Neutral Citation Number: [2024] EWHC 560 (Ch)

Case No: BL-2023-000116

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 15/03/2024

Before :

MASTER KAYE

- -

Between :

(1) PAUL O'BOYLE(TRADING AS VIRIDIAN) **(2) JUDITH O'BOYLE**	**Claimants**
- and -	
MARY VIVIEN WALLIS	**Defendant**

- -
- -

Mr Paul Wright (instructed by **Taylor Fordyce**) for the **Claimants**
Ms Daria Gleyze (instructed by **Adams & Remers**) for the **Defendant**

Hearing dates: 30 November 2023
Written submissions 6 December 2023 and 15 December 2023

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Approved Judgment

This judgment was handed down remotely at 3 pm on 15 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER KAYE

MASTER KAYE:

1. This decision concerns (i) the claimants' application for permission to re-amend their particulars of claim dated 26 September 2023 ("**the amendment application"**) issued pursuant paragraph 5 of an order dated 16 August 2023 ("**the Order"**) and (ii) the defendant's application dated 17 April 2023 seeking an order to strike out and or for reverse summary judgment of parts of the amended particulars of claim ("**the second strike out application**") ("**APOC**").

2. The amendment application was supported by the witness statement of Paul O'Boyle dated 26 September 2023 which exhibited the version of the re-amended particulars of claim for which permission was sought ("**RAPOC**").

3. The defendant's evidence in support of her second strike out application and in response to the amendment application evidence was provided in witness statements from Peter Ames, the defendant's solicitor, dated 17 April 2023 and 9 October 2023 together with a witness statement of Mrs Wallis also dated 9 October 2023.

4. Ms Gleyze has represented Mrs Wallis throughout this claim. Mr O'Boyle has been legally represented throughout but has changed solicitors and counsel. At this hearing Mr O'Boyle was represented by Mr Wright who has also drafted the RAPOC.

5. I had the benefit of written and oral submissions from both counsel at the hearing on 30 November 2023. However, although Mr Wright had prepared the RAPOC it appears he was only instructed at a late stage for the hearing itself and so his skeleton argument and its annex which sought to set out the disputed amendments were only received late. Ms Gleyze had separately provided a marked up copy of the RAPOC which sought to identify those amendments to which the defendant would consent and those she opposed.

6. I received further written submissions from both counsel in December 2023 culminating in Ms Gleyze's written submissions dated 15 December 2023. I have taken all of those oral and written submissions into account even if I do not set out each and every argument or point raised by counsel during the course of this judgment.

7. The second strike out application sought strike out or summary judgment in relation to parts only of the APOC focussing on (i) all loss relating to the Containers including the alleged agreement relating to rental offset against refurbishment work; (ii) loss of profit/loss of opportunity in the sum of £70,000 and/or £1.3million; (iii) the "all rights reserved" claim; (iv) all references to particulars to be found in other documents; and (v) obviously superfluous and irrelevant sentences/paragraphs. Importantly, it does not seek to strike out the entire claim. Whatever the outcome of the applications the claim will continue. This is a relevant factor when considering some of the amendments.

8. The amendment application seeks permission to amend in the form of the RAPOC exhibited to Mr O'Boyle's witness statement. The RAPOC addresses (ii) to (v) of the second strike out application. It is therefore appropriate to address the amendment application first.

9. As a consequence of the submissions made at the hearing even if I were to be minded to give permission to amend, the RAPOC needs at least some further refinement as appeared to be accepted by Mr Wright.

10. Given the approach to the amendments, the manner in which they were advanced and the incoherence of the explanation provided on behalf of the claimants, I consider that Mrs Wallis has taken a very fair and generous approach to the tidying up and reorganising amendments such that only a few key amendments remain in issue.

11. If having addressed the amendment application any parts of the strike out application remain then it will be necessary to consider those on a free standing basis.

12. Ms Gleyze's objections to the RAPOC went beyond those limited to the amendments made to the RAPOC and the matters raised in the second strike out application. She accepts that is the case but argues that it is as a consequence of the amendments to the RAPOC that the defendant has developed a better understanding of the claimants' case as advanced in the original particulars of claim ("**POC**") and the APOC. She therefore argues that the court should determine the new issues now rather than require a further strike out or summary judgment application to be made.

13. Whilst I have considerable sympathy with the defendant it does not appear to me that it is consistent with the overriding objective of dealing with cases fairly, justly and proportionately for the claimants or indeed the court to have grapple with these new arguments and objections without having seen the scope of them clearly set out.

14. The RAPOC remains unsatisfactory but for the reasons set out below I have determined that there will need to be a further hearing in this case to address further amendments to it. This will also allow time for any further objections to the RAPOC to be articulated including in relation to any further proposed amendments so that the claimants know the objections they have to meet. It will also allow time for the defendant, if so advised, to accept any further amendments or make any further application to strike out parts of the APOC.

Applicable Principles

15. CPR 17 provides the court with a broad discretion when considering whether to permit a party to amend. The guiding principle is that the overriding objective requires the court to strike a balance between the injustice to the applicant if the amendment is not permitted and the injustice to the respondent if the amendment is permitted. When exercising its discretion the court must deal with all cases justly and at proportionate costs which includes ensuring that cases are dealt with expeditiously and fairly whilst allotting an appropriate share of the court's resources to any particular case. The court must therefore have regard to all the circumstances before granting permission.

16. However, the applicant has to be able to demonstrate that the proposed amendment has a real prospect of success which draws on the same test as is applied in strike out and summary judgment applications (see for example *Orb A.R.L v Ruhan* [2015] EWHC 262 (Comm), per Cooke J at [3]).

17. An amendment should be refused if it is clear that it has no real prospect of success drawing on the test for summary judgment. The applicant must therefore demonstrate

that the amendment has a more than merely fanciful prospect of success and carries some degree of conviction. However, when considering the proposed amendments, the test imposes a comparatively low burden or bar and the question is whether it is clear that the proposed amendment has no prospect of success. Amendments can be weak and even improbable but still not fanciful. That is particularly the case where contested factual or expert evidence might be necessary to test the claim. However, if the court considers that a particular claim is improbable or particularly weak but still not fanciful it may impose conditions on the applicant. It is therefore necessary to consider whether the RAPOC amendments have a real as opposed to fanciful prospect of succeeding even if they may be weak or improbable.

18. The court should, however, reject an amendment seeking to raise a version of facts that is inherently implausible, self-contradictory, or not supported by contemporaneous documents and the court should reject an amendment if it can say with confidence that the factual basis of the proposed amendments is fanciful and entirely without substance. For the purpose of this application it is necessary to distinguish between true amendments and those parts of the proposed amendments that are simply rearranged or reorganised parts of the APOC.

19. It is no part of the court's role on the amendment application to engage in a mini-trial or determine contested factual matters. Where any issue turns on contested factual evidence or where a factual enquiry is necessary because determination of the issue involves mixed questions of fact and law the court will be unable to say with confidence that the proposed amendments are fanciful or without substance even if weak. In such a case it seems to me that the low burden or bar will have been met.

20. For both the amendment and the second strike out application the factors that may be relevant when considering all the circumstances are case specific. Primarily the authorities to which I was referred reinforce the broad scope of the court's discretion when considering whether to allow an amendment and the balance of the injustice of permitting or not permitting the amendment as between the parties.

21. For these applications it seemed to me that the court should consider in particular the following general points.

22. Although the amendment application has been made at an early procedural stage (despite the claim being issued in 2020 it has yet to reach a CCMC) it has been made after two strike out applications and the particulars of claim are on their fourth iteration and will need further work. The current amendments were only advanced after the claimants were provided with a final opportunity to put their case in order. Many of the amendments now advanced could and should have been advanced at latest when the claimant was given that opportunity to amend by the Consent Order made in May 2022. In reality many of the amendments are ones which follow criticisms made by the defendant prior to the making of the first strike out application in April 2021. That those amendments are only being advanced 2½ years later and nearly 10 years after the events giving rise to the claim seems to me to be a powerful factor to weigh in the balance against the amending party. As Coulson J explained in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC), lateness is a relative concept but an amendment is always in principle late if it could have been advanced earlier.

23. *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18] emphasises the need for any proposed amendment to be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence which establishes a factual basis for the allegation. It is for the amending party to persuade the court that the amended claim is arguable, coherent and supported by evidence that establishes a proper factual basis for the allegations. Against that of course the court must be cautious not to conduct a mini-trial where there are contested factual issues.

24. There is a distinction to be drawn between whether an amendment introduces a new claim or provides further particulars of an existing claim. A new allegation which does not have a reasonable prospect of success will not be permitted but providing further particulars, based on factual material, in support of an existing pleaded point may be allowed subject to any cross application to strike out.

