Neutral Citation Number [2024] EWHC 3054 (Ch)

CR 2023 005665

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (CHD)
IN THE MATTER OF KILLEAN ESTATE LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL
Date: 2/12/2024

Before :

ICC JUDGE BARBER

Between:
ANTHONY ALAN GLADWIN

Claimant

- and –

(1) RSM UK RESTRUCTURING ADVISORY LLP
- and -
(2) PAUL DOUNIS
(3) STEVEN ROSS
(4) GARETH HARRIS

Defendant

Proposed Defendants

- -

The Claimant appeared in person
Mr Rory Brown (instructed by **RSM UK Restructuring Advisory LLP)** for the **Defendant** and for the **Second and Fourth** of the **Proposed Additional Defendants**

Hearing date: 3 October 2024

- -

Approved Judgment

This judgment was handed down remotely by email and MS Teams. It will also be sent to The National Archives for publication. The date and time for hand-down is 9.30 a.m. on 2 December 2024

ICC Judge Barber

1. On 3 October 2024, I made an order (i) declaring the Claimant's claim issued on 13 July 2023 to have been struck out; and (ii) dismissing the Claimant's applications dated 13 July 2023, 29 August 2023, 25 September 2023 and 25 September 2024, with written reasons to follow. This judgment sets out my reasons for making that order.

Background

2. The proceedings arise out of the administration of Killean Estate Limited ('the Company'), a company incorporated on 16 November 2015 which carried on the business of operating the Killean Estate, Tayinloan, Argyll PA29 6XF. The Killean Estate comprised 24 self catering holiday lets, two farms, a shop and a hotel (together, 'the Killean Estate'). The Company purchased the Killean Estate in 2016. The Claimant was the sole director and shareholder of the Company. He lived at the main property on the Killean Estate, known as Killean House, together with his family until his eviction in July 2023.

3. The Company's purchase and development of the Killean Estate was facilitated by loan monies advanced by Lendy Ltd ('Lendy') (now in administration), Saving Stream Security Holding Limited ('SSSHL') (now also in administration) and others.

4. By letter dated 29 June 2018 sent on behalf of Lendy and SSSHL, the Company received a formal demand for immediate repayment of the various loans together with interest. The letter stated that the loans were in default and that the whole sum was repayable immediately.

5. On 17 July 2018, Mr Dounis and Mr Ross (at the time both partners at RSM UK Restructuring Advisory LLP, then known as RSM Restructuring Advisory LLP, hereafter, 'RSM') were appointed as joint administrators of the Company by SSSHL in exercise of its right as qualifying floating charge holder. The purpose of the administration was 'realising property in order to make a distribution to one or more secured or preferential creditors' pursuant to paragraph 3(1)(c) of Schedule B1, the joint administrators having concluded that it was not reasonably practicable to achieve either of the first two limbs of the paragraph 3 objective (rescue or better result).

6. In June 2020, Mr Ross left RSM and was replaced as joint administrator of the Company by another partner at RSM, Gareth Harris, pursuant to a block transfer order approved on 31 July 2020.

7. The administration was extended by court order on four occasions: on 10 July 2019, to 16 July 2020; on 8 July 2020, to 16 July 2021; on 29 June 2021, to 16 July 2022; and on 13 July 2022, to 16 July 2023.

8. The Claimant did not cooperate with the administrators, prompting a number of court applications within the administration, including an application for injunctive relief, which was granted on 4 September 2018, restraining the Claimant and his wife from interfering with any property or assets of the Company.

9. Ultimately, the whole of the Company's heritable property was sold for £4,396,923. The Claimant had offered to purchase part of the estate for £3.46m, but this offer was not progressed as the Claimant failed to provide adequate evidence of funding. The secured creditor, Lendy, was paid £3.176 million of a total of £8.772 million that it was owed. There were insufficient funds to pay any other class of creditor.

10. On 14 July 2023, the Joint Administrators filed a notice of move from administration to dissolution. The Company was dissolved on 17 October 2023.

11. Mr Ross, Mr Dounis and Mr Harris have been discharged from liability as joint administrators following their departure from office. Mr Ross was discharged on 31 July 2020. Mr Dounis and Mr Harris were discharged on 17 July 2023.

