Neutral Citation Number: [2024] EWHC 172 (Ch)

Case No: BL-2021-001958

**IN THE HIGH COURT OF JUSTICE**
**Business and Property Courts of England and Wales**
**Business List (ChD)**

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 5 February 2024

**Before** :

**MASTER PESTER**

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**Between :**

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| **PANKIM KUMAR PATEL** | **Claimant** |
| **- and -** | |
| **(1) MINERVA SERVICES DELAWARE, INC.** | **Defendants** |
| **(2) PAUL BAXENDALE-WALKER** | |
| **(3) MARK BARRY SLATER** | |

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**PATRICK HARTY** (instructed by **Bark & Co Solicitors Limited**) for the Claimant/Applicant
**ROGER STEWART KC and CHRISTOPHER LOXTON** (instructed by **Wordley Partnership**) for the First Defendant
**DAVID LEWIS KC and WILLIAM SKJOTT** (instructed by **Morrison Solicitors LLP**) for the Second and Third Defendants

Hearing date: 30 October 2023

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# APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties or their representatives by email. The date and time for hand-down is deemed to be 4pm on 5 February 2024.

**MASTER PESTER:**

*Introduction*

1. This is my judgment on the Claimant's application, dated 4 May 2023, for permission to amend his Claim Form and Points of Claim. The proceedings were begun by Part 8 Claim Form, which explains the reference to Points of Claim.

2. The Claimant, Pankim Patel, is represented by solicitors and Junior Counsel. The First Defendant, Minerva Services Delaware, Inc ("MSD") is represented by solicitors and Leading and Junior Counsel. The Second and Third Defendants, Paul Baxendale-Walker and Mark Barry Slater, are separately represented, again by solicitors and both Leading and Junior Counsel.

3. The three Defendants all oppose the application to amend. MSD is a company registered in the US state of Delaware. MSD began arbitration proceedings against Mr Patel in Delaware in August 2021 ("the Delaware Arbitration"), and legal proceedings against Mr Patel in Delaware in January 2022 ("the Delaware Proceedings"). Both the Delaware Arbitration and the Delaware Proceedings were discontinued. Mr Baxendale-Walker was formerly a barrister and then a solicitor specialising in tax law, and latterly a pornographer: see *Sargespace Limited v Eustace* [2013] EWHC 2944 QB), at [1]. He was adjudged bankrupt in 2018, and a bankruptcy restriction order made against him: *Official Receiver v Baxendale-Waleker* [2020] EWHC 195 (Ch). On Mr Patel's case, at least, he remains able to access large sums of money. Mr Slater is the sole director and shareholder of Bay Mining Consultants Ltd ("Bay"). Bay was the claimant in proceedings brought against Mr Patel in the High Court in April 2021, but discontinued in May 2021 ("the High Court Proceedings").

4. Mr Patel brings a claim for both unlawful and lawful means conspiracy. The unlawful means relied on include causing proceedings to be commenced against Mr Patel by one or more entities controlled by Mr Baxendale-Walker and/or Mr Slater, not for any legitimate purpose but to put pressure on Mr Patel, and to give or rely on dishonest evidence. In addition, Mr Patel now says that the unlawful means include relying on a forged document in the proceedings. Mr Patel's case is that both Bay and MSD are companies controlled by Mr Baxendale-Walker and Mr Slater.

5. At the previous hearing, on MSD's application to strike out the claim against it, I was concerned as to whether Mr Patel had provided sufficient particulars to found a claim in unlawful means conspiracy. After all, in a claim for unlawful means conspiracy, the claimant must prove each unlawful act relied upon as a freestanding wrong and that it was carried out pursuant to the conspiracy: *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 71, at [132]. The point taken by MSD was that commencing litigation is neither a crime, nor a tort, nor a breach of statute, nor breach of contract, all acts which might constitute unlawful means. Mr Patel's Counsel responded that, in certain circumstances, commencing litigation can amount to a tort, either the tort of abuse of process, or malicious prosecution. Rather than accede to MSD's strike out application, I took the view that it was preferable to afford Mr Patel a further opportunity to clarify his pleading.

6. The proposed amendments to the Points of Claim now expressly plead that, in commencing the High Court Proceedings, Bay committed the torts of abuse of process and malicious prosecution (paragraph 17) and that, in commencing the Delaware Arbitration and the Delaware Proceedings, MSD committed the torts of abuse of process and malicious prosecution (paragraph 18(c)), and that this was done

pursuant to a conspiracy and combination between Mr Baxendale-Walker, Mr Slater and Bay. Obviously, the Delaware Arbitration and the Delaware Proceedings relate to events abroad. The central ground of opposition advanced by the Defendants to the application to amend is their submission that the tort of malicious prosecution does not extend to arbitrations generally, nor to foreign proceedings. The tort of abuse of process is likewise said to be limited to proceedings before, and abuses of the process of, this Court, and this court alone, and that this is a point which can and should be determined on an application to amend.

*Background*

7. The background to this application is certainly unusual, and rather involved. It is not necessary in this judgment to set out the full background. There has already been one appeal, by MSD, to the Court of Appeal, which was dismissed. A fuller background is set out in my earlier judgment in these proceedings, reported at [2023] EWHC 856 (Ch), as well as the judgments of Mr Lance Ashworth KC, sitting as a deputy High Court Judge, reported at [2022] EWHC 970 (Ch), and of the Court of Appeal, reported at [2023] EWCA Civ 118.

8. In summary:

(1) In April 2021, Bay commenced the High Court proceedings against Mr Patel, and two others. Bay's position was that it was the assignee of the benefits of a purported Deed of Fiduciary Declaration from 2008 ("the 2008 Deed") and a further Deed of Fiduciary Declaration from 2021 ("the 2021 Deed"), under which it claimed that Mr Patel held in excess of £11 million on trust for the principal under the Deeds. Mr Patel says that before starting the High Court Proceedings, on or about 25 March 2021, Mr Baxendale-Walker demanded that Mr Patel pay

over the monies allegedly held as trustee for Minerva Services Limited Belize ("MSL Belize") to a company nominated by MSL Belize. (This is admitted by Mr Baxendale-Walker in his Defence, paragraph 10.8.).

(2) In a judgment reported at [2021] EWHC 1304 (QB), Tipples J refused to grant the freezing injunction which Bay had sought against Mr Patel. In her judgment, Tipples J held that Mr Baxendale-Walker was "… clearly involved in the background to this case, if not the person who is driving it": see at [30]. The proceedings brought by Bay were discontinued on 6 May 2021.

(3) MSD was then incorporated in Delaware in June 2021. The rights under the various Deed were then purportedly assigned to MSD which then commenced the Delaware Arbitration. It is common ground that the arbitration was, at least in substance, in respect of the same sums claimed to have been advanced to Mr Patel under or arising out of or in connection with the 2008 Deed and the 2021 Deed. Mr Patel challenged the jurisdiction of the arbitrator in Delaware on the ground that there was no enforceable arbitration agreement.