25. Here there is confusion because of the way the amendments have been advanced as to whether some aspects of the amendments are simply moving the existing parts of the APOC and the associated schedules around into a more appropriate part of the particulars of claim or whether they are amendments in a real sense. There is also some confusion as to what amounts to further particulars given the copious use of schedules and inappropriate cross references to witness statements and exhibits in the APOC. This is complicated by the earlier permission to amend by reference to schedules in a witness statement but without a draft form of the APOC being made available in advance. However, it seems to me that the majority of the proposed amendments to the RAPOC were within a class of amendments that might be better described as reorganisation. In many instances they were not in fact true amendments at all and could ultimately be mapped against the APOC and the associated schedules. Where that was the case the benefits of clarity weighed firmly in favour of allowing such amendments which were not in fact seeking to expand or particularise the claim. Indeed, the clarity provided by the redraft had reduced some of the confusion created by the APOC.

26. As Ms Gleyze noted in her reply submissions, this is not a case in which the claimants have amended their particulars neatly or to a limited extent as against the APOC, so that, if an amendment is not allowed, the claimants could fall back on a previous version of the particulars of claim. They have overhauled the previous particulars of claim to such an extent that they were unable to produce a version which showed the changes as against the old text. I agree with Ms Gleyze that if the court does not allow one of the disputed amendments, it is wholly unclear what would replace it. This only reinforces my concerns and the need for a further hearing. However, I also note the significant improvement in understanding of the claim which the RAPOC provides.

27. I do not however, agree with Ms Gleyze's submission that if the amendments can properly be considered to be further particulars in support of an existing pleading that the amendment test applies in the same way. See for example the notes in the White Book 2023 at 17.3.6 and HHJ Eyre QC in *Scott v Singh* [2020] EWHC 1714 (Comm) at [19]

> "The requirement that the claim or defence proposed by way of amendment has a real prospect of success arises from the need to avoid the futility of allowing a claim or defence to be made by way amendment which is liable to be struck out or to be defeated by a summary judgment application. The same consideration

> does not apply if the line of claim or defence is in the original pleading and will remain in issue even if the amendment is not allowed. ”

28. This does not mean that the claimants can simply add in whatever particulars they want, there would still have to be some relevant basis or connection to the plea, but only that the existing plea to which they relate does not need to meet the test for permission to amend.

29. As a general rule the court has no discretion to add a new cause of action in existing proceedings after the expiry of the relevant limitation period since this would have the effect of depriving a defendant of an accrued limitation defence. However, CPR 17.4 provides a limited exception. A party may seek to introduce a new claim by amendment after the expiry of a relevant limitation period if it arises out of the same or substantially the same facts as are already in issue in the existing claim. However, this may not assist where there is also a need to add a party outside the relevant limitation period (CPR 19.6).

30. In respect of the second strike out application the principles concerning summary determination under Part 24 were summarised in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] as subsequently approved in the Court of Appeal in *AC Ward & Sons Limited v Catlin (Five) Limited* [2009] EWCA Civ 1098. Similar principles can be said to apply equally to strike out applications, at least where the contention of the applicant for reverse summary judgment is that the case as pleaded discloses no reasonable grounds as here. The claim must be realistic, not fanciful, and more than merely arguable. There is therefore a bar which the claimant has to overcome, but it is not a high bar in relation to the second strike out application or the amendment application.

31. CPR 3.4.2(a) and/ (c) provide the court with the power to strike out statements of case or parts of statements of case as an exercise of discretion if they disclose no reasonable grounds for bringing the claim and/or there has been a failure to comply with a rule, practice direction or court order. As Ms Gleyze noted PD 3A.1 gives the example of a claim that may be struck out as one which although it contains coherent facts even if true would not disclose a recognisable claim against the defendant.

32. Finally, particulars of claim should comply with the rules of pleading as summarised in CPR 16. There are numerous authorities which grapple with the purpose and contents of pleadings for example: *McPhilemy v Times Newspapers Ltd* [1999] E.M.L.R. 751, at [776] and *Mortgage Agency Services Number Four Ltd v Alomo Solicitors (a firm)* [2011] EWHC 22.

33. Ms Gleyze relied on Leggatt J in *Tchenguiz v Grant Thornton* UK LLP [2015] EWHC 405 (Comm)

> “Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric.” (at [1]) ”

and *Gamatronic v Hamilton & ors* [2013] EWHC 3287 (QB) Andrew Smith J.

34. She also referred me to *McKillen v Misland (Cyprus) Investments Limited and others* [2012] EWHC 521 (Ch) at [123] where Richards J said it was not permissible to use phrases such as *"for example"* or *"without prejudice to the generality of the foregoing"*. The judge also said it was neither helpful nor meaningful to include a sentence such as *"the [Claimant] reserves his position to add further matters"*. These were all well-made points and appropriate criticisms of the APOC.

35. The issue that arises on the amendment application is whether the RAPOC resolved the obvious difficulties with the APOC and if it does should the claimant be given permission to rely on it. If in doing so the claimants have pleaded new claims or causes of action should they be given permission to rely on those amendments despite the limitation issues that would arise. And finally do any parts of Ms Gleyze's second strike out application remain to be determined if the claimant is allowed to amend in the form of the RAPOC.

36. It is sufficient to conclude this section by referring to the clear statement of the purpose of pleading which can be found in Mrs Justice Cockerill's judgment in *King v Steifel* [2021] EWHC 1045 (Comm) at [145] – [149] to which I referred the claimants to at the August hearing and which I set out in full below:

> "145. A pleading in these courts serves three purposes. The first is the best known – it enables the other side to know the case it has to meet. That purpose, and the second are both expressly referenced in the following citation from the speech of Lord Neuberger MR in *Al Rawi v Security Service* [2010] EWCA Civ 482; [2010] 4 All ER 559, [18]:
>
> "a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance, so that the trial can be fairly conducted, and, in particular, the parties can properly prepare their respective evidence and arguments at trial."
>
> 146. The second purpose then is to ensure that the parties can properly prepare for trial – and that unnecessary costs are not expended and court time required chasing points which are not in issue or which lead nowhere. That of course ties in with the Overriding Objective, which counts amongst its many limbs "*(d) ensuring that [the case] is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases…*".
>
> 147. This is a point which feeds into the dictum of Teare J in *Towler v Wills* [2010] EWHC 1209 (Comm), at [18]-[21]:
>
> "The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is

> being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies."
>
> 148. The third purpose for the pleading rules is less well known but no less important. The process of pleading a case operates (or should operate) as a critical audit for the claimant and its legal team that it has a complete cause of action or defence.
>
> 149. Particulars of Claim, in particular, should generally aim to set out the essential facts which go to make up each essential element of the cause of action – and thought should be given to whether any more than that is either necessary or appropriate, bearing in mind the functions which a pleading serves and whether any components of what is pleaded are subject to rules requiring specific particularisation."

37. The POC and the APOC had not adhered to those principles and the failure to have carried out a critical audit has resulted in the two strike out applications and the amendment application. Statements of case are important and provide the framework against which to understand and test the claim in oral evidence. Those are weighty factors to consider when considering whether to exercise the court's broad discretion on both the amendment and the second strike out application.

Preliminary Conclusion

38. Here one might say that the claimants have already exceeded the generous ambit of the court's discretion and patience given the number of hearings so far and the fact that the claim remains in an unsatisfactory form. The claimants' complaints that the delay in progressing the claim is the fault of the defendant for raising the pleading points fails to recognise that the real fault lies with the chaotic and incoherent nature of the APOC which fails to comply in any real sense with the rules of pleading and is largely incomprehensible. It is for that reason that for those parts of the claim that progress I intend to consider making a conditional order.

39. Despite the submissions of both counsel and having reflected on them and the RAPOC I am not yet satisfied that the RAPOC fully addresses the shortcomings in the APOC but neither am I prepared to strike out those parts of the claim that are not yet in proper form. It seems to me that there is further work to be done by the claimants if they want to salvage those parts of their claim.

40. I set out below my determination on some of the key issues that were outstanding between the parties but as was clear from Mr Wright's submissions as the hearing progressed further amendments were going to be needed to clarify and revise aspects of the amendments that are still in dispute. With the further clarity provided by Mr Wright, Ms Gleyze had further objections to the RAPOC/APOC which were not the subject of the second strike out application.

41. On the most significant issue between the parties I have concluded that the claim against Mrs Wallis as a partner in Woodmancott Enterprises is not a new cause of action, is properly constituted and has always formed part of the claim. But I do not allow all of the amendments Mr Wright has sought to make in relation to that claim – not least because some of them are narrative statements which have no place in a statement of case. They may be matters for evidence or legal submission in due course. To the extent that any amendments to that part of the claim are permitted they overcome the low bar for amendment. Mr Wright will need to make further amendments to reflect my intention to give permission.

42. This means that in principle the claim in relation to the Containers and their contents remains. However, the partnership dissolved with the death of Mr Wallis on 20 September 2014 and the RAPOC does not address clearly, or at all, the consequences of that dissolution in respect of the claims in relation to the Containers and their contents including the moulds. Again this needs to be revisited by Mr Wright.

43. As a more general point the RAPOC refers to "Goods" generically and "Claimants" generically but there are different claims by different claimants against the defendant in relation to the Units and the Containers. The defendant is entitled to know which claims to damages for conversion relate to which of the Units or Containers and which of the claimants. This may need further amendment to reflect the dissolution on 20 September 2014.

