and certainly did not go clearly wrong.
- ii) The draft pleading did not properly specify the parts of the documents said to be confidential, even now.
- iii) Nothing should be made of the fact that the defendants had already pleaded to the documents listed in CA1. The existing case was that there had been misuse of confidential information by the defendants in producing a single document, namely the ACOF Presentation. That case is now sought to be widened by including an allegation that the defendants also used the information in implementing the ACOF fund. Previously therefore there was a bottleneck with the only relevant parts of the confidential information being those which (on the claimant's case) could have been used in producing the ACOF presentation.
- iv) In any event, there is a difference between the position where an original pleading is presented and where there is a proposed draft amendment. In the latter case the pleading is properly to be held to a higher standard of particularity.

37. I prefer the claimant's submissions. The following points appear to me to be particularly significant:

- i) The proposed amendments do two things: they introduce further documents, some of which are merely iterations of documents already contained in CA1; and they specify particular parts or features of the documents as confidential.

- ii) I consider it material that the defendants have already pleaded in detail to the existing listed documents. I do not think that the expansion of the pleading to cover other documents would be unduly onerous. It seems to me that the defendants' bottleneck argument is overstated and unpersuasive. They expressly pleaded at various points of their defence that they had not used the confidential information, either in the production of the ACOF presentation or, more generally, in setting up or running the fund. That must have been based on a careful consideration of the allegations and the documents already referred to in CA1.
 - iii) The draft amended ACA1 now specifies certain passages or features of the documents said to be confidential. That part of the pleading can only be helpful to the defendants, as it specifies the material said specifically to be confidential. The claimant offered below and here to delete those parts of the pleading which used the phrase "without prejudice as to generality" or similar phrases. It also seems to me that the claimant could and should be required to specify as a condition of any permission to amend whether there are any other specific passages in those documents that they rely on as containing specific confidential information. (That would be in the alternative to their overall contention that the documents themselves were confidential.) The draft pleading, together with any information provided under this condition, will thus serve the helpful purpose of identifying those parts of the document said specifically to contain confidential information. That is an improvement on the existing unamended CA1.
 - iv) I consider that, in contrast to my conclusions about the Big Idea, this part of the pleading is intelligible. If there is any further shortcoming in particularity, that can be addressed by a request for further information.
 - v) I do not consider that the Master properly considered this specific part of the pleading properly. It seems to me that she erred in taking rather a sweeping view of it, which was based on her conclusions about the definition of the Big Idea and did not go on to give independent and separate reasons in respect of this part of the draft pleading.
38. I therefore consider that I should exercise my own discretion and, in the exercise of that discretion, that permission to amend should be given (though on the condition that I have already set out). I therefore give permission to appeal on this point and allow this part of the appeal on the basis (a) that all references to the pleading being "without prejudice to generality" are deleted and (b) that the claimant shall confirm within a short period that no other passages are relied on as containing specific items of confidential information. The second condition is not intended to curtail or prevent any separate request by the defendants for further information.

Misuse

- 39. The unamended claim is that the defendants used the confidential information in producing the ACOF Presentation. The amendments seek in the alternative to say that the information was also misused in pursuing and implementing the ACOF fund.
- 40. The claimant submitted in outline that:

- i) This is a relatively small change in the case. The ACOF presentation was prepared as part of the setting up and implementation of the funds. It did not have any other purpose.
 - ii) Paragraph 27 of the POC already shows that that link between the preparation of the ACOF presentation and the setting up and the implementation of the fund were intended to be advanced as part of the claimant's case.
 - iii) The Master's reason for refusing permission was that it would be onerous for the defendants to have to plead to these allegations, but that ignores the history. The defendants have already pleaded that they did not use any confidential information of the claimant in setting up or running the ACOF fund. They say that, instead, they relied on publicly available information and did not trespass on any confidentiality of information provided by the claimant.
 - iv) This is an early stage in the case before any disclosure and ACA5 sets out the best particulars currently available.
 - v) The Master's decision in this respect was plainly wrong.
41. The defendants submitted in outline that:
- i) This is an important change in the case; the claimant has not previously pleaded this broader case.
 - ii) The problems with ACA1 bleed into ACA5, which is based on the same dichotomy between the Big Idea and the Detail; the allegations in relation to the former are not intelligible for the reasons already given; the allegations in relation to the Detail are broad and unparticularised.
 - iii) The Master did not err in the exercise of her discretion, and certainly was not plainly wrong.
42. The starting point in relation to this issue is to note that the Master's decision largely followed from her conclusions in relation to the first and second issues. She was justified in making that link as ACA5 is closely tied to ACA1. Indeed it reflects ACA1, and to the extent that she rejected the application to amend ACA1, there were good reasons for rejecting the amendments in ACA5. But, given my earlier conclusions in relation to the Detail set out in ACA1, it follows that further analysis is required.
43. I consider that insofar as the claimant seeks in paragraphs 28 and 28A and ACA5 to advance the case based on the Big Idea the Master was correct. The pleading is indeed derivative from ACA1, and for the reasons I already given, I do not consider that the existing proposed draft pleads a properly intelligible case.
44. But there is separately the new allegation based on the Detail in ACA1. I agree with the contention of counsel for the claimant that there is an obvious existing connection between the allegations that the confidential information was used in producing the presentation and the allegations that it was used in the implementation of the fund.