(4) Before the arbitrator had given any ruling, Mr Patel commenced these current proceedings, by way of a Part 8 claim dated 28 October 2021, seeking an anti-suit injunction preventing MSD, Mr Baxendale-Walker and Mr Slater from taking any further steps in an arbitration in Delaware, or commencing or pursuing any other claims or proceedings in any other jurisdiction, other than England or Wales arising out of or in connection with the 2008 Deed. The basis for Mr Patel's anti-suit injunction was that the Delaware Arbitration was vexatious and oppressive and an abuse of the Court's process.

(5) On 27 December 2021, the arbitrator held that, as there was a dispute in respect of his jurisdiction, he could not proceed.

(6) MSD then obtained the Delaware equivalent of freezing relief (referred to as "a status quo order") from the Chancery Court in Delaware on 27 January 2022, by a without notice application ("the Delaware Proceedings"). The relief was discharged by order dated 7 February 2022, and the Delaware Proceedings were discontinued in April 2022.

(7) By order dated 6 April 2022 (but sealed on 9 May 2022), Mr Ashworth granted Mr Patel an anti-suit injunction, and also refused to grant MSD freezing and proprietary injunctions. Among other things, directions were given for the exchange of statements of case. One matter which had troubled Mr Ashworth at an earlier hearing in March 2022 was that, in order to obtain an anti-suit injunction in a case not involving a contract with an exclusive jurisdiction clause in favour of England and Wales, English law requires the existence of proceedings in this country which needed to be protected by the grant of a restraining order. Initially there were no such proceedings. In response to this point (a point which had not been taken by any of the Defendants), Mr Patel filed Points of Claim by which he (a) sought a negative declaration that he is not liable to MSD, and that he does not hold any monies on trust for MSD (b) expressly pleads that he did not sign either the 2008 Deed or the 2021 Deed and (c) brings a claim for unlawful means conspiracy against all three Defendants, seeking both the anti-suit injunction and damages.

(8) On 9 May 2022, MSD filed its Defence and Counterclaim, by which MSD seeks payment of £9,477,178. In June 2022, Mr Patel filed his Reply and Defence to

Counterclaim, which was then followed by MSD's Reply to Defence to Counterclaim, also in June 2022. These statements of case are lengthy and detailed, raising numerous allegations and counter-allegations.

(9) In September 2022, MSD applied to strike out Mr Patel's conspiracy claim. This was followed in October 2022 by MSD's application to strike out Mr Patel's Defence to Counterclaim, alternatively, for summary judgment.

(10) On 10 February 2023, the Court of Appeal dismissed MSD's appeal against Mr Ashworth's refusal to grant freezing relief (the lead judgment given by Asplin LJ, with Bean and Baker LLJ concurring).

(11) Over two days in February 2023, I heard MSD's strike out/summary judgment applications. Neither Mr Baxendale-Walker nor Mr Slater were involved in those applications. In a judgment delivered on 10 March 2023, I dismissed MSD's applications, save in respect of that part of the application that there was no actionable conspiracy. This was stood over, pending any application by Mr Patel for permission to amend. There has been no appeal against that decision. Counsel for Mr Baxendale-Walker and Mr Slater attended the hand-down of the judgment.

9. Mr Patel produced draft Amended Points of Claim on 24 March 2023 ("the APOC"), and sought the Defendants' consent to the amendments on the usual terms. On 31 March 2023, all three Defendants indicated that they opposed the amendments. Mr Patel then applied for permission to amend. In support of his application, Mr Patel relies on the eighth witness statement of his solicitor, Riz Majid, dated 4 May 2023.

10. None of the Defendants has filed any evidence in opposition to the application to amend, although they could of course have done so. MSD's solicitors sent a detailed

letter, dated 9 June 2023, setting out the objections to the various amendments in the APOC. Mr Baxendale-Walker and Mr Slater rely on a document, also dated 9 June 2023, headed "Grounds of Objection to Claimant's Proposed Amendments".

11. In reply, Mr Patel filed a further witness statement from his solicitor, Mr Majid's ninth statement, dated 16 October 2023, responding to the objections raised by the Defendants. Mr Majid's ninth statement cross-refers to earlier statements filed in the proceedings, specifically to his first, fifth and seventh statements. Mr Patel's present application to amend is not being made in a vacuum. The parties have already adduced a very large number of statements and underlying exhibited material. I set out the material which was relied on before me at the earlier hearing at [26] – [32] of my earlier judgment.

12. The Defendants, to various degrees, complain about the references in the APOC to material set out in previous witness statements served by Mr Majid on behalf of Mr Patel. However, in the circumstances, it seems to me unrealistic for the parties to ignore what has previously been said in witness statements and accompanying exhibits filed by both sides.

*Applications to amend – the Legal principles*

13. The court has a broad discretion to grant permission to amend a statement of case pursuant to CPR Part 17, r. 17.1(2). I was referred to a large number of authorities, although the fundamental principles did not seem to be in dispute.

14. First, on an application to amend, a claimant must show that the claims made have a real, as opposed to a fanciful prospect of success, which is one that is more than merely arguable: *Elite Property Holdings Ltd v Barclays bank plc* [2019] EWCA Civ

204, at [41]. Further, the pleading must be coherent and properly particularised: *Elite Property Holdings*, at [42]. In determining whether a claimant has a real prospect of success, the Court applies the well-known summary judgment test, as set out in *Easy Air Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch), per Lewison J, at [15]; and see *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33, at [17]. On an application to amend, it is never appropriate to conduct a mini-trial.

15. Second, the claims must be recognisable and maintainable as the law currently stands, and cannot be made in the hope that the Court of Appeal or Supreme Court may develop the law subsequently: *Mandrake Holdings Limtied v Countrywide Assured Group plc* [2005] EWC 311 (Ch). However, it has been said that "it is inappropriate to strike out a claim in an area of developing jurisprudence. In such areas, decisions should be based upon actual findings of fact …": *Partco Group Ltd v Wragg* [2002] EWCA Civ 594, at [28], cited with approval by Floyd LJ in *TFL Management Services Ltd v Lloyds TSB Bank plc* [2013] EWCA Civ 1415, at [27].

16. Third, statements of case are required to plead the facts relied on to formulate the cause of action, not the evidence which will be relied on at trial to prove those facts: see for example *Tejani v Fitzroy Place Residential Ltd* [2020] EWHC 1956 (TCC), at [22].

17. Fourth, amendments will not be allowed where the allegations are speculation or pure invention: *Clark v Marlborough Fine Art (London) Ltd* [2002] 1 WLR 1731 (Ch). The claim must carry a degree of conviction and be supported by evidence which establishes a factual basis which meets the merits test: *Sayn-Wittgenstein-Sayn v HM Juan Carlos Alfonso Victor Maria de Borbon y Borbon* [2022] EWCA Civ 1595, at [65].