44. The claim in relation to the moulds generally whether in the Containers or Unit 12C appears to be a weak claim but it relies on factual evidence. The fact that the defendant has evidence from the artists that they consider the moulds were their moulds is not a complete answer to Mr O'Boyle's claim to the moulds. It simply provides the two sides of the argument. Mr O'Boyle says that when he made the moulds they were his and not the artists and or that he had entered into a joint arrangement with the relevant artists. The evidence the defendant has adduced suggests that at least some of the artists considered themselves to be the owner of the moulds for their sculptures. It is right that in the POC it appeared that Mr O'Boyle's case was different. However, that goes to the weakness of the claim only. Who is right as to ownership of the moulds will turn on an assessment of the factual evidence by the trial judge and an application of the law to the facts as found. Only then can the judge determine who in fact owned the moulds. I do not therefore strike out that part of the claim as a whole at this stage though it will be subject to further clarification as to what Mr O'Boyle says was in each of the Containers and Units and which claimant is pursuing which claim.

45. Any further amendments addressing those issues will have to be considered on their own merits at the next hearing. For simplicity they should be amended on to the version of the RAPOC which was advanced at the hearing on 30 November 2023. That does not mean that permission has yet been given for the RAPOC in any particular form. Mr Wright will have to consider how he provides details of his proposed amendments so

that it is clear which are simply refining amendments for which there is not yet formal permission and which are further amendments to the underlying APOC.

46. He will also need to give consideration to Ms Gleyze's well-made point that at present if an amendment is not permitted it is entirely unclear what the fall-back position would be given the wholesale reorganisation of the APOC.

47. I am concerned to ensure that going forwards this claim in whatever form it finally takes after the next hearing, proceed with expedition and focus. I consider that many of the claims such as the refurbishment offset, and the moulds claims are improbable or weak. I consider that there are potentially some difficulties with the heads of loss which are now pursued and the overlap between them. Some of the additional particulars relied on appear to me to fall into the same category, in that they appear to be improbable but are the particulars said to provide the detail for the claims which have already been pleaded. Where the amended particulars contradict the particulars previously relied on that must raise a question as to the strength of the particulars and their reliability. Where they are said to be calculations of, for example, the amount of arrears said to have been outstanding on a particular date and all parties have different figures based on different evidence (and indeed the claimants have changed their position on the amount of arrears) it seems to me that court cannot resolve that issue at this stage, it is a trial matter.

48. There will be costs consequences in relation to the manner in which this claim has been conducted to date. The stubborn resistance of the claimants to recognising the very obvious shortcomings in the POC and the APOC resulting in two strike out applications have caused and will continue to cause the defendant to incur considerable unnecessary costs. The court's time and the defendant's time has been wasted and the court's limited resources have been unnecessarily taken up by this claim which is yet to reach a CCMC. Everything about this case is stale and has been unnecessarily delayed.

49. Against that this claim will proceed in any event since although poorly pleaded there is no application to strike out the claim against the defendant in relation to the Units in its entirety. Refusing permission to amend on a discretionary basis if I am otherwise satisfied that the amendments should be allowed will not bring the claim to an end. The defendant would still be faced with a substantial claim which is not the subject of any strike out application however weak she considers it to be. That is a significant factor to weigh in the balance when assessing the balance of prejudice.

50. It seems to me however, that to the extent that I allow the claimants to amend the prejudice to the defendant can be adequately addressed by appropriate sanctions that will ensure that the claim proceeds with expedition and addresses any adverse costs consequences and the risks to the defendant of the delay and unnecessary costs she has incurred to date. When considering that balance in due course I will take into account that previous adverse costs orders were not always paid promptly.

51. The court has a broad discretion in relation to the management of its own procedures and general case management. That includes the power to take any step or make any order for the purposes of managing a case and furthering the overriding objective under CPR 3.1(2)(m) and the power to make an order the subject of conditions including a condition of a payment of a sum of money into court under CPR 3.1 (3). The ultimate aim of the court is to identify the just order having regard to the overriding objective.

52. This is a paradigm case for making a conditional order given the weakness of parts of it, the failure to comply with court rules in relation to the pleading and the considerable delay in bringing and then pursuing or progressing the claim. It appears to me to recognise the balance between the prejudice to the claimants who appear to want to pursue their claim and the prejudice to the defendant who is facing a stale claim that has been considerably delayed by the conduct of the claimants.

53. At the next hearing I will be considering making a conditional order requiring the claimants to make a payment into court if they intend to continue to pursue the claim. This condition or sanction would be to reflect the weakness and improbability of some aspects of the claim but also to reflect on the past failures to comply with the rules, practice directions and orders and to encourage future compliance consistent with good case management and the overriding objective. The nature and extent of such payment would have to be considered at the next hearing. The payment into court will be separate to and in addition to any costs orders made in respect of the amendment and second strike out applications.

54. At the next hearing I will also be making costs orders in relation to the amendment and second strike out application. Although I will hear submissions from the parties on the incidence and basis of costs if they are unable to agree, it appears to me that the defendant is likely to be entitled to a costs order in her favour in relation to both applications.

55. A further hearing will be listed. Any revised RAPOC and any evidence should be filed and served by 4 pm 21 days before the date fixed for that hearing. The evidence if any should be focussed on and only address the further refinement of the RAPOC and the conditions to be attached to any permission to amend. The defendant should file and serve any responsive evidence including in respect of the conditions to be attached to any order for permission by 4 pm 14 days before the date fixed for the hearing. If the defendant intends to seek to strike out other aspects of the APOC in light of the clarification she says has been provided by the RAPOC any such further application should be made by the same date. The claimant can provide any reply evidence by 4 pm 7 days before the hearing. Skeleton arguments should be filed by 12 noon 2 clear days before the hearing together with any costs schedules on which any party intends to rely. Such submissions should be concise and focussed on those matters which are outstanding and/or which the court still needs to determine.

56. The parties should consider carefully whether they are able to agree any further amendments and seek to agree a list of what remains outstanding and to be determined at the further hearing.

57. The determination of any applications for costs arising out of these applications will be reserved to the next hearing. It should not therefore be necessary for there to be an additional hearing in advance of the next hearing.

Factual Background

58. Mr and Mrs O'Boyle each leased a unit in the Calvert Centre from Mr and Mrs Wallis in October and November 2012 (Units 13A and 12C respectively or the Units and the leases). The leases were in similar terms each for a period of 6 years. The lessees were

recorded in the leases as Mr O'Boyle for Unit 13A and Mrs O'Boyle for Unit 12C, with Mr and Mrs Wallis together as lessors.

59. Mr O'Boyle also entered into two agreements for storage services with Woodmancott Enterprises, a general partnership between Mr and Mrs Wallis, on 31 October 2012 ("**the storage agreements"**). The parties to the storage agreements were Woodmancott Enterprises as hirer and Mr O'Boyle. Pursuant to the storage agreements Mr O'Boyle had use of Container A from 1 November 2012 and Container B from 1 February 2013 (together the Containers).

60. The claimants describe Mr O'Boyle's business as a foundry and sculpture business. The defendant explains that Mr O'Boyle used the Units to cast sculptures for artists from moulds. The Units were used as premises for the business and the Containers for storage. The defendant says that Mr O'Boyle had made significant alterations to the Units.

61. Mr O'Boyle was convicted of various offences and imprisoned on 29 August 2014. The nature of the offences is not relevant to these applications.

62. Save as to precisely the status of the parties who entered into the leases and storage agreements there does not appear to be a dispute about the actual terms of the leases or storage agreements themselves. There is a dispute about (i) the amount of the arrears in August 2014 (the fact of arrears is admitted) and (ii) the effect of the terms including Mrs Wallis' rights in light of the admitted arrears and what she says was the abandonment of the Units and the Containers after 29 August 2014.

63. The defendant says that by 2014 there were arrears of rent in respect of the Units and following Mr O'Boyle's imprisonment the Units were abandoned on or about 30 August 2014 and not reinstated causing the defendant to incur considerable costs of reinstatement. The Containers were also described as being abandoned. The defendant says that many of the items contained in the Units and the Containers were subsequently retrieved by Mrs O'Boyle, Mr O'Boyle's son and associates of Mr O'Boyle and/or recovered by the owners of the items stored in the Containers. This appears to have occurred between about the beginning of September 2014 and continued until at least March 2015.

64. Mr O'Boyle subsequently retrieved some items himself in 2015 following his release from prison. He does not however accept that other items in the Containers were either retrieved as explained by the defendant and/or should have been released to those other parties. It is also now his case that the moulds created to caste the sculptures belonged to him.

65. Mr O'Boyle brings his claim against the defendant on the basis that he was trading as Viridian/Veridian but the defendant does not recognise either name and believed she and Mr Wallis were dealing with Mr O'Boyle directly. Certainly the name Viridian/Veridian does not appear on the leases or service agreements. However, a trading as name does not provide any limited liability or create any separate legal personality. Mr O'Boyle would remain personally liable for, for example, rent arrears.

66. Mr Wallis died on 20 September 2014 (his executors were Mrs Wallis and Mrs Spencer). The general partnership of Woodmancott Enterprises dissolved with

immediate effect on Mr Wallis' death. Mrs Wallis says she continued the business thereafter as a sole trader. The date of dissolution of the partnership has particular significance in relation to any claims concerning the conversion of the contents of the Containers.