The Claim

12. On 13 July 2023, the Claimant issued a claim form, naming RSM as the only defendant ('the Claim'). The brief details of the claim set out in the claim form were as follows:

> 'C is the sole director and shareholder of a Realty, going by the name Killean Estate Limited (KEL), that has been brought into administration under D's possession.
>
> KEL owns a substantive Estate, which has now been wrongfully sold, RSM sold the Estate without following proper processes and procedures under the receivers and IA Act 1985. Their conduct amounts to professional negligence.
>
> D's actions have diminished the value of C's Estate with causing severe harship [sic] and losses for C and his family and relatives, including the local community.
>
> Value
>
> Unspecified, however estimated to be in excess of £23M.'

13. The points of claim dated 13 July 2023, which were annexed to the claim form, alleged as follows:

'The Claimant ('C') is the sole director and shareholder of a Realty, and estate going by the name 'Killean Estate Limited' ('KEL')

1. The Defendant ('D') (with company number OC325349) acted as administrators for KEL therefore there was an established duty of care to act in the best interests of the company and its stakeholders, that being the claimant.

2. D as a professional services firm, has a duty to exercise reasonable skill, care, and diligence in performing their administrative duties

3. D should avoid any conflicts of interest that may compromise their ability to act impartially and in the best interests of KEL. If conflicts arise, they must disclose them and take appropriate steps to manage or mitigate them.

4. D sold the estate owned by KEL without ensuring the proper registration of title, this is a breach of their duty of care and professional obligations.

5. In selling without the proper registration, it is viewed as an act of fraud and fraudulent land transfers will not pass full ownership, defrauded proprietor remains beneficial owner.

6. Furthermore D sold the estate undervalue, with the estate being valued £8.5M and sold for circa £4.4M.

7. D in selling the estate wrongfully, has caused to significantly depreciate the value of the estate and this in turn has caused C financial harm and loss. This cannot be seen as acting in the best interest of KEL.

8. D should have either not sold the estate and enabled the business to continue operating or at least ensured that the proper registration of title was being used, and that the estate was sold for the true value.

9. In addition to the wrongful sale of titles, D had been working with Lendy Limited ('Lendy') and Saving Stream Security Limited ('SSSHL') prior to the administration of KEL, RSM could not have been assigned as administrator for KEL as there was a conflict of interest. There arose a further conflict of interest when RSM became administrators of Lendy and SSSHL.

10. By being administrators for all of the companies involved, D cannot maintain their duty of care with all of them. D ought to have disclosed this fact and taken the appropriate steps in mitigation.

11. Due to the conflict of interest D has not acted in the best interests of KEL and therefore has caused loss to the value of KEL and has in turn caused financial harm and loss.

The Claimant Claims:

1. The sale and subsequent transfer of the various assets of KEL particularly the Land Title of Killean Estate was unenforceable, and order should be made for the land titles (found in SCHEDULE A) to be reversed to the original land title ARG22755, in the ownership of Killean Estate Limited.

2. Compensation for the destruction of both capital and trading value of Killean Estate.

1. [sic] Compensation for the conflict of interest that occurred when RSM was representing Lendy and SSSHL as well as being Administrator for KEL.

2. Compensation for the difference in value due to under selling the Assets of Killean Estate which were valued at £8.5M.

3. Compensation for all Legal Costs and associated expenses.

4. Damages and losses to be assessed and estimated in the region of £23M, with the rights reserved to alter the figure as necessary.'

The Damages Application

14. On the same day as issuing the Claim, the Claimant filed an application notice dated 13 July 2023, naming RSM as the only Respondent, seeking 'An order for damages caused due to Ds negligence in the administration of the Claimant Realty, Estate (Killean Estate Limited), causing significant losses and damages to the claimant and the local community' ('the Damages Application'). The Damages Application Notice sought a one hour hearing and was supported by a witness statement dated 13 July 2023.

15. From the Claimant's witness statement dated 13 July 2023, it is clear that the Claimant is extremely unhappy at the manner in which Lendy and SSSHL treated the Company. He alleged that they had thwarted the Company's attempts to refinance and had instead arranged for administrators to be appointed. The Claimant is also clearly very unhappy with the steps then taken by the administrators, following their appointment, to lay off staff and sell the Company's assets. As put at paragraph 35 of the witness statement:

'My Business Estate was a very profitable business with an enormous potential, however this was effectively stolen from under me. When Lendy realised that they could not slow my business down they put it into administration to take and destroy everything.'