18. Fifth, however, while claimants are not entitled to embark on speculative cases in the hope that disclosure will throw up something useful, the inability to make a full case without disclosure is not a bar to starting the litigation in the first place. Unless the prospects of getting disclosure are "fanciful", the claimant is generally entitled to maintain its case: see *Gulati v MGN Ltd* [2013] EWHC 3392 (Ch), at [7] – [9].

19. Sixth, Mr Patel referred me to the following statement of Lord Hope in *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1, who said this:

> *"It would only be right to strike out the whole of the claim if it could be said of every part of it that it has no real prospect of succeeding. ... Conversely, I consider that if one part of the claim is to go to trial it would be unreasonable to divide the history up and strike out other parts of it."*

Despite the high authority of the statement, I approach it with a degree of caution. *Three Rivers* was decided before the introduction of the Civil Procedure Rules, and even though that particular passage has been followed subsequently, nowadays the Court is expected to subject statements of case to greater scrutiny. Even if one part of the claim must go to trial in any event, the Court can and often should strike out other parts, provided that those other parts truly have no real prospect of succeeding.

*The torts of malicious prosecution and abuse of process*

20. The tort of malicious prosecution has evolved in the 21st century. In *Gregory v Portsmouth City Council* [2000] 1 AC 419, the House of Lords re-affirmed that, in England and Wales, the tort is confined to the malicious institution of criminal prosecutions and certain civil claims which constitute "special cases of abuse of legal process". Examples of the limited category of civil claims which could give rise to a claim were the malicious presentation of a winding up petition order or bankruptcy petition, maliciously procuring a bench warrant or search warrant, and the malicious

arrest of a ship. Lord Steyn explained that the common feature of such claims was that the very institution of the proceedings resting on an *ex parte* legal process may cause immediate and irreversible damage to the claimant.

21. However, a few years later, the majority of the Privy Council in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17; [2014] AC 366, and then a majority of the Supreme Court in *Willers v Joyce* [2016] UKSC 43; [2018] AC 779, held that there was in fact a general tort of malicious prosecution applying to both criminal and civil proceedings. Both cases were decided by bare majorities, *Crawford Adjusters* by a 3-2 decision, and *Willers v Joyce* by a 5-4 decision of the specially convened panel of nine justice. In *Willers v Joyce*, the claimant, Mr Willers, had been the subject of proceedings for alleged breaches of contractual and fiduciary duties to a company, Langstone Leisure Limited ("Langstone"), of which he was the director, by causing it to incur the costs of proceedings which were instituted but later abandoned. Mr Willers brought his claim in malicious prosecution on the basis that the defendant, Albert Gubay, had controlled Langstone and had instructed him to bring the discontinued proceedings; and that Mr Willers had suffered damage to his health, reputation and earnings, and as well as suffering a loss in that his legal expenses in defending the claim were higher than the amount recovered through a costs order. The whole claim was permitted to go to trial, the majority of the Supreme Court concluding that it would be unjust if someone who had been injured by the malicious prosecution of legal proceedings could not be compensated for the injury that had been injuriously caused.

22. It is now clear that in an action for malicious prosecution, the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in

motion against him by the defendant on a criminal charge (and now, via civil proceedings); secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious; and fifthly, as a result of the proceedings, the claimant has suffered loss which sounds in damages: see per Rose J in *Willers v Joyce* [2018] EWHC 3424, at [187]. The onus of proving every one of those elements is on the claimant. I note that, after taking the case all the way to the Supreme Court to establish the general availability of the tort of malicious prosecution for civil proceedings, Mr Willers's action failed. Rose J held that, on the facts, Mr Gubay could not be regarded as the prosecutor of the civil action, there was clear reasonable and probable cause for the action, and it had not been established that Mr Gubay had in any event been motivated by malice. (A further irony is that, by the time the matter had come to trial, Mr Gubay had died, so the claim was being defended by the executors of his estate.)

23. There is another tort, usually referred to as abuse of process, which is distinct from the tort of malicious prosecution. In *Crawford Adjusters*, Lord Wilson said that:

> *"It is hard not to regard abuse of process as a tort distinct from malicious prosecution if only because, apart from the need to establish a purpose not within the scope of the action (ie a "collateral" or, more helpfully, an "improper" purpose), abuse of process requires neither that the action should have been brought without reasonable cause nor that it should have terminated in favour of the alleged victim: Tindal CJ said so in the Grainger case itself, at p 221, and it has never been gainsaid. Nevertheless the two torts sprang from the same tree and one would not expect issues common to them both, such as whether they enable recovery for economic loss, to be resolved differently."* (at [62])

However, I observe that in *Crawford Adjusters*, the claim for abuse of process failed, whereas the claim for malicious prosecution succeeded. The two torts may have sprung from the same tree, but they remain distinct, and on the present state of the authorities, they have not been assimilated.

24. It has thus long been established, at least since *Grainger v Hill* (1838) 4 Bing NC 212; 132 ER 769 (the authority usually seen as the foundation stone of the tort), that a legal process, not itself devoid of foundation, may be maliciously employed for some collateral object of extortion or oppression, and in such cases the injured party may have a claim, although the proceedings of which he complains may not have been determined in his favour. As Lord Wilson explained, in *Crawford Adjusters* again:

> *"What is an improper purpose? A helpful metaphor suggested by Isaacs J in the High Court of Australia in Varawa v Howard Smith Co Ltd (1911) 13 CLR 35, 91, is that of a stalking horse:*
>
> > *'If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim on which the court is asked to adjudicate they are regarded as an abuse of process for this purpose …'*
>
> *The metaphor aids resolution of the conundrum raised by the example of the claimant who intends that the result of the action will be the economic downfall of the defendant who may be a business rival or just an enemy. If the claimant's intention is that the result of the victory in the action will be the defendant's downfall, then his purpose is not improper: for it is nothing other than to achieve victory in the action, with all such consequences as may flow from it. If, on the other hand, his intention is to secure the defendant's downfall – or some other disadvantage to the defendant or advantage to himself – by use of the proceedings other than for the purpose for which they are designed, then his purpose is improper. …" (at [63].*

25. There has recently been useful discussion in *Kings Security Systems Limited v King* [2021] EWHC 325 (Ch), where Andrew Lennon KC, sitting as a High Court Judge, summarised the present state of the law, at [228]. In particular, I note there that Mr Lennon, in his summary of the ingredients of the tort, indicated that "… the bringing of legal proceedings for the purpose of achieving the natural consequences of the litigation, such as the defendant's financial ruin, is not an improper purpose."

*Outline submissions of the parties*

26. On behalf of Mr Patel, it was stressed that "the basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable the party to properly answer it … Pleadings are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to an end, and that end is to give each party a fair hearing …": see *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 45 Con LR 1 at [45]. It was said that overall the amendments were clearly reasonably arguable, and that the Defendants' opposition to the proposed amendments was either an abuse, in that it related to points which had been raised at the earlier hearing before me, and rejected, or which could have been so raised, or were impermissible attempts to turn an application to amend into a "mini-trial" on the documents.