67. Mr O'Boyle now says that following his release from prison he undertook works to adapt his own property at a cost of £15,000 and subsequently set up and ran his foundry business from there. Those costs (unparticularised) have been in the RAPOC as a new head of loss and damage arising from the claim for unlawful eviction in relation to the leases. That claim for loss and damage includes in addition a claim for the loss of the term of the leases. The generic claim for loss of profit and loss of opportunity has been amended out by the RAPOC.

68. Mr O'Boyle did not seek to pursue a claim against Mrs Wallis in any capacity in 2015 or put her on notice of any potential claim. Indeed, apart from a general enquiry in late December 2015 there was no contact from Mr O'Boyle until Mrs Wallis (and Mrs Spencer) received a letter of claim dated 20 July 2020.

69. In the meantime Mr Wallis' estate had been fully administered by 2017. Mrs Wallis is one of the beneficiaries of Mr Wallis' estate. On 4 August 2020 Godwins on behalf of Mrs Wallis and the executors of Mr Wallis confirmed to Mr O'Boyle's then solicitors that the estate of Mr Wallis had been fully administered.

70. Mr O'Boyle's claim was issued on 14 August 2020 in the Winchester County Court naming both Mrs Wallis in her own capacity and Mrs Wallis and Mrs Spencer as executors of the estate of the late Mr Wallis. Mrs O'Boyle was not a party and despite the guidance in CPR PD 7.3 Woodmancott Enterprises were also not named as a party.

71. Although the claim was issued within limitation, given the nature of the claim which includes claims for the delivery up and return of goods said to have been held in the Units and the Containers in 2014, it is at the very least surprising that the claim was not made earlier and or that Mrs Wallis was not put on notice.

72. Although Mr O'Boyle took full advantage of the four months permitted for service, the shortcomings in relation to the identity of the parties was not remedied. The particulars of claim ("**POC**") dated 3 December 2020 plead the terms of the leases and the storage agreements, and admit that there were arrears in 2014. The POC claim an agreement to offset arrears against the costs of refurbishment work in relation to one of the Containers but do not plead the terms of the agreement. The claimant claims unlawful eviction on or about 29/30 August 2014 when he says that the contents of the Units and the Containers were removed and subsequently retained, lost or disposed of by the defendants causing the claimant loss. This gives rise to the claim for delivery up and consequential damages for conversion of the contents of the Units and the Containers and various losses said to arise from the wrongful eviction including a claim for loss of profit or loss of opportunity and loss of the term. The POC were brief.

73. Mrs Wallis' and the executors acknowledged service on 16 December 2020 and served their defences on 1 February 2021. The defences highlight key deficiencies in the POC including the absence of Mrs O'Boyle as a party despite being the lessee of Unit 12C. The defences plead that Mrs Wallis and Mrs Spencer obtained a grant of probate on 21 August 2015 and that Mr Wallis' estate had been administered in accordance with his

will and fully distributed and probate concluded on 23 March 2017 several years before the claim was issued (plene administravit).

74. The estate's defence therefore pleads the following (i) that there was no estate to claim against it having been fully administered but also (ii) that in the alternative all the defences relied on by Mrs Wallis in her personal capacity were available to the estate as Mr and Mrs Wallis were joint landlords of Units 13A and 12C and partners of Woodmancott Enterprises. This is of course relevant to the current objections raised by Mrs Wallis in relation to the claim said to be brought against her as a former partner.

75. Mr O'Boyle does not appear to have taken stock on receipt of the defences. Instead it was left to the defendants to issue the first strike out application dated 13 April 2021. This sought (i) the removal of the executors of Mr Wallis' estate as a party on the basis that the estate had been fully distributed (ii) strike out or summary judgment on the basis that the claim appeared to be made by Mr O'Boyle t/a Viridian rather than Mr O'Boyle personally (iii) to require the claimant to address any limitation issues if either a new claim were to be issued or a new party were to be added (iv) strike out of the claim in relation to Unit 12C as Mrs O'Boyle was not a party to the claim and (v) strike out or summary judgment in relation to the claims in respect of the moulds on the basis that as Mrs Wallis understood and Mr O'Boyle had pleaded they belonged to the various artists for whose works they had been made.

76. The application was listed for hearing on 16 September 2021. Mr O'Boyle filed late evidence on 16 September 2021 only 1 hour before the hearing. The effect of this was that the hearing was adjourned to be relisted. The judge took the opportunity to highlight to Mr O'Boyle that the POC in their current form would not be able to go forward. This was repeated in correspondence from the defendants dated 28 September 2021. This did not elicit any proposed application or amendments.

77. The second hearing of the first strike out application was listed on 18 January 2022. Yet again Mr O'Boyle served late evidence on 11 January 2022 which exhibited a number of schedules said to set out the contents of the Units and the Containers and the losses being claimed. No application was made to rely on that evidence nor were any amendments or applications proposed.

78. Perhaps fortunately for Mr O'Boyle the hearing was adjourned. It was relisted for 5 May 2022. Yet again Mr O'Boyle did nothing until just before the hearing. On 28 April 2022, a year after the first strike out application had been issued and only days before the hearing, Mr O'Boyle finally issued an application to join Mrs O'Boyle as a party to the claim. The application did not seek to address any of the other deficiencies with the claim and POCs.

79. At the hearing Mr O'Boyle was represented by counsel (not Mr Wright). Ms Gleyze represented the defendants. The parties agreed that the claim and POC would need to be amended including the joinder of Mrs O'Boyle but there was no draft of the proposed amendments available. The parties agreed a consent order which is dated 5 May 2022 ("**the Consent Order**").

80. The Consent Order gave permission to join Mrs O'Boyle as a second claimant and for consequential amendments. That should have simply required some minor amendments in relation to the claim in respect of Unit 12C where she rather than Mr O'Boyle had

been the party to the lease. It was agreed that Mr O'Boyle would discontinue the claim against the executors.

81. As part of the Consent Order, the first strike out application was withdrawn. Importantly, given some of the arguments advanced before me, that means it was not determined. In principle it was and is open to Mrs Wallis to raise the same issues raised in the first strike out application in the second strike out application or in a subsequent strike out application if they still arise.

82. The Consent Order provided permission for Mr O'Boyle to amend his particulars of claim by 8 June 2022 but the amendments were limited to "the items currently referred to in Schedules A to E exhibited to Mr O'Boyle's 1 January 2022 witness statement". Those schedules were said to be schedules setting out the contents of the Units and Containers (including the moulds) which Mr O'Boyle (and Mrs O'Boyle) said had been wrongly converted by the defendants and for which he was entitled to delivery up or damages.

83. Hindsight is of course a wonderful thing but providing Mr O'Boyle with a free hand to amend the POC without the court or the defendant having seen a draft was a risk.

84. The APOC were eventually served dated 1 July 2022. Had the APOC been provided in draft and/or had an application to amend been needed, permission to amend in that form would not have been granted. In a pleading sense the APOC were hopeless. The APOC failed to address properly or at all many of the issues that had been identified in the first strike out application. Further they were colloquial in style, more evidence than pleading. They did not clearly set out the claims that were being made against Mrs Wallis by each claimant or the basis of those claims. There were formatting and paragraph errors. Hand written numbers had been added in places. The APOC failed to set out in any recognisable form the particulars relied on by the claimants instead making extensive cross-references to witness evidence and their exhibits. The schedules appeared to have been copied directly into the APOC from Mr O'Boyle's witness statement leaving narrative paragraphs of evidence in the middle of the schedules now annexed to the APOC. The cross-referencing in the schedules to parts of the witness statement and the exhibit remained. No attempt had been made to set out any recognisable claim for losses or to adapt the schedules. The schedules had been supplemented with some additional narrative explanation at the beginning of each. The wholesale amendments to the APOC had not been limited to those strictly permitted by the Consent Order. For completeness although it was said by the defendants that the APOC was not signed with a statement of truth there was one, it was just on the wrong page.

85. The amendments to the APOC were largely incomprehensible and confused including amendments to the parts of the POC that had previously been clear if not properly particularised. In order to understand the extent of the difficulties I set out some limited examples copied from the APOC as served including two excerpts from the schedules.