The presentation was prepared for that purpose. The new allegations are of course somewhat wider, but they were anticipated. The defendants have already pleaded that the confidential information was not used in setting up the fund, as well as addressing the specific allegations about the preparation of the presentation. These parts of the defence must have been pleaded after careful examination of the facts. So I do not think that it would be unduly onerous for the defendants to be required to plead to this allegation.

45. There is a further point here as to particularity. As I have explained, the draft amended pleading in ACA5 in relation to the Detail does not in fact clearly go beyond the specific allegation that the Detail was used by the defendants in preparing the ACOF Fund presentation. The pleader reserves the right to plead further in the future. At the moment it is, though, arguably tied to the preparation of the ACOF Fund presentation. The claimant says in the pleading that this is because the case is being advanced before disclosure. It seems to me that the pleading should state in terms that the claimant is providing the particulars of misuse it can at this stage and any permission to amend ACA5 at this stage should be on that basis. If the claimant later wishes to provide further particulars of misuse of the Detail, then it seems to me that it will be required to provide those further particulars in the usual way. It may be that will require a further amendment, but that is to be decided later. It seems to me that that is another reason why pleading back to ACA5 at the moment would not be unduly onerous.
46. Overall, I consider on this point that the Master erred to the extent that she refused to allow the allegations of misuse in relation to the Detail.
47. There is a further point. The Detail in ACA1 goes beyond the existing CA1 (by adding further documents), and it seems to me that the claimant should be allowed to rely on that further Detail in relation to its (existing) allegations concerning the production of the presentation. The Master did not, as I read it, give any reasons for rejecting that particular contention.
48. In my judgment, the Master should have addressed the Big Idea and the Detail separately when considering paragraphs 28 and 28A and ACA5 and erred in failing to do so. I shall give permission to appeal and allow the appeal in that respect. In the exercise of my discretion, I shall give permission for those parts of ACA5 as concern the Detail and the same goes for paragraphs 28 and 28A, however, subject to those being redrafted, to omit all references to the Big Idea and also to state that the particulars of misuse which are relied upon at present are those set out.

[Further Argument]

49. I now turn to the question of costs. As is commonplace, there is a stark division between the parties, with each party seeking some proportion of its costs from the other party. Counsel for the claimant submits that the claimant was successful on the appeal. He says that there are effectively three heads, as set out in my judgment, and that it succeeded on one of them and at least on part of another. The claimant says that it should have 50% of its costs of the appeal on summary basis.
50. The defendants say that it is not appropriate to subdivide matters in that way. The pleading that has emerged as a result of my decision is nothing like the pleading that

the claimant sought. Had the claimant simply put in some further detail in Annex 1 things might well have looked very different, but that was not the way that matters were presented.

51. Counsel for the claimant says in response that the claimant had to come and seek all of the amendments because it was only during the hearing that counsel for the defendants said that it may be possible for the claimant to return with a further attempted amendment.
52. It seems to me that this is a case where it is not easy to discern which is the successful party. Nor do I think it is entirely straightforward to divide matters up in the way that the claimant suggests. A substantial amendment was sought in respect of the Big Idea, and most of the changes to ACA5 piggy-backed off the concept of the Big Idea. On the other hand, the claimant has succeeded in expanding the list of documents it relies on in ACA1 and has also succeeded in pleading more specifically some of the matters that it relies on, and has been able to plead a potentially broader case in relation to misuse, albeit at the moment it does appear to me that that is still materially on the pleadings restricted to the preparation of the presentation because in ACA5 the parts of the pleading based on the Detail arguably do not extend beyond that.
53. It seems to me that the fair order in this appeal is that the costs should be costs in the case. I do not think it is right that either party should be required in all of the circumstances to pay the costs of the other.

[Further Argument]

54. I now deal with the question of the costs in the court below. The Master ordered that the claimant should pay the defendants their costs and ordered summary assessment of them at £60,000. The claimant says that, in the light of my decision, that order should be set aside and replaced by an order that the costs be in the case and that the amount paid on summary assessment should be repaid.
55. The defendants say that the matter should be left to the trial judge, but it seems to me that that cannot be right because if the order of the Master remains untouched, then that part of the costs will not be before the trial judge; they will already have been dealt with by an order of the court.
56. I think that the claimant is right in this respect. It seems to me that the outcome of the appeal is that on the points which were in contention the claimant would have been successful in obtaining some of the permission to make some of the amendments which it was seeking but not all of them. For the same reasons as I have given in relation to the cost of appeal, it seems to me that the fair order in those circumstances in the costs below is that the costs of the application should be costs in the case. It will therefore be for the defendants to repay the amount which they have received in respect of the summary assessment.