27. The Defendants for their part complained that Mr Patel had already had four attempts to plead a viable case. The first was when Mr Patel commenced the proceedings by Part 8 Claim Form, seeking an injunction without any underlying proceedings in this jurisdiction. In May 2022, Mr Patel produced his Points of Claim. In March 2023, at the hand-down of my earlier judgment, Mr Patel produced a further draft. These were then further refined when the formal application to amend was made in May 2023. In summary, the Defendants say that the fourth iteration remains "manifestly deficient".

28. Whilst the Defendants are challenging nearly every proposed amendment, their core complaint, it seems to me, is that neither of the torts, of malicious prosecution and abuse of process, can apply to arbitral proceedings, nor to foreign proceedings. An arbitration is not a legal process or one brought before a tribunal clothed in judicial authority; and malicious prosecution does not extend to civil proceedings commenced in a foreign state as the same does not involve the coercive power of this State:

paragraph 23 of the skeleton argument filed on behalf of Mr Baxendale-Walker and Mr Slater. It is then said, by parity of reasoning, that the same arguments must also apply in relation to abuse of process: paragraph 55 of the skeleton argument filed on behalf of Mr Baxendale-Walker and Mr Slater. MSD makes substantially the same submissions.

29. All the Defendants thus raise what is really a question of law. As Lewison J said in *Easy Air v Opal Telecom*, at [15], if "the applicant's case is bad in law, the sooner that is determined, the better."

*Analysis and discussion*

30. This is a claim for unlawful means conspiracy. In terms of what must be pleaded and proved, there is no need for an express agreement whether formal or informal. It suffices if two or more persons deliberately but tacitly combine to a common end. The parties must be sufficiently aware of the surrounding circumstances and share the same object to have a sufficiently similar objective before it can be properly inferred that they acted in combination: *Kuwait Oil Tanker*, at [111]. See also the further points summarised in *Alesco Risk Management Services v Bishopsgate* [2019] EWHC 2839 (QB), at [367] – [376]. In particular, the defendant does not need to be the one who takes the relevant action (that is, the unlawful means) provided that they are a party to the combination: *Alesco Risk Management*, at [373].

31. The most significant part of the proposed amendments is found at paragraphs 16 – 18. I propose to consider these amendments first. The core of Mr Patel's claim, in the proposed amended form, runs as follows:

(1) The proposed amendments at paragraph 16(b)(i) and (iii) allege that that the conspirators (Mr Baxendale-Walker, Mr Slater and, originally, Bay) caused proceedings to be commenced against Mr Patel not for any legitimate purpose, but "for a predominant purpose not of enabling the party bringing the claim to recover funds or otherwise receive any benefit from the litigation but rather to put pressure on Mr Patel in order to cause him to make a payment to or for the benefit of Mr Baxendale-Walker …". (The proceedings are defined as being the High Court Proceedings brought by Bay in 2021, as well as the Delaware Arbitration and the Delaware Proceedings: see paragraph 15.)

(2) Paragraph 16A then provides particulars of the primary facts on which Mr Patel relies to allege that Mr Baxendale-Walker, Mr Slater and Bay (or in the alternative, any two or more together) knew that there was no reasonable or probable basis for the litigation.

(3) Paragraphs 16B and 16C provide particulars of the ulterior motive and purpose for which the proceedings were brought.

(4) Paragraph 16D sets out the basis for the allegation that Mr Baxendale-Walker and/or Mr Slater forged the 2021 Deed. I note here that, in the APOC, the unlawful means relied on includes not only the tort of malicious prosecution and/or abuse of process, but also the reliance on a forged document, the 2021 Deed: proposed paragraph 16(d).

(5) Paragraph 17 then alleges that commencing proceedings in the circumstances alleged meant that Bay committed the torts of abuse of process and malicious prosecution, and that Mr Baxendale-Walker and Mr Slater were each joint tortfeasors.

(6) The amendments to paragraph 18 then give particulars of MSD's involvement from June 2021 onwards, when it is said that MSD joined the conspiracy, pleading the elements of the torts of abuse of process and malicious prosecution, and giving particulars by reference to paragraphs 16A to 16C. In summary, it is alleged that MSD committed the torts of abuse of process and malicious prosecution.

32. The initial point taken by Mr Patel was that in so far as MSD (and the two other Defendants) contended that no claim in malicious prosecution or abuse of process can be brought in respect of foreign proceedings or an arbitration, this is a point which should have been raised by MSD as part of its earlier strike out application. There is no merit in that contention, which to be fair Counsel for Mr Patel did not pursue very forcefully, if at all, on the application to amend. The short answer to that is that the original, unamended Points of Claim did not refer to the two torts, the point having been raised for the first time in the skeleton argument filed on behalf of Mr Patel at the earlier hearing.

33. I will therefore consider first the position in relation to the Delaware Proceedings, and only then move on to the Delaware Arbitration. The arguments relating to the scope of the two torts in relation foreign proceedings and foreign arbitrations are distinct. There was, however, a tendency for all the parties before me to conflate the arguments. Whilst Mr Patel submitted it was reasonably arguable that both torts could apply to foreign proceedings, as well as arbitrations in general, the Defendants submitted that neither tort was actionable either in relation to the Delaware Arbitration or the Delaware Proceedings.

34. The starting point for my analysis is that the availability of malicious prosecution in civil proceedings has only recently been recognised. I have already referred to the

cases of *Crawford Adjusters* and *Willers v Joyce*. The precise limits of malicious prosecution in relation to civil claims are still being worked out. Indeed, that appears from the judgments themselves, and from the fact that the Justices of the Supreme Court disagreed so, if I may say, trenchantly. Lord Wilson, a member of the majority in both *Crawford Adjusters* and *Willers v Joyce*, noted that it seemed likely that there would be more claims for malicious civil prosecutions, than for malicious criminal prosecutions, in modern conditions: *Crawford Adjusters*, at [11]. Lord Sumption, one of the dissentients in both cases, said in *Crawford Adjusters*, at [147]:

> *"… the precise ambit of the tort, if it extends to civil proceedings of a private nature will be both uncertain and potentially very wide. The Board would have created a new malice-based tort the gist of which is the malicious initiation of baseless proceedings in a manner which damages the reputation of the victim. But if that is to be the essence of the tort, then it ought in principle to apply to malicious abuse of disciplinary proceedings, the very proposition which the House of Lords was not prepared to accept in Gregory. Logically, it would also apply to any factual case advanced in civil proceedings which maliciously and baselessly discredited another party, including a case advanced by a defendant or a third party …"*

35. As to whether the tort can, in principle, extend to the malicious commencement of foreign proceedings, Mr Patel relies on the following passage in the latest edition of *Clerk & Lindsell on Torts*, 24th ed., 2023, at 15-65:

> *"It would seem that malicious prosecution in a foreign court may be actionable, though the point may often be academic, since the law governing liability is likely to be that of the place where the damage occurred, which in turn will normally be where the foreign court is situated."*

36. Three authorities are cited in Clerk & Lindsell in a footnote as authority for that proposition: *Congentra AG v Sixteen Thirteen Marine SA (the Nicholas M)* [2008] EWHC 1615 (Comm); [2009] 1 All ER (Comm) 479 (alleged malicious attachment of funds in New York pursuant to US Federal law); also *Castrique v Behrens* (1861) 3 E & E 709 and *Gulf Azov Shipping Co Ltd v Lonestar Drilling Nigeria Ltd* [2001] EWCA Civ 505; [2001] 1 Lloyd's Rep 727 (arrest of ship abroad). Counsel for MSD

submitted that none of those authorities, properly analysed, supported the proposition that malicious prosecution in foreign proceedings could give rise to the tort. As to these:

(1) In the first of these authorities, *Castrique v Behrens,* Crompton J denied the plaintiff's plea for a declaration that the defendants had maliciously prosecuted the plaintiff in France. As I read the report, all that Crompton J was deciding was that, for an action for malicious prosecution, it was essential to show that the proceedings "instituted maliciously and without reasonable cause" had terminated in the plaintiff's favour. On the facts, the plaintiff was unable to do that. While it is true that Crompton J did not dismiss the claim because the allegedly malicious proceedings were pursued in France, the case is a very old authority, and I derive little assistance from it.

(2) The *Congentra AG* case involved the alleged malicious attachment of funds in New York, pursuant to US Federal law, in advance of an arbitration. Flaux J held that, as a matter of US federal maritime law, there was a cause of action under what Flaux J held to be the governing law. He commented, however, on what the position would be under English law, indicating that "… there may be scope for incremental growth and extension of the existing torts, including wrongful arrest." Here, all Flaux J was deciding was that there was a good arguable case that wrongful attachment of a person's assets was within the scope of the existing tort of wrongful arrest, in comments which are strictly speaking obiter dicta.

(3) The *Gulf Azov* case involved the alleged detention of a ship. The Privy Council in *Crawford Adjusters* recognised that, historically at least, the tort of malicious prosecution of civil proceedings was confined to a few disparate situations,

"linked only by the occurrence of prejudice to the victim at or close to the outset of the proceedings", of which a writ to arrest a ship in the course of a dispute about a contract for its sale was one: see *Crawford Adjusters*, at [67].

37. It seems to me that these three cases, while not positively establishing that English law recognises that malicious prosecution in a foreign court gives rise to a cause of action, equally do not suggest that there is an actual bar to bringing a claim for malicious prosecution in respect of foreign proceedings. Further, they may be said to point in the direction of allowing such a claim as part of the natural evolution of the law of torts.

38. On the other hand, the Defendants relied on *Research In Motion UK Ltd v Visto Corp* [2007] EWHC 900 (Ch), which they submitted positively established that the torts of malicious prosecution do not apply to foreign court proceedings. There Lewison J (as he then was) said this, at [28] – [29]:

> *"28. Mr Dicker also relies on the decision of the European Court of Justice in Turner v Grovit [2005] 1 AC 101 as indicating that this court should not purport to tell a court in another member state directly or indirectly how to exercise its own jurisdiction. To award damages against a party for having improperly invoked the process of a foreign court is an indirect interference with that foreign court. I accept his submission, which provides another reason why the Italian court should decide questions arising under Article 96.*
>
> *29. Had it been necessary, I would also have held that the matters raised in paragraphs 2 to 10 of the defence would not have been a good defence to the claim for a non-infringement declaration. It is no part of the function of an English court to investigate whether the process of a foreign court is being abused. That is all the more so where, as here, the patent in suit has territorial application only and where the European Court of Justice has said that both infringement and validity actions must be brought on a member state by member state basis. Thus even on the assumption that the undertaking had not been given I would still have dismissed the counterclaim."*

Lewison J's decision was upheld by the Court of Appeal: see [2008] EWCA Civ 153.

39. The *Research In Motion* case concerned jurisdictional issues on patent claims arising under Brussels I Regulation. Lewison J was not considering the torts of either malicious prosecution, or abuse of process. Further, the decision predates the decision of the Supreme Court in *Willis v Joyce.* It seems to me that what was said in the *Research In Motion* case may anticipate some of what was said in *Clerk v Lindsell*, in the passage quoted above, namely that in many cases an action seeking damages for malicious prosecution for foreign proceedings may not get very far, as this court will decline to hear it on forum grounds. However, that is not a difficulty in this case, as Mr Baxendale-Walker and Mr Slater are both resident in England, and MSD has brought a very substantial counterclaim against Mr Patel, which clearly constitutes a submission to the jurisdiction.

40. In summary, the ambit of the tort of malicious prosecution remains, post *Willers v Joyce*, a developing area of law. I am not willing to find, on an application to amend, that the tort of malicious prosecution can never be actionable in respect of foreign proceedings. That is not a point which should be decided on an interim application, but should be left to trial, provided that Mr Patel has a real prospect of establishing the constituent elements of the tort (which I consider further below).

41. Similar arguments apply in relation to the tort of abuse of process. Although the practical application of the tort appears to be very rare, with only two reported cases showing a successful claim (*Grainger v Hill* in 1838, and *Gilding v Eyre* in 1868)[1], the Privy Council in *Crawford Adjusters* acknowledged the continued existence of the tort. The essence of the tort is the abuse of civil proceedings for a predominant purpose other than that for which they were designed. At the earlier hearing before

[1] At least in this jurisdiction. As the Privy Council pointed out, litigants in Australia have proved more successful: *Crawford Adjusters*, at [149] (per Lord Sumption).

me, on MSD's original strike-out application, I had understood that Counsel for MSD had accepted that this tort could conceivably have a role to play in respect of foreign proceedings. The example discussed was the situation where one party commences proceedings in a jurisdiction where imprisonment for debt still exists, such as some countries in the Middle East, and the party bringing the proceedings knows that there is no basis for bringing a claim, but simply wishes to bring pressure on the other party. Counsel for MSD now submits that that situation would more appropriately be characterised as the tort of false imprisonment, but the proceedings may not end in the imprisonment of the wronged party who might, for example, flee abroad before any sentence was passed. Of course, the facts of the present case are far removed from that hypothetical situation. In the end, however, the question whether abuse of process could conceivably extend to foreign proceedings is again not a question which I feel should be determined on a strike out application. It is a clear case where the decision should be left to trial, when the full facts are available to the trial judge.