16. At the conclusion of the witness statement, under the heading 'REMEDIES SOUGHT', the Claimant continued:

'I seek the Court intervention for the return of the status Quo of my business and premises, together with the associated damages and losses incurred to be considered by the attending Judge.'

17. The Claim and the Damages Application were flawed both procedurally and substantively. By letter dated 27 July 2023, RSM wrote to the Claimant, listing the flaws and urging the Claimant to seek legal advice. The letter also explained the process for discontinuing a claim, invited the Claimant to embark on that process and stated that if he did so promptly, RSM would not seek any costs. The Claimant did not wish to withdraw the Claim. Following further correspondence, an unless order was agreed.

The Unless Order: 15 August 2023

18. On 15 August 2023, Master Kaye made the following Unless Order by consent:

'UPON the Claimant's claim dated 13 July 2023

AND UPON the parties having agreed the terms of this order

BY CONSENT IT IS ORDERED that:

1. If the Claimant intends to pursue the Claim, he shall file an Amended Points of Claim which sets out with full particularity the legal and factual basis for the relief sought against the correct defendants; and an application to amend the Claim Form and named Defendants; and such application as is required under the Insolvency Act 1986 by no later than 4pm on 5 September 2023.

2. In default of compliance with paragraph 1, the Claim shall be struck out without further order.

3. In the event the Claimant complies with paragraph 1 above, the time for the Defendant to file a Defence to the Claimant's claim is extended to 28 days after the agreement and/or determination of the application to amend the Claim Form and named Defendants.

4. Costs in the case.'

The Joinder Application

19. On 29 August 2023, the Claimant issued a further application seeking to join Paul Dounis, Steven Ross and Gareth Harris to the Claim ('the Joinder Application'). The reason given for seeking their joinder was stated in the application notice to be that 'they were under the control or employment of RSM UK Restructuring Advisory LLP, the Defendant in this case.'

20. Filed with the Joinder Application were further points of claim, dated 29 August 2023. These were still defective however, in that they did not set out with full particularity the legal and factual basis for the relief sought, made serious and unparticularised allegations of fraud, and did not bear a CPR compliant statement of truth. In addition, the Claimant had made no application to amend his points of claim.

21. A further problem was that the additional parties whom the Claimant wished to join as defendants to the Claim were former administrators of the Company who had already been discharged from liability under paragraph 98 of Schedule B1 to the Insolvency Act 1986. As noted above, Mr Ross was discharged on 31 July 2020. Mr Dounis and Mr Harris were discharged on 17 July 2023. Whilst, in principle, an application raising complaints against a former administrator can still be made under paragraph 75 of Schedule B1 after their discharge in appropriate circumstances, any such application requires the permission of the court (paragraph 75(6)). The Claimant had not applied for such permission.

Transfer to the Insolvency and Companies List

22. By Order dated 15 September 2023 Master Kaye transferred the Claim and attendant applications to the ICC list.

The Amendment Application

23. On 25 September 2023, the Claimant issued a further application notice, naming the respondents to the application as RSM, Paul Dounis, Gareth Harris and Steven Ross. By this application, the Claimant appears to have sought permission to amend, albeit without saying so expressly. In box number 3 of the Application Notice, in response

to the printed question, 'What order are you asking the court to make and why?, the Claimant had written simply:

> 'Amended Points of Claim Document (25 September 2023)
>
> Amended Schedule A Document (25 September 2023).
>
> Claimant's Schedule of Damages (In Table Format).'

24. I shall refer to this application as 'the Amendment Application'. Annexed to it were proposed draft amended points of claim, an amended Schedule A document and an amended Schedule of Damages which included sums described as 'past damages' totalling £14,145,642 (plus interest) and sums described as 'future' damages (including £51.2m in respect of 32 years of lost revenue from 16 wind turbines) of £95,205,260, of which 33.3% (£31,703,352) was claimed.