2 By a further lease dated 30 November 2012, the ~~Defendants~~ Defendant (with her late husband Brian Gerald Wallis) demised (in that Judith O'Boyle was named in the lease) the premises situate at Unit 12C, The Calvert Centre, Woodmancott, Nr Winchester, Hampshire S021 3BN ("Unit 12C") to Judith Frances O'Boyle (the First Claimant's wife) (the Second Claimant) for a term of six years from 1 October 2012, to 30 September 2018, at an annual rent of £5,200 (excl. VAT), paid by monthly by instalments, plus insurance rents and service charge. The sum of £1,000 was paid by the First Claimant to the Defendant and her late husband Brian Gerald Wallis ~~,~~ in Advance of the commencement date. The Defendant and her late husband Brian Gerald Wallis was aware that the First Claimant would be trading from Unit 12C and permitted, as did the Second Claimant, the Claimant to so trade. ~~-~~Unit 12C was known as The Wax Shop. The First Claimant was treated by the Defendant and Brian Wallis as the tenant of the lease of Unit 12C (including through email(s)/documents referred to in the 16 September 2021 and 11 January 2022 statements of the First Claimant and their exhibits (including the reference from the Defendant to the First Claimant to "your balance" in relation to claimed rent due for Unit 12C and the Defendant stating to the First Claimant that she had after 30 August 2014 credited the Unit 12 C deposit to the First Claimant). The First Claimant (and not the Second Claimant) has paid the Defendant and the late Brian Wallis monies in relation to the Unit 12C lease. In the alternative (and without prejudice to the foregoing) the First Claimant was a licensee of the Second Claimant at Unit 12 C on the same terms as the lease from the Defendants in relation to Unit 12C and with the consent of the Defendant and her late husband Brian Wallis, (and with an ability to enforce either directly against the Defendant and her late husband Brian Wallis in respect of the provisions in the lease of Unit 12C and/or through the Second Claimant who is joined to this claim and joins in with all the claims of the First Claimant including in respect of breaches by the Defendant and her late husband Brian Wallis including in respect of the lease of Unit 12C).

The Defendant (Mary Wallis) has been the decision maker for the landlord/licensor. The Defendant has (and including in relation to the partnership she had at the Calvert Centre with her late husband Brian Wallis and the reference to reversionerr in the landlord provision in the lease) in relation to the landlord/licensor provisions in the leases of the Units and licences of the Containers and in any event managed the Units/Containers and including the unlawful eviction and subsequent disposal/removal (and/or allowing of disposal/removal of goods/items form the Units/Containers and in any event at the end of August 2014 the Brian Wallis husband of the Defendant (Mary Wallis) was old, infirm and unwell and died on or around 20 September 2014 within a few weeks or so of the end of August 2014. Liability of the Defendant to the Claimants, and as referenced below, arises under both the leases of the Units and licences of the Containers and the Torts (Interference with Goods) Act 1977.

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3 Unit 13A and Unit 12C form part of a number of units within a building, known as Phase III Calvert Centre.

4. Pursuant to a Rent Deposit Deed, also dated 1 October 2012, the First Claimant deposited the sum of £866.67 (plus VAT of £173.33) with the ~~Defendants~~ Defendant and her late husband Brian Gerald Wallis as a security for payment of the rents reserved under each of the leases, for Unit 13A and Unit 12C. Additional sums totalling £3,600 were also deposited by the First Claimant.

5. By two separate licence agreements dated 31 October 2012, the ~~(~~ First Claimant agreed to hire two storage containers ("Container A and Container B"), from the ~~Defendants~~Defendant and her late husband Brian Gerald Wallis (and who had a ~~, under their~~ then trading/partnership name of Woodmancott Enterprises), on a month to month basis at an agreed monthly rate of £100 (plus VAT) each, from 1 November 2012. The First Claimant paid to the Defendant and her late husband Brian Wallis a refundable deposit of £120 and £240 (plus VAT) respectively, for each storage container. The pertinent term, for the purposes of this claim, contained in the licence agreements were as follows:

   (a) Clause 5 - the Defendant's and the Brian Wallis' (ie the now late Brian Wallis)' right to *'suspend the provision of any or all the Services, if and so long as any invoice is not paid within the stated credit period ...'*

   (b) Clause 8 - the Defendant's and the Brian Wallis' (ie the now late Brian Wallis') right to *'terminate the [licence) agreement (forthwith upon any material or persistent breach by the [First Claimant] of any provision hereof'*

6. The First Claimant ~~is~~ has a sole trader (ie in the name of the First Claimant) sculpture and foundry business making bronze sculptures and at the relevant time, employing about 5 people, from the Units and Containers for national and international artists.

7. By Clause 5(2) of the leases of Unit 13A and Unit 12C, the Defendant and the now late Brian Wallis covenanted to allow the First Claimant and in the case of Unit 12C also the Second Claimant to '... *peaceably and quietly*

Unit 13A (The Chasing Shop)

Item number	Item	Cost	Supporting Invoice	Supporting Photo	Further details

Equipment and materials

Nb invoices for 1 of item 1 (work bench), item 2 (bench vices), item 3 (metal rollers), item 4 (welding bench), item 5 (large belt sander), item 6 (small belt sander), items 8, 9 and 10 (air line/oilers), item 11 (table and 4 chairs), 12 (compressor), item 13 (sand blaster), 21 (2 chemical cabinets) in pages 57 – 88 in the Exhibit POB2 (ie an Exhibit in the Paul O'Boyle (First Claimant) 11 January 2022 statement).

Photos for item 1, item 2, item 4, items 8-11, 13, 20 and 21 at pages 57 - 88 in the Exhibit POB2.

The item numbers on these copy invoices/photos correspond to the below item numbers.

Work in progress and bronzes					
	Work in progress				
	50 or so waxes in Unit 12 C, and 10 to 15 moulds. Waxes kept in fridge. Construction process of bronze- make mould (rubber and plaster) around original object (pattern). Make wax (green) from mould. Put wax tubes onto wax. Cover in ceramic shell Heat up to melt wax and leave hollow ceramic shell (mould) hollow. Pour bronze into ceramic mould. Original structure (pattern) usually destroyed in the making mould process. Working at 29/8/14 eviction for Philip Blacker, Heather Jansch (now died), Emma Mc Dermett, Eddie Powell, Gerina Bennet, Claire Tupman, Simon Gudgeon, Marie Acker.	Circa £8,600		Photos of some of the waxes and moulds in Unit 12 C at pages 39 – 43 in the Exhibit POB2	

86. Mrs Wallis' amended defence dated 12 August 2022 was served without prejudice to her contentions as to the problems with APOC. The defence pleaded that (i) the particulars of claim are verbose, difficult to follow and at times incomprehensible; (ii) they plead evidence and refer to particulars not included in the pleading itself (as demonstrated from the excerpts above) in particular the particulars of claim seek to plead the claim by reference to the witness statements and exhibits of Mr O'Boyle; (iii) they go beyond the scope of the limited consent provided in paragraph 8 of the Consent Order; (iv) failed to set out coherently the particulars of loss alleged to have been suffered by each claimant; and (v) plead new heads of loss and or new claims and fail to provide proper particulars. The value of the claim had also jumped significantly with the APOC indicating that the loss of profit/loss of opportunity claim alone was said to be about £1.3m.

87. It will be apparent even from the limited excerpts above that there was some force in the defendant's criticism. Despite this clear signal that the APOC needed more work no further action was taken by the claimants to remedy any of the defects.

88. Given the increased value of the claim it was transferred to the Business & Property Courts. The second strike out application was issued on 14 April 2023. It was listed for hearing on 16 August 2023.

89. A week before the hearing on 8 August 2023 Mr O'Boyle sought a late adjournment. No evidence in response to the application and no proposed amendments had been provided by the claimants. The adjournment was sought on the basis that Mr O'Boyle was in Ireland. His house there had suffered extensive damage following a leak, the internet was not good and he was unable to return to the UK and/or provide instructions in good time for the hearing. The application was refused on paper. It was renewed by Mr Sclater (Mr O'Boyle's solicitor) at the hearing on 16 August. That hearing provided

an opportunity for the court to explain that there was considerable force in many of the criticisms made of the APOC and that parts of them were very likely to be susceptible to strike out. The claimants were provided with an opportunity to seek to rectify the defects by providing a revised draft RAPOC. The second strike out application was therefore adjourned.

90. Mr Wright prepared a draft RAPOC. It was a clean document that effectively started again but had to do so by reference to the APOC. For understandable reasons, Mr Wright's RAPOC was not marked up against the APOC. However, in order to establish whether (i) the amendments were in fact amendments and not simply restructuring (ii) should be allowed either by agreement or the court or (iii) were seeking to raise new claims outside limitation, it was necessary to map them against the APOC. The usual method for doing so being to strike through or add text in green.

91. Mr Sclater initially resisted providing any form of mark-up, instead providing a long and detailed explanation, which was also in part destination table, seeking to set out which parts of the APOC had been moved to which parts of the RAPOC and why and what had been added and where. It was incomprehensible. The claimants should have been able to explain in a clear and coherent manner what amendments were being made to which parts of the APOC for the purposes of the amendment and second strike out application.

92. I directed that a marked-up copy be provided. What that highlighted was the extent of the amendments. So extensive were the amendments that it appeared it was not possible to mark-up on a word version of the document. A hand amended version of the APOC in green ink with additional notes was provided. However, in preparing the marked up version the claimants identified further amendments they wanted to make. These were added in black to a later version. It is the version of the RAPOC advanced at the hearing including those further black additions which is the one in respect of which permission is sought.