42. I turn now to the separate question of whether Mr Patel has at least real, as opposed to fanciful, prospects of establishing that the torts of malicious prosecution and abuse of process apply to foreign arbitrations. The Defendants' point is that arbitration is not a form of legal process: see, for example, the Arbitration Act 1996, which distinguishes between "arbitral proceedings" and "legal proceedings". Several authorities were cited to me where various judges, in dealing with claims for malicious prosecution, emphasised that a prosecution requires the commencement of proceedings before a judicial body: see, for example, *Crawford v Jenkins* [2014] EWCA Civ 1035, at [48] - [50]; *Barkhuysen v Hamilton* [2016] EWHC 2858 (QB), at [146]; and *Mosley v Associated Newspapers Ltd* [2020] EWHC 3545 (QB); [2021] 4 WLR 2, at [56]. See also *Clerk & Lindsell*, at para. 15.15.

43. One needs to be a little cautious about some of the language used here. None of these cases considered the situation of a malicious instigation of arbitral proceedings. As was pointed out by Nicklin J in the *Mosley v Associated Newspapers* case:

> *"The word 'prosecution' in the eponymous tort is perhaps apt to mislead; it extends beyond 'prosecution' as that word is usually understood. More accurately, perhaps, it is the malicious abuse of the process of the court. ..."* (at [53])
>
> And
>
> *"The coherence of this area of the law is, perhaps, impaired by the fact that there are distinct torts of malicious prosecution and abuse of process, albeit that they 'sprang from the same tree': Sagicor [62] per Lord Wilson. Baroness Hale suggested that they might, ultimately, be combined 'in a single coherent tort of misusing legal proceedings': Sagicor [82]. Nevertheless, the coherence that Baroness Hale envisaged would be achieved by focussing the tort on 'intentionally abusing the legal system' [89]. It did not extend to malicious and baseless complaints to the police and/or prosecuting authorities."* (at [66])

44. That is what Nicklin J was considering, the allegedly malicious handing over a "dossier" to the Crown Prosecution Service, which is very far removed from the case of pursuing an allegedly malicious arbitration. And on the other hand, if one looks at some of the passages in *Willers v Joyce*, the language used seems to me at least capable of extending to arbitrations: see at [28] – [29] (per Lord Toulson) and [64] - [66] (per Lord Clarke) ("to put into force the process of the law maliciously and without any reasonable or probable cause …"). Further, Lord Neuberger, one of the dissentients in *Willers v Joyce*, who would have refused the extension of the tort to civil proceedings, gave as one of the reasons for his opposition that "… there could easily be arguments as to whether it could apply to family court proceedings, domestic tribunal proceedings and arbitrations …": see at [162] (emphasis added).

45. MSD relied on a recent decision of the US Supreme Court, *ZF Automotive US. Inc. et al v Luxshare Ltd*, 596 US SC (2022) holding that foreign arbitration proceedings

were not a "foreign or international tribunal" within the meaning of section 1782 of the US Code. It was explained that:

> *"an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution ... No government is involved in creating the panel or prescribing its procedure. The adjudicative body therefore does not qualify as a governmental body."* (at p. 12).

I have to say that I derive no assistance from that case. What the Supreme Court was doing there was construing a particular statute, in the context of its particular legislative history.

46. MSD also cited *Metall under Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, where certain passages in the judgment of Slade LJ, at pp. 469 – 470, when discussing the elements of the tort of abuse of process, refers to "abuse of the process of the court …". Similar language was used in *Broxton v McClelland (No. 1)* [1995] EMLR 485 (1995) by Simon Brown LJ. I did not find those passages to be conclusive with respect to the question as to whether the tort of abuse of process was available in relation to arbitration proceedings. The question before me was not being considered. It is hardly surprising, when considering whether the tort still existed or not, which was what Slade LJ had in mind, that the Court would use language which is consistent with the focus being on court proceedings, rather than arbitrations.

47. It is one thing to refuse permission to bring a claim which is clearly contrary to an existing authority. It is another matter entirely where, although there is no authority positively stating that a particular claim can be brought, there is equally no authority stating in terms that English law does not recognise the type of claim relied on, particularly in an area of developing jurisprudence. I would hold that abuse of process is, potentially at least, capable of applying to foreign arbitrations. However, the counter-arguments against recognising that the tort of malicious prosecution might be

extended to encompass arbitrations seem to me considerably stronger. My conclusion is that the tort of malicious prosecution does not extend to maliciously prosecuted arbitrations, given the repeated references in the case law to malicious proceedings being limited to legal proceedings.

48. I turn now to the other proposed amendments. In the original, unamended Points of Claim, paragraph 6, it is pleaded that Mr Baxendale-Walker and/or Mr Slater are the ultimate beneficial owners and/or controllers of MSD. The proposed amendment in the APOC is to add the words "… *and its* [that is, MSD's] *directing mind and will. Accordingly, their knowledge and intent fall to be attributed to it."*

49. As I understood it, the Defendants object to this proposed amendment on three grounds. MSD complained that Mr Patel had failed to give proper particulars of the alleged direction by Mr Baxendale-Walker and/or Mr Slater, including "(i) the means of direction; (ii) the content of such direction; (iii) the times of direction; (iv) by whom the alleged direction was received; (v) which directions were acted on and which were not." There is nothing in that objection. The plea that Mr Baxendale-Walker and/or Mr Slater is the controller of the company is already in the existing pleading, so the further plea that they are the directing mind and will of the company is simply to make express what was already implicit in Mr Patel's case. A party in Mr Patel's position cannot possibly be expected to provide those further particulars which MSD says it needs to know. The proposed amendment raises, in my view, matters for disclosure and ultimately trial. In any event, there is ample material, already set out in paragraphs 8 and 9 of the existing pleading, to support the further plea.

50. Next, the Defendants submit that "… to prove that a person is an actual prosecutor or the controlling mind of the prosecuting company, it is necessary to establish that that

person had a dominant influence over the directors of the company", or misled them, by for example providing them with false information or withholding information: see letter dated 9 June 2023, from Mr Baxendale-Walker's and Mr Slater's solicitors, at paragraph 5. This submission is derived from the first instance decision in *Willers v Joyce*, where the claimant failed, at trial, because (amongst other things) it could not be shown that Mr Gubay was the prosecutor. There was much emphasis in the submissions made on behalf of Mr Baxendale-Walker and Mr Slater on the need for the APOC to plead and prove that the actual directors of Bay and MSD did not make an independent decision to prosecute and that "their will was overborne".

51. Again, this in my view misunderstands what is needed for a legitimate plea in a claim for malicious prosecution. Bay's sole director was Mr Slater. Given that it is alleged that MSD was the prosecutor, and that Mr Slater is one of the conspirators, the existing plea seems to me to accord with what Rose J said in *Willers v Joyce*, at [200]. The same applies to MSD, albeit with the complication that the actual de jure director of MSD, and its sole shareholder, is Saeedeh Mirshahi, an English qualified solicitor (Ms Mirshahi gave her address in her witness statement filed in support of one of MSD's earlier applications as Wilmington, Delaware, although I am told this is no longer the case). At the moment, there is no evidence from Ms Mirshahi as to why MSD began the Delaware Arbitration or subsequently the Delaware Proceedings. It does not seem to me necessary for Mr Patel to plead that Ms Mirshahi's will was overborne.