25. On 17 October 2023, the Company was dissolved.

26. Following directions given by orders dated 9 November 2023 and 18 December 2023 of ICC Judge Greenwood and Deputy ICC Judge Agnello respectively, by listing order dated 5 January 2024 the Claim and attendant applications were listed for a hearing on 3 October 2024.

The Adjournment Application

27. Very shortly prior to the hearing of 3 October 2024, the Claimant issued a further application, by Application Notice dated 25 September 2024, seeking an adjournment of the hearing of 3 October 2024 ('the Adjournment Application'). The grounds of the application stated in the Application Notice were as follows:

> 'My Solicitors, Clarke Willmott LLP, have come off the Court Record and I in the process of appointing and instructing a New Solicitor and Barrister to represent me.
>
> Mhairi Richards KC has agreed to represent me.
>
> The case is very complexed, and is the reason why Gibson Booth Accountants will provide a full Forensics Accounts Report and a copy of the Forensics Accounts Report will be submitted to the Court Record.
>
> I cannot do this in person.
>
> There is no prejudice suffered by the defendants if the matter is adjourned.
>
> I respectfully ask the court in the interest of justice to allow the adjournment.'

28. The Adjournment Application was listed for hearing on 3 October 2024 as well.

Discussion and Conclusions

29. In my judgment the Claimant failed to comply with the Unless Order dated 15 August 2023, in that he failed by 4pm on 5 September 2023:

    (1) to file amended points of claim bearing a statement of truth and setting out with full particularity the legal and factual basis for the relief sought, against the correct defendants;

    (2) to file an application to amend the claim form and join the correct defendants; and

    (3) to file an application pursuant to paragraph 75(6) of Schedule B1 to the Insolvency Act 1986 for permission to bring proceedings against the former administrators.

30. Accordingly, by operation of paragraph 2 of the Unless Order, the Claim stands struck out.

31. Whilst the Claimant currently appears in person, he had the benefit of legal advice and representation from December 2023 to September 2024. He was represented by Counsel at the directions hearing in December 2023. Yet even now, he has made no application for relief from sanction and an extension of time, nor any application pursuant to paragraph 75(6) of Schedule B1 for permission to pursue the former administrators. He has already had more than enough time in which to make such applications had he wished to do so. He is over a year late in complying with the Unless Order.

32. Naturally I have considered whether the Claimant should be granted an adjournment nonetheless, with a view to allowing him further time in which to make an application for relief from sanction. Having considered this issue with some care, I have concluded that it would not further the overriding objective to do so.

33. In reaching this conclusion I have taken into account the factors that the court would consider on an application for relief from sanction. Whilst there is no such application before me, it is, I think, a useful 'stress-check' to consider these factors. I turn, then, to consider these factors briefly. The principles governing relief from sanction are well-known. They are addressed in CPR 3.9 and Denton v TH White Ltd [2014] EWCA Civ 90.

34. Under CPR 3.9, on an application for relief, the court will consider 'all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for the litigation to be conducted efficiently and at a proportionate cost; and (b) to enforce compliance with rules, practice directions and orders.'

35. As confirmed in Denton at [24]:

> 'A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule

> 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]".'

36. In general, the strength of a party's case is irrelevant to the question of whether relief from sanctions is to be granted. However, there is an exception where, on a summary judgment basis, the case of the party seeking relief is bound to succeed or fail: R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633 at [46]-[47]. As put by Moore-Bick LJ (in the context of a relief from sanction application during an appeal) at [46]:

> 'Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process.'

37. Applying the Denton factors to the present case, in my judgment the breach is plainly both serious and significant.

38. Moreover, no good reason has been given for the breach (or indeed the failure to make an extension application). During the course of the hearing the Claimant at various points sought to suggest that he 'assumed' that his previous solicitors were getting on with making an application for relief from sanction and an application under paragraph 75(6), but the Claimant took me to no evidence showing that his solicitors had at any time been instructed to do so.

39. The Claimant's submissions to the effect that at the time of the Unless Order, (and at the time of the hearing before me), he was a litigant in person, avail him of nothing. Being a litigant in person is not of itself considered a good reason for failing to comply with court orders: Elliott v Stobart Group Ltd [2015] EWCA Civ 449. As confirmed by Lord Sumption in Barton v Wright Hassall LLP [2018] 1 WLR 1119 at [18] and [42]:

> 'In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR r 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the

> applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against them: R (Hysaj) v Secretary of State for the Home Department [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); Nata Lee Ltd v Abid [2015] 2 P & CR 3. At best, it may affect the issue "at the margin", as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor'.