93. I have copied below the marked-up version of the paragraphs from the APOC set out above to give an idea of the extensive nature of the amendments:

3 2

By a ~~further~~ lease dated 30 November 2012, the ~~Defendants~~ Defendant (with her late husband Brian Gerald Wallis) demised ~~(in that Judith O'Boyle was named in the lease)~~ the premises situate at Unit 12C, The Calvert Centre, Woodmancott, Nr Winchester, Hampshire S021 3BN ("Unit 12C") to ~~Judith Frances O'Boyle (the First Claimant's wife) (the Second Claimant)~~ for a term of six years from 1 October 2012, to 30 September 2018, at an annual rent of £5,200 (excl. VAT), paid by monthly by instalments, plus insurance rents and service charge. ~~The sum of £1,000 was paid by the First Claimant to the Defendant and her late husband Brian Gerald Wallis, in advance of the commencement date. The Defendant and her late husband Brian Gerald Wallis was aware that the First Claimant would be trading from Unit 12C and permitted, as did the Second Claimant, the Claimant to so trade.~~ Unit 12C was known as The Wax Shop. ~~The First Claimant was treated by the Defendant and Brian Wallis as the tenant of the lease of Unit 12C (including through emails/documents referred to in the 16 September 2021 and 11 January 2022 statements of the First Claimant and their exhibits (including the reference from the Defendant to the First Claimant to "your balance" in relation to claimed rent due for Unit 12C and the Defendant stating to the First Claimant that she had after 30 August 2014 credited the Unit 12 C deposit to the First Claimant). The First Claimant (and not the Second Claimant) has paid the Defendant and the late Brian Wallis monies in relation to the Unit 12C lease. In the alternative (and without prejudice to the foregoing) the First Claimant was a licensee of the Second Claimant at Unit 12 C on the same terms as the lease from the Defendants in relation to Unit 12C and with the consent of the Defendant and her late husband Brian Wallis, (and with an ability to enforce either directly against the Defendant and her late husband Brian Wallis in respect of the provisions in the lease of Unit 12C and/or through the Second Claimant who is joined to this claim and joins in with all the claims of the First Claimant including in respect of breaches by the Defendant and her late husband Brian Wallis including in respect of the lease of Unit 12C).~~

~~The Defendant (Mary Wallis) has been the decision maker for the landlord/licensor. The Defendant has (and including in relation to the partnership she had at the Calvert Centre with her late husband Brian Wallis and the reference to reversioners in the landlord provision in the lease) in relation to the landlord/licensor provisions in the leases of the Units and licences of the Containers and in any event managed the Units/Containers and including the unlawful eviction and subsequent disposal/removal (and/or allowing of disposal/removal of goods/items form the Units/Containers and in any event at the end of August 2014 the Brian Wallis husband of the Defendant (Mary Wallis) was old, infirm and unwell and died on or around 20 September 2014 within a few weeks or so of the end of August 2014. Liability of the Defendant to the Claimants, and as referenced below, arises under both the leases of the Units and licences of the Containers and the Torts (Interference with Goods) Act 1977.~~

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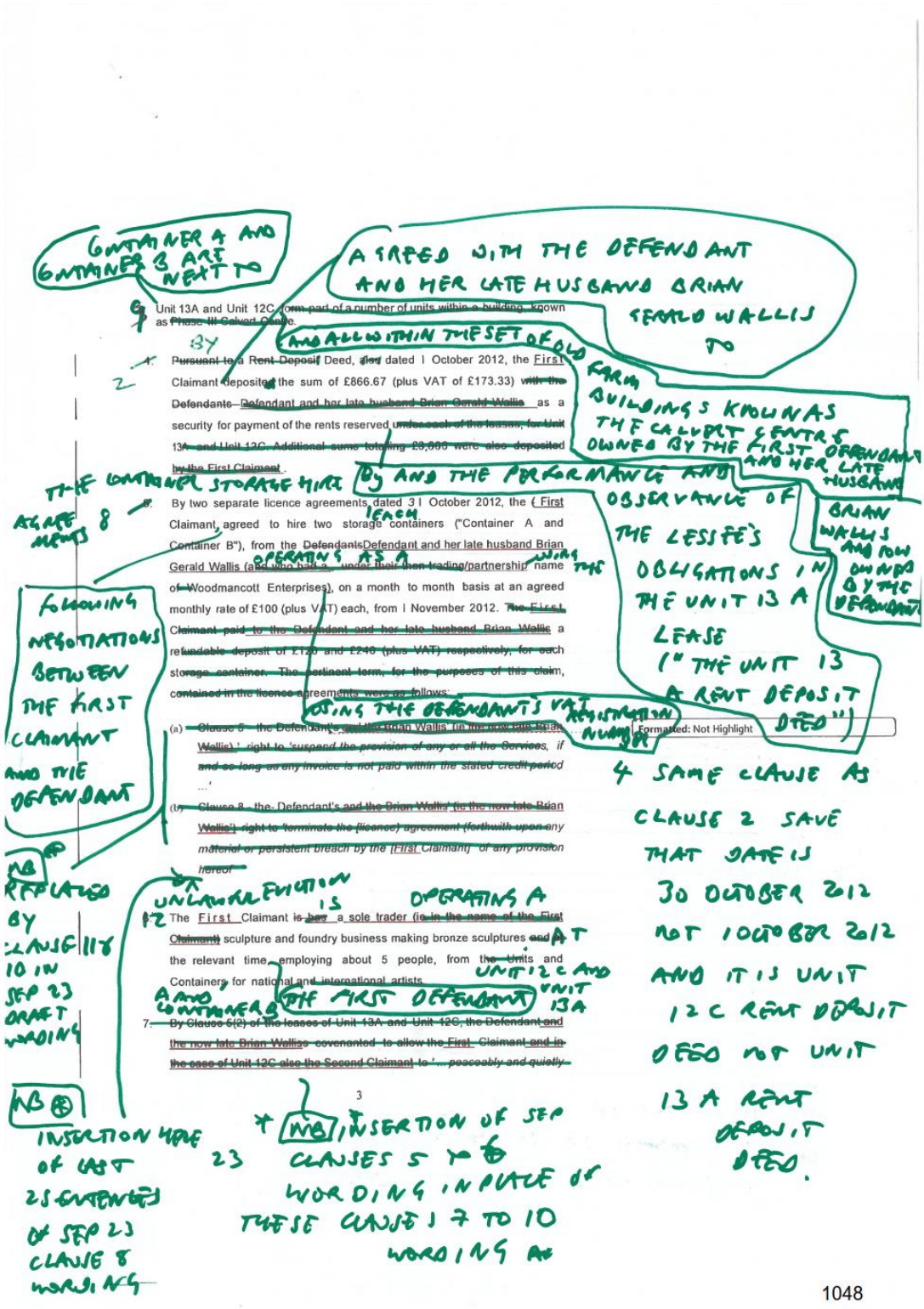
NB
THIS WORDING REPLACED BY CLAUSE + WORDING IN SEP 23 RE-AMENDED PARTICULARS OF CLAIM



94. Despite the difficulties presented by the RAPOC and whilst the defendant still had some complaints about the RAPOC Mrs Wallis' accepted many of the amendments.

95. Mrs Wallis asked that the claimants sign a version of the RAPOC with a statement of truth in advance of permission being granted. Ms Gleyze submitted it was necessary since the facts relied on kept changing. However, since I have yet to give permission to amend in any form it seems to me to be premature for the RAPOC itself to be signed.

Mr O'Boyle exhibits the version of the RAPOC for which he seeks permission to his witness statement dated 26 September 2023. That statement is signed with a statement of truth. Whilst an additional sentence positively confirming that he sought permission to amend in that form might have completed the circle, I am satisfied that the witness statement is sufficient particularly as any RAPOC for which permission is given will have to be signed with a statement of truth before it is served.

96. I come to consider the amendment application and the strike out application against that background. As I have concluded that Mr Wright has more work to do before I am prepared to give permission to amend in any particular form I will focus only on the key areas of dispute. I keep in mind the principles and approach to amendments and strike out or summary judgment set out in this judgment.

Partnership

97. The amendments that give rise to the main dispute between the parties are those in paragraph 8 of the RAPOC. The defendant objects to the amendments as she argues that it impermissibly advances a new claim or cause of action against her as a partner in Woodmancott Enterprises. She argues that the partnership is not a party to the claim and the claim against it is a new claim raised outside limitation such that CPR 17.4 is engaged.

98. Ms Gleyze's short point is that in order to perfect the claim against the partnership it would be necessary to (i) join Woodmancott Enterprises as a party and (ii) plead a claim against the partnership. That would now be a new claim against a new party made after the limitation period had expired.

99. The original claim was made against both Mrs Wallis and the executors of Mr Wallis. The POC plead in relation to the storage agreements and Containers at paragraph 5 as follows:

> By two separate licence agreements dated 31 October 2012, the Claimant agreed to hire two storage containers ("Container A and Container B"), from the Defendants, under their then trading name of Woodmancott Enterprises, on a month to month basis at an agreed monthly rate of £100 (plus VAT) each, from 1 November 2012. The Claimant paid a refundable deposit of £120 and £240 (plus VAT) respectively, for each storage container. The pertinent term, for the purposes of this claim, contained in the licence agreement were as follows:

100. The POC pleaded breaches of the service agreement for the Containers and sought remedies against the defendants in relation to the Containers including delivery up of the goods conversion and damages.