52. Finally, Mr Baxendale-Walker and Mr Slater say that it is necessary for Mr Patel to elect between Mr Baxendale-Walker and Mr Slater as to who is the directing mind and will. I do not agree. It has long been accepted that, where there are a number of

possibilities and, at the pleading stage, it is not possible to say which is correct, a party is entitled to advance alternative cases. If the position were otherwise, *"A defendant to an honest claim will be able to compel the claimant either to choose between seemingly viable alternatives or to abandon the claim entirely"*: *Clarke v Marlborough International Fine Art Establishment* [2002] 1 WLR 1743, at p. 1745G, per Patten J (as he then was).

53. The next proposed amendment is at paragraph 9(a). Here the original plea referred to the allegation that "on or around 25 March 2021, Mr Baxendale-Walker demanded that Mr Patel pay over monies alleged to be held by Mr Patel as bare trustee for MSL Belize to an entity nominated by MSL Belize". In the APOC, the words "an entity nominated by MSL Belize" have been struck through and replaced by a reference to another company, Ezee Management Limited ("EML"). The APOC goes on to plead that Mr Patel infers that EML is controlled by Mr Baxendale-Walker and ultimately beneficially owned by him, and that any funds received by it (that is, EML) would be at Mr Baxendale-Walker's free disposal, and not used for any of various Minerva companies or Bay or MSD.

54. The Defendants object to what is said in relation to EML because Mr Patel is said to have failed to provide proper particulars as why Mr Patel infers what he does and that "it is therefore no better than speculation". I do not accept that this is a proper basis for refusing the proposed amendment. There are a number of difficulties, set out in my earlier judgment, regarding MSD's case on this point. I went as far as to say that the evidence put forward by MSD on this point described "a very surprising and uncommercial arrangement": see at [77]. Mr Patel has a real prospect of showing that the funds in the accounts of various supposed fiduciaries, such as EML, were in fact

held for Mr Baxendale-Walker and/or Mr Slater, rather than the Minerva corporate entities. To the extent that it was submitted that the Defendants are entitled to have the matters on which Mr Patel set out in a pleading, this seems to me to be a request that Mr Patel plead evidence.

55. The next proposed amendment is at paragraph 9(b), which addresses the 2021 Deed and contains an express denial that Mr Patel signed this document. Mr Patel seeks to add the words "and what purports to be his signature on it is a forgery". Mr Baxendale-Slater and Mr Slater, but not MSD, object to that amendment. There is nothing in their objection. I dealt with the question of the alleged forgery in the context of MSD's earlier applications. The difficulty which Mr Baxendale-Walker and Mr Slater face at this juncture is that the core allegation, already found in the pleading, is that Mr Patel did not sign this document. The parties, that is, MSD and Mr Patel, have exchanged witness statements. I remain of the view that there is here a triable issue. The proposed amendment simply makes Mr Patel's position absolutely clear.

56. The next amendment, at paragraph 16(b)(i), is the plea that the conspirators (originally, Mr Baxendale-Walker, Mr Slater and/or Bay) agreed to cause proceedings to be commenced against Mr Patel

> *"In circumstances where each was aware that there was no reasonable or probable basis for the litigation and, in particular, where each was aware that Mr Patel did not hold any funds on trust for the party bringing the claim or for any of the Minerva companies".*

57. MSD objects to this on the basis that no facts have been pleaded with regard to any of the Defendants' awareness, and that the Defendants are entitled to particulars of such knowledge (see CPR PD16, para. 8.2). It seems to me that Mr Patel has pleaded perfectly adequate facts and matters for present purposes relating to the awareness:

see APOC, paragraph 16A. MSD's skeleton argument, paragraph 19, accepts that "If reference is being made implicitly to another paragraph of the amended pleading then it needs to expressly plead this …." The simplest way to address this point is to require Mr Patel to add words at the end of paragraph 16(b)(i) referring the reader to paragraph 16A.

58. A similar complaint is made in relation to APOC paragraph 16(b)(iii), but again, particulars are found in new APOC, paragraphs 16B and 16C.

59. However, I note that, when referring to particulars, in a number of instances the APOC contains the phrase "among other things": see proposed new paragraphs 16A, 16B and 16C. I think it would be better for those references, in so far as they are contained in the proposed amendments, to be removed. The Defendants complain, with a degree of justification, that it is not fair, particularly in a fraud claim, for a pleading to make repeated use of the words "among other things".

60. Mr Baxendale-Walker and Mr Slater make two further points as to why they say Mr Patel's proposed claim for malicious prosecution and abuse of process, has "additional difficulties", the first in relation to the requirement to show malice, in relation to the tort of malicious prosecution, and the second in relation to the need to plead and prove Delaware law, in relation to both torts. I will consider these objections in turn.

61. As regards malice, one of the elements of the tort of malicious prosecution is that the proceedings be actuated by malice. Mr Patel alleges that the prosecutor was either Bay (in relation to the High Court Proceedings) or MSD (in relation to the Delaware Proceedings, and the Delaware Arbitration, to the extent that the malicious proceedings can apply to arbitrations at all). It is clear that malice can be inferred

from the absence of reasonable and probable cause: see *Juman v the Attorney General of Trinidad and Tobago* [2017] UKPC 3, at [10]. But Counsel for Mr Baxendale-Walker and Mr Slater submit that while those elements are entwined, they should not be conflated: see per Rose J, *Willers v Joyce*, at [278]. As Bay and MSD are companies, it will be necessary for Mr Patel to prove that an individual whose knowledge can properly be attributed to those companies was motivated by malice: again per Rose J, *Willers v Joyce*, at [192] – [200] as to what is required.

62. I accept those submissions, as a starting point. However, it is then said that Mr Patel has failed to elect or to plead primary facts supporting attribution. In their written submissions, lengthy criticism was directed at the allegations in the APOC as to how Bay and MSD, through the agency of their de jure directors (Mr Slater in the case of Bay, and Ms Mirshahi in the case of MSD) did not make an independent decision to prosecute and the need to show "that their/the companies' will and process was overborne by [Mr Baxendale-Walker]". There is then a further point, that Mr Patel has not joined Bay to the proceedings, and will not receive any evidence that is covered by privilege with which to prove malice on the part of Mr Baxendale-Walker or Mr Slater.

63. The criticisms on these points are matters for trial. In this case, both Bay and MSD have single directors. It does not appear that these companies have any independent business, save to serve as litigation vehicles to bring proceedings against Mr Patel. Neither Mr Baxendale-Walker, nor Mr Slater has filed any evidence on this point, nor has a statement been filed by Ms Mirshahi. It may well prove difficult for Mr Patel to succeed in showing that one or other of Mr Baxendale-Walker or Mr Slater was motivated by malice, and that such malice can be attributed to the relevant

prosecuting company. However, I am not willing to engage in a mini-trial at this stage. All I will do is that where the APOC pleads, at paragraph 17, that "commencing proceedings in the circumstances set out above was malicious", the APOC should identify the precise paragraphs or sub-paragraphs relied upon as "set out above".