40. The Claimant had the benefit of legal advice and representation for several months and took no steps to make applications under Paragraph 75(6) and for relief from sanction: see [31] above.

41. Turning next to stage three of the Denton test (all the circumstances): the Claimant contended that RSM and the former administrators have not been prejudiced by any delay. I reject that contention. RSM has been prejudiced by the delay in final disposal of this matter and would be prejudiced by further delay, as on any footing there can be no relief against it. In my judgment the former administrators are also prejudiced by the delay in final disposal. It has already been over a year since the claim was issued and the various iterations of points of claim since filed and served by the Claimant raise serious (albeit unparticularised) allegations of fraud and wrongdoing which are potentially damaging to their professional reputations.

42. I would add that, for reasons addressed in a later section of this judgment, this *is*, in my judgment, a case in which, in a Denton context, the court would be able to see, without much investigation, that if reinstated, the Claimant's claim would be bound to fail. It follows, in my judgment, that in this case the merits would have a significant part to play when balancing the various factors that would fall to be considered at stage three of the Denton process.

43. Taking into account all the circumstances of this case, including but not limited to (1) the need (a) for the litigation to be conducted efficiently and at a proportionate cost and (b) to enforce compliance with rules, practice directions and orders and (2) the fact that the Claimant's claim would in any event be bound to fail, I have concluded that relief from sanction would not be granted in this case.

44. It follows that no good purpose would be served by adjourning this matter to allow further time for an application for relief from sanction to be made.

45. Taking into account the foregoing factors and taking into account also the need, so far as is practicable, to ensure that each case is dealt with expeditiously and fairly (CPR1.1(2)(d)) and has allotted to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases (CPR 1.1(2)(e)), I have concluded that the Adjournment Application should be dismissed.

46. As matter stand therefore, the Claim has been struck out pursuant to paragraph 2 of the Unless Order. In light of that fact, in my judgment the Damages Application, the Joinder Application and the Amendment Application (which all relate to the Claim) should also be dismissed. Absent the Claim, they have no purpose.

47. These conclusions of themselves are sufficient to dispose of this matter. For the sake of completeness, however, I shall also summarise briefly the reasons why the Claim and related applications were in any event bound to fail.

48. Dealing first with the Claim: the only defendant to the Claim is RSM. The Claimant can have no conceivable claim against RSM, because it does not stand in any relevant juridical relationship to him. RSM has never owed any kind of duty to the Claimant, nor has RSM ever infringed any of the Claimant's rights. RSM was not ever an administrator. As such, the claim against RSM is hopeless.

49. Turning next to the Damages Application dated 13 July 2023: this too is an application brought only against RSM: see generally [48] above.

50. Turning next to the Joinder Application dated 29 August 2023: as the Claim has been struck out, there are no live proceedings to which Messrs Dounis, Harris and Ross could be joined as parties. Even putting that to one side, however, all three individuals have ceased to be administrators and, by operation of Paragraph 98 of Schedule B1, have been discharged from liability in respect of any of their actions in that role. The Claimant has made no application for permission pursuant to paragraph 75(6) to bring proceedings against any of the three individuals and is now over a year out of time for applying for such permission; the Unless Order having required any such application to be made by 5 September 2023. No adequate explanation has been given for the Claimant's failure to apply for such permission, notwithstanding having had that requirement pointed out to him in RSM's letter of 15 September 2023.

51. Even if the Claimant had applied for permission under paragraph 75(6) of Schedule B1, however, (presumably as a contributory, the Claimant having filed no proof of debt), unless the court was prepared to entertain his various schedules of damages, which were not supported by evidence and were plainly essays in make-believe, he would have no possible pecuniary interest in the relief that he would be seeking. This is because he would be 'out of the money', there being a significant shortfall to the secured creditor and thus insufficient funds to pay a dividend to any unsecured creditors. It is a matter of settled law that the court will not permit a member to occasion an examination into the conduct of administrators where the member has no pecuniary interest in the outcome: see Re Coniston Hotel (Kent) LLP (in liquidation) [2014] EWHC 1100 (Ch) at 52-53, per Morgan J.