101. The POC therefore made it clear that Mr O'Boyle knew that Woodmancott Enterprises was a business run by Mr and Mrs Wallis and that he was pursuing a claim against them in relation to the storage agreements he had entered into with that business in respect of the Containers and their contents. In the defence Mrs Wallis explained that Woodmancott Enterprises was a general partnership. Whether Mr O'Boyle understood

the difference between a sole trader and a partnership is not relevant. What the court needs to consider is whether the claim as advanced in the POC as a matter of legal analysis was a claim against the partnership/partners as represented by Mrs Wallis and the executors.

102. It seems to me that although it could have been more clearly articulated there was a claim against Mr and Mrs Wallis as partners in Woodmancott Enterprises in respect of the service agreements and the Containers in the original POC. Ms Gleyze argues that the claim against the partnership would still be defective unless Woodmancott Enterprises were named as a party (see below).

103. By the Consent Order the executors were removed as defendant on the basis that the estate had been fully administered. One can see that faced with a plea of plene administravit removing the executors of the administered estate as a defendant made sense. Mrs Wallis remained a defendant. As a matter of fact she was the lessor of the Units, the surviving former partner in Woodmancott Enterprises in relation to the service agreements and the Containers, a beneficiary of Mr Wallis' estate and so recipient of at least some part of his estate and for completeness she says she continued the businesses as a sole trader after Mr Wallis' death. I note that the original defences pleaded that Mrs Wallis had available to her all the defences that the estate or partnership may have had. She was clearly in a position to respond to the partnership claim and was likely to be the individual against whom any successful claim would be enforced as both the surviving partner and the recipient of part of Mr Wallis's estate.

104. Paragraph 5 of the APOC was amended to reflect the removal of the executors as a party and to introduce the word partnership which may not strictly have fallen within the permitted amendments pursuant to the Consent Order. Whether the additional word partnership was actually necessary it is clear that the APOC continued to make the claim against the partnership. Again the defendant pleaded the partnership in her defence. With the removal of the executors not all the partners were parties to the claim. The second unnumbered part of paragraph 2 of the APOC (see above) does however, plead Mrs Wallis' liability under the service agreements.

105. I am satisfied that the claim against Mr and Mrs Wallis in relation to the partnership was already pleaded in the POC and continued to be pleaded in the APOC. The removal of Mr Wallis' estate as a party to the claim was not of itself fatal to a claim against the partnership. There is a separate procedural question as to whether if the claim was not made against Woodmancott Enterprises that was fatal to Mr O' Boyle which I address below.

106. The RAPOC proposes to amend paragraph 5 which becomes paragraph 8 as set out above in green. The clean version of paragraph 8 and new paragraph 9 of the RAPOC are set out below:

THE CONTAINER STORAGE HIRE AGREEMENTS

8. By two separate licence agreements each dated 31 October 2012, the First Claimant , following negotiations between the First Claimant and the Defendant, agreed to hire two storage containers ("Container A and Container B"), from the Defendant and her late husband Brian Gerald Wallis (operating as a partnership using the name Woodmancott Enterprises, using the Defendant's VAT registration number), on a month-to-month basis at an agreed monthly rate of £100 (plus VAT) each, from 1 November 2012 ("the Container Storage Hire Agreements"). As Woodmancott Enterprises has since been dissolved, the Defendant is sued also in her capacity as a member of the partnership at the time of the conduct complained of below. This is because any enforcement of judgment in favour of the Claimants would necessarily be in respect of assets of the Defendant alone.

9. Container A and Container B are next to Unit 12C and Unit 13A and all within the set of old farm buildings known as the Calvert Centre owned by the First Defendant and her late husband Brian Wallis, and now owned by the Defendant.

107. Although this adds some additional words the core claim against the partnership is still pleaded.

108. A partnership exists where two or more persons carry on a business with a view to profit. Mr and Mrs Wallis were in business together with a view to profit. The defendant says that she and Mr Wallis were in a partnership. They were therefore trading together as described in the POC but the characterisation of their business relationship absent any other formal agreement or arrangement as a matter of law was a general partnership governed by the Partnership Act 1890. There does not in fact appear to be any dispute about the nature of their business, Woodmancott Enterprises.

109. A general partnership has no separate legal personality separate to the individual partners, unlike say a company. This means that it is the individual partners that are the business together even if the partnership has a trading name. In this case Mr and Mrs Wallis were the individual partners and the business, the trading name Woodmancott Enterprises did not change that.

110. This was a partnership consisting of only two partners. Where a partner of a general partnership dies the partnership is dissolved with immediate effect and is subject to a winding up process. The partnership in winding up continues to exist only to the extent necessary to enable it to be wound up. The business will have been brought to an end at the moment of dissolution, here 20 September 2014. Such a process would involve liabilities being paid and the remaining net assets being divided between the partners. Here that would have resulted in that part of the remaining net assets of the partnership attributable to Mr Wallis' share in the partnership falling into his estate. His estate had been fully administered by 2017. Mrs Wallis was both one of the beneficiaries of the

estate and a recipient of it (and had also been an executor) as well as the surviving partner who will have received her share of the net assets of the partnership upon the winding up.

111. Where a third party dispute has arisen and the cause of action arose before the dissolution, as appears to be the case here for at least part of the claim, the simplest approach is to sue the partnership in its firm name. The claim could then make clear that the partnership had been dissolved and was in the process of winding up.

112. However, whilst as a matter of partnership law the estate of a dead partner is liable for the debts and obligations which arose whilst the dead partner was a partner although the debts of the partner's individual estate would take priority (see for example section 9 Partnership Act 1890) the position is different depending on the nature of the claim. There is a potential difference between the treatment of contractual claims and those arising in tort which in part depends on the distinction to be drawn between joint and several liabilities and liability in equity. No attempt appears to have been made here to address any differences that might arise or the effect of the dissolution on 20 September 2014.

113. Bringing the claim either against the partnership in the firm name would seem to be the most obvious and desirable way to frame a claim. It is more consistent with the procedural guidance in PD 7A. 7.3. However, on the facts of this case I do not consider that only having the surviving partner as a party to the claim is fatal.

114. Lindley & Banks on Partnership 21st Ed addresses the complications arising from the death of a partner at 13-08 and more generally at 26-15 to 26-29. In particular at 26-28 when considering the debts incurred prior to a partner's death it provides in a section headed "Parties to actions":

> "The creditor can issue one set of proceedings against the surviving partners and the personal representatives of the deceased partner **or he may proceed against them separately**.73 If he adopts the former course, priority will still be accorded to the deceased's separate creditors, so that in practice he may have to look for payment solely to the surviving partners.74 …"

115. The note to which this passage refers at 73 provides:

> "Judgment against the surviving partners was not a bar to proceedings against the estate of a deceased partner (and vice versa) even prior to the Civil Liability (Contribution) Act 1978: see supra, paras 13-08, 13-09. Note also that the feasibility of a single set of proceedings prior to the Judicature Acts appears to have been sufficiently uncertain to have required specific comment: for a summary of the position, see the 15th edition of this work at p.752."

116. These passages appear to be support for the possibility of pursuing only the surviving partner or the deceased partner in an appropriate case.

117. The effect of death of a partner on the administration of their estate and potential claims by third parties is also considered in texts such as Williams, Mortimer & Sunnucks – Executors, Administrators and Probate 22nd Ed. In particular the issues are considered in chapter 35 and chapter 37. For example when considering the position of a creditor of a partnership in a contract claim at 35.69:

> "Where one of two partners dies, an action on a contract made with the firm must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined,282 nor can they sue separately. "

118. And considering the position of claims against the estate of a dead partner at 37-52:

> "Thus, a creditor of a partnership, though not strictly a joint and several creditor, has concurrent remedies against the estate of a deceased partner and against the surviving partners, and it makes no difference which remedy he pursues first. He may, if he chooses, resort to the assets of the deceased partner, leaving it to the representative of the deceased partner to take proper measures for recovering what, if anything should appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner. In this regard, it has been said that:
>
> "It is now well established that a Court of Equity does treat the estate of a deceased partner as still liable to the partnership creditors, though at law the survivor has become solely liable. And it must now be considered as established that the partnership creditor may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor.""

119. There are clear differences between the effect of death on contractual claims and tortious claims and how those might be pursued. But it is equally clear that despite the preferred procedural route as set out below it is recognised that it might be appropriate in some cases to pursue a surviving partner only.

120. The position in relation to the procedural requirements for a claim against a partnership do not appear to me to fully account for all the possible different scenarios arising from the principles of legal liability as they apply to partners, particularly in a general partnership of two where, as here, one has died. No doubt the saving provision referred to below is to allow for the more unusual scenarios where it might be appropriate to take a different course.

121. CPR 16 and PD 16 provide the rules and practice directions relating to the contents of a claim and particulars of claim. CPR PD 16.2 provides that a claim form must contain the "full names" of the parties. In the case of a general partnership they can either be sued in the name of the firm – here Woodmancott Enterprises – or be named individually. This would mean naming all the partners in the partnership on the claim form as either claimants or defendants as appropriate just as you would any other party to a claim (PD16.2.4(3)(b)). This is because as I set out above a general partnership

has no separate legal identity and it is a matter of convention or practicality that has resulted in the provisions that allow partners to be sued in a firm name. Subject to Ms Gleyze's argument about the effect of CPR PD 7A 7.3, CPR 16 makes it clear that it is sufficient to name the partners when issuing a claim.