64. Turning now to the question of pleading and proving Delaware law, Counsel for Mr Baxendale-Walker and Mr Slater complain that Mr Patel treats the Delaware Arbitration and Delaware Proceedings "as if they were governed by the law of England and Wales when they are not". The recent decision of Lord Legatt in *FS Cairo (Nile Plaza) LLC v Brownlie* [2021] UKSC 45 explains that, on the question of foreign law, the "default rule" treats English law as applicable in its own right where foreign law is not pleaded. Further, there is a separate "presumption of similarity", which is a rule of evidence, to the effect that, even where foreign law is recognised as applicable, it is presumed that the foreign law is materially similar to the law in question: see at [108] – [126]. Lord Legatt explained that a combination of three factors justified the presumption, the first of which was that while there are of course differences between the laws of different countries, there are of course many similarities, and this is particularly the case where the laws have a common origin, as in the case of countries which apply the common law: see at [123].

65. Counsel for Mr Baxendale-Walker and Mr Slater submitted that Mr Patel must plead and prove foreign law, and also plead that Mr Baxendale-Walker and Mr Slater knew the content of Delaware law and "show what is unlawful under that law". I do not accept that it is necessary at the pleading stage for Mr Patel's statement of case to do either. The question of choice of law in this case is quite complex. There are factors which points towards the conclusion that the conspiracy claim is governed by English

law, as the law of the place where Mr Patel appears to have suffered damage and where (presumably) any conspiracy or combination was agreed. Equally, I accept that there are arguments that the separate tort of abuse of process would be governed by Delaware law, but at least at this stage Mr Patel appears to me entitled to rely on the default rule and/or the presumption of similarity. In any event if, as appeared to be suggested, an intention to use a forged document or to give dishonest evidence is not unlawful under Delaware law, it is for Mr Baxendale-Walker and Mr Slater to lead evidence on this point, which they have failed to do. That would be in any event a very surprising submission.

66. Turning to loss, paragraph 51 of the original Points of Claim pleads loss and damage for the unlawful means, alternatively lawful means, conspiracy. In summary, the loss claimed is the unrecovered incurred costs arising from the High Court Proceedings, the Delaware Proceedings, and the Delaware Arbitration. The APOC seeks to add a sentence expressly confirming that Mr Patel is not claiming his costs of the present proceedings by way of damages. Almost alone amongst the proposed amendments, I did not understand any of the Defendants to object to that.

67. At the previous hearing, one of the grounds for MSD's strike out was that Mr Patel had suffered no actionable loss or damage. I rejected that submission, finding that on the evidence before me that it was not possible to determine this point conclusively against Mr Patel. It seemed to me that on any view he had suffered at least some loss. As I understood it, part of the costs of the High Court Proceedings were not paid until after the start of these proceedings and therefore any cause of action in tort was complete as at the time when Mr Patel first began these proceedings. I noted, however, that better particulars could perhaps be provided as to how the losses alleged

to have been suffered as a result of the High Court Proceedings had been calculated. A new proposed paragraph 51A in the APOC purports to provide further particulars regarding those losses. The pleaded losses amount to £65,250 in relation to the High Court Proceedings, approximately £19,311 in relation to the Delaware Arbitration and approximately £7,945 in relation to the Delaware Proceedings, as follows:

> *"51A. The costs claimed by Mr Patel are as follows:*
>
> *(a) In relation to the High Court Proceedings, a total of approximately £65,250, consisting of:*
>
> *(i) Approximately £8,750 relating to work in relation to the costs orders made by Mrs Justice Tipples, on 30 April 2021 and 14 May 2021 (which together totalled £27,702), including work and correspondence in relation to a potential wasted costs application against Bay Mining's solicitors and counsel (it was only following such correspondence that the sum due in respect of the Order of Mrs Justice Tipples dated 30 April 2021 was paid, without interest);*
>
> *(ii) Approximately £4,000 relating to an application made by Mr Baxendale-Walker on 4 June 2021 for permission to appeal against the Order of Mrs Justice Tipples dated 14 May 2021;*
>
> *(iii) Approximately £24,500 relating to the hearing on 14 May 2021, including work in relation to the possibility raised by the Judge of a civil restraint order being made against Mr Baxendale-Walker and/or Mr Slater and/or Bay Mining and the costs of preparing for and attending the hearing;*
>
> *(iv) Approximately £12,500 relating to considering a possible committal application against Mr Slater;*
>
> *(v) Other miscellaneous costs totalling approximately £15,500.*
>
> *(b) Costs of approximately £19,311 in relation to the Arbitration;*
>
> *(c) Costs of approximately £7,945 in relation to the Delaware Proceedings."*

68. MSD objects to the recovery of any losses in relation to the High Court Proceedings, pointing out that these costs were all incurred prior to its incorporation on 24 June 2021. That seems a perfectly valid point. However, the fact that one alleged conspirator may not be liable for a particular loss does not mean that claim as a whole is untenable. In any event, in his Counsel's skeleton argument, Mr Patel made it plain

that he does not seek the costs of the High Court Proceedings from MSD. That should be made plain in the final version of the APOC.

69. As for Mr Baxendale-Walker and Mr Slater, they take issue with the recoverability of the various heads of loss on grounds which might variously be described as causation, or remoteness. While points on causation can sometimes be decided on an interim application, they are frequently so fact-sensitive that the court should be cautious about doing so. As to the recoverability of the losses generally, it is necessary here to note the difference between a costs order made in favour of a successful party, and damages more broadly. In *Willers v Joyce*, Mr Willers was awarded costs of £1.7million following the discontinuance of the proceedings against him. One of his heads of loss claimed as recoverable under the tort of malicious prosecution was the difference between that amount and the full amount of the costs incurred by him in defending Langstone's claim, of £3.9million: see at [5] of the decision of the Supreme Court. There was no difficulty, in principle, with claiming his loss on that basis.

70. I do not think I can determine the various points raised by Mr Baxendale-Walker and Mr Slater on an amendment application. These are properly matters for trial. The one direction I would make is that Mr Patel ought to provide some detail in relation to the "other miscellaneous costs" of approximately £15,500. In the absence of any more detail being provided as to what these are, that particular sub-paragraph should be removed.

71. Finally, in relation to recovering the costs of the Arbitration and the Delaware Proceedings as damages, I would allow the amendments. These seem to me perfectly pleadable heads of loss.

*Conclusion*

72. For the reasons given above, I would grant Mr Patel permission to amend his Points of Claim, save in relation to those points as set out above where I have expressly refused permission.