52. In addition, any application for permission to bring proceedings under Paragraph 75 of Schedule B1 against the former administrators would be bound to fail as it would not pass the threshold requirements set out in Katz v Oldham [2016] BPIR 83.

53. I would add that the Claimant has no standing outside of paragraph 75 of Schedule B1 to bring a claim against the administrators under common law. Whilst the administrators owed duties to the Company, the Company has been dissolved. No application for restoration to the register has been made and the Claimant does not represent the Company. As a member, the Claimant enjoyed no fiduciary or contractual relationship with RSM or any of the former administrators. The Claimant did not plead any special relationship between him and RSM or the former administrators and on the evidence before me there appear to be no facts which could support a case of special relationship, pleaded or not.

54. For all these reasons, even leaving aside the fact that the Claim has been struck out, the Claimant's Joinder Application in respect of the former administrators would be bound to fail.

55. I turn next to the Claimant's Amendment Application dated 25 September 2023. This suffers from the same fundamental flaws already considered in other sections of this judgment. Firstly, the Claim to which the proposed amended points of claim and revised schedule of damages relate has been struck out and the Claimant has made no application for an extension of time or relief from sanction, whether promptly or at all. Second, the Claimant has no claim against RSM and does not have permission under Paragraph 75(6) of Schedule B1 to bring proceedings against the former administrators.

56. Third, the Amendment Application would in any event be bound to fail.

57. As noted by Mr Andrew Hochhauser QC sitting as a Deputy High Court Judge in SPI North Ltd v Swiss Post International (UK) Ltd [2019] EWHC 2004 (Ch) at paragraph [5]:

> '[5] The test to be applied in an opposed application to amend a statement of case is the same as the test applied to an application for summary judgment. The question is whether the proposed new claim has a real prospect of success. A real prospect of success is to be contrasted with a "fanciful" prospect of success: see Swain v Hillman [2001] 1 All ER 91. A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable see: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8], applied and approved in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15].'

58. A similar approach was adopted by Popplewell LJ (Henderson and David Richards LJJ concurring) in the later case of Kawasaki Kisen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33. This confirms that a proposed amendment must be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence that establishes a factual basis for the allegation. As put by Popplewell LJ (Henderson and David Richards LJJ concurring) at [16]-[18]:

> '[16] It was common ground that on an application to serve a claim on a defendant out of the jurisdiction, a claimant needs to establish a serious issue to be tried, which means a case which has a real as opposed to fanciful prospect of success, the same test as applies to applications for summary judgement: Atimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804 per Lord Collins JSC.
>
> [17] The Court will apply the same test when considering an application to amend a statement of case, and will also refuse permission to amend to raise a case which does not have a real prospect of success.

> [18] In both these contexts:
>
> (1) It is not enough that the claim is merely arguable; it must carry some degree of conviction: ED & F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472 at paragraph 8; Global Asset Capital Inc v Aabar Block SARL [2017] 4 WLR 164 at paragraph 27(1).
>
> (2) The pleading must be coherent and properly particularised: Elite Property Holdings Ltd v Barclays Bank Plc [2019] EWCA Civ 204 at paragraph 42.
>
> (3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: Elite Property at paragraph 41.'

59. Applying such guidance to the present case, in my judgment the draft amended points of claim forming the subject matter of the Amendment Application do not set out a 'more than merely arguable' claim, carrying a degree of conviction, with real as opposed to fanciful prospects of success. The proposed pleading is not coherent and properly particularised. It is also not supported by evidence which establishes a factual basis for the allegations. In addition, on any realistic analysis, the Claimant is so far 'out of the money' that he would have no pecuniary interest in the proceedings in any event.

60. It follows that, even leaving aside the fact that the Claim has been struck out, the Amendment Application would be bound to fail.

Conclusions

61. For all these reasons, I have made an order declaring that the Claim has been struck out and dismissing the Claimant's related applications.

62. I shall hear submissions on costs and any other consequentials on the handing down of this judgment.

ICC Judge Barber