122. Ms Gleyze however argues that the partnership could only be sued in the firm name relying on the wording of CPR PD 7A 7.3 but CPR PD 7A 7.3 is not absolute, it provides:

> "Where that partnership has a name, **unless it is inappropriate to do so**, claims must be brought in or against the name under which that partnership carried on business at the time the cause of action accrued."

123. There appears to me to be a slight tension between this provision and CPR 16 and CPR PD 16.2 which makes provision for claims to be brought otherwise than in the name of the partnership. But in any event PD 7A includes the saving provision "unless it is inappropriate to do so" which provides some scope for not doing so in an appropriate case. PD 7A 7.3 is not therefore an absolute bar to using the names of the partners, a conclusion supported by the clear wording of PD 16.2.

124. In support of the claimants' contention that the claim against the partnership did not need to be in the name of the partnership Mr Wright referred to *Brooks v AH Brooks & Co (a firm)* [2010] EWHC 2720 (Ch) HHJ David Cooke held:

> *1. 5. In English law, of course, a partnership is not a separate legal entity. A claim brought against a partnership is, therefore, in law a claim against all the individuals who are partners in the firm at the time the cause of action accrued. For convenience, it has long been the case that such a claim may be brought using the firm's business name as that of the defendant, but this has always been merely a matter of form, the substance of the action being one against the individuals (or other entities) who together constituted the partnership at the relevant time.*

125. And whilst Lindley & Banks on Partnership 21st Ed. Notes at 14-08 that:

> "Proceedings by or against two or more partners who carry on business within the jurisdiction must, unless it is inappropriate so to do, be commenced in the name under which they carried on business when the cause of action accrued.37"

126. The editors also noted at paragraphs 14-08 and 14-09, when considering CPR PD 7A 7.3, Lord Lindley's observations

> "…the firm's name, when used in any action, is merely a convenient method of expressing the names of those who constituted the firm when the cause of action accrued. The rule does not incorporate the firm40"

> "14-09 It should be noted that this is a mere rule of procedure,

> which will neither affect the rights of the parties nor give rise to any new or independent cause of action.43"

127. Using a firm name would seem to be an obvious solution to the difficulties that can arise where there are changes to the members of a partnership, or where a partnership has been dissolved, but it is clear that a claim that is not brought in the name of a partnership does not automatically fail and is not automatically defective as a matter of partnership law.

128. All these passages highlight the difference between the underlying legal rights and obligations of the partners as individuals and the procedural framework that has been developed in order to simplify the way in which such claims are brought. Nothing in PD 7A 7.3 changes those underlying rights and obligations.

129. Mr Wright submits that if notwithstanding the authorities allowing for claims against named partners, the court were to consider that the claim should have been made against Woodmancott Enterprises it should simply permit an amendment to join the partnership given the history of the claim and the clear pleading of a claim against the partnership.

130. One can see that if that were necessary that to do otherwise would appear to be a triumph of form over substance in this case.

131. It seems to me that in this case the claim is made against the surviving partner of two partners after the deceased partner's estate had been fully administered which administration should have included his entitlement to the net assets from the winding up of the partnership. The surviving partner was also the beneficiary and recipient of at least part of the deceased partner's estate (including a part of his entitlement to the net assets of the partnership) which had been fully administered. She was also one of the executors of the deceased partner's estate. Despite the guidance in PD 7A, a claim such as this may be one of the few types of claim in which it would not be inappropriate to pursue the claim in the name of the surviving partner only. As set out above a firm's name is no more than a convenient method of identifying the parties. There is no prejudice to Mrs Wallis in the claim proceeding against her in her name as a partner of Woodmancott Enterprises. She is the person against whom it appears any claim would always in reality be being made, even if under the name Woodmancott Enterprises, given her dual role as both surviving partner and beneficiary of Mr Wallis' estate. Naming Woodmancott Enterprises as the party to the claim would not change her role in relation to this claim – unless she had been able to persuade me that there was no existing claim against the partnership.

132. It seems to me that this case gives rise to an unusual combination of facts. It will be rare for all the same factors to be operating at the same time.

133. When considering the balance of prejudice between the parties and the overriding objective and given the history of the claim against the partnership which as I say I am satisfied has always formed part of this claim it would indeed be a triumph of form over substance to not allow the partnership claim to proceed. The particular facts of this case seem to me to give rise to the rare and unusual type of case in which there is a good reason to consider that it is not inappropriate to allow the claim to continue against the surviving partner rather than having to reconstitute the claim against Woodmancott Enterprises.

134. This would still not however, solve some of the issues raised by the claim against the partnership which I address below. I anticipate that there will be further complications in due course if the claim against the partnership is successful in whole or in part. However, for present purposes I am satisfied that pursuing a claim against the surviving partner, Mrs Wallis, is procedurally permissible and consistent with the overriding objective and it is appropriate to do so and inappropriate to require the claim to be brought in the name of Woodmancott Enterprises.

135. I am satisfied that the claim against Mrs Wallis as a former partner of Woodmancott Enterprises when coupled with paragraph 5 in the POC/APOC and paragraph 8 of the RAPOC provides a properly constituted claim against Mrs Wallis as a partner of Woodmancott Enterprises. I am therefore satisfied that the claim against the partnership in relation to the service agreements and the Containers always formed part of the claim and can continue against Mrs Wallis. It is not necessary to join a new party and it is not a new claim. The CPR 17.4 issues do not arise.

136. Mrs Wallis can be pursued for the liabilities of the partnership. It was perhaps unwise to remove the estate of Mr Wallis or to not use the name of Woodmancott Enterprises given the difficulties it has caused but it is not inappropriate to allow the claim to proceed against Mrs Wallis given the death of Mr Wallis and the fact that his estate has been fully administered for the reasons I have set out.

137. Even though the partnership claim can continue it needs to be revisited. Some of the proposed amendments are not ones I am prepared to allow and there are other amendments that will need to be considered.

138. Mr Wright has added in some additional narrative to paragraphs 8 and 9. Much of it is unnecessary in a pleading context and will be a matter for either evidence or legal submission in due course. For example "using the Defendant's VAT registration number" seems to have no relevance at all to the claim against the partnership. If this is an attempt to advance a claim against Mrs Wallis not as a former partner but personally, that claim has not been pleaded. I would not therefore allow this amendment.

139. In addition the amendment from "As Woodmancott Enterprises has since been dissolved …" to the end of the paragraph is also unnecessary narrative and I would not be prepared to allow it. Likewise the amendments/addition of paragraph 9 appears to have no relevance to any current claims. I do not therefore allow it. Either there is already a claim against the partnership of which Mrs Wallis is the surviving partner or there is not. Any attempt to shoehorn into this claim an additional claim against Mrs Wallis personally in relation to the contents of the Containers post-dating Mr Wallis' death would appear to me to be too late.

140. The claim in relation to the Containers and moulds survives in principle. However, as currently pleaded it does not address the issues that arise as a consequence of the dissolution on 20 September 2014. No attempt has been made to identify which claims and against whom would survive Mr Wallis' death. As is clear from the evidence already available the claimants' case is that the contents of the Containers were removed over a period of time both before and after the dissolution of the partnership. The addition to paragraph 8 which I have not allowed does not answer that issue.

141. In so far as the claims for conversion, delivery up or damages relate to claims/causes of action which accrued after the dissolution it does not appear to me at present that those claims can be sustained against the partnership. It will be necessary for Mr O'Boyle as part of the further amendments to decide what claims for damages and conversion can and are pursued against the partnership.

Other Proposed Amendments to the RAPOC

142. Turning the rest of the disputed amendments I will provide brief comments on each. However, many of the disputed amendments were not subject to the second strike out application. They were simply reconstituted or reorganised parts of the existing APOC or the schedules for which permission had been given by the Consent Order. Whilst I understand Ms Gleyze's objections to some parts of the RAPOC which represent this reconstitution, they were not in fact amendments to the APOC. The defendant had consented to the majority of them by the Consent Order. That is of course unsatisfactory but it is a consequence of the route this claim has taken.

143. Paragraph 7 of the RAPOC is a paragraph that demonstrates this problem at least in part. Sub paragraphs 7(a) to 7(g) are said to provide particulars of knowledge that is relied on by the claimants to demonstrate that the defendant was aware that Mr O'Boyle would be trading from Unit 12C even though the lease was in the name of Mrs O'Boyle.

144. Mr Wright says that the sub paragraphs are just particulars or further and better particulars, they are not a new claim. Certainly the claim is not new and some of the particulars can be found in various parts of the APOC. To that extent pulling them together in one place and calling them particulars of knowledge is helpful. But several of the particulars of knowledge are new and do not appear to me to be particulars at all nor to add anything to the plea at paragraph 7. Just because they are said to be further particulars does not mean there should not be some scrutiny of them.

145. Having taken into account the submissions of both counsel I will allow the amendments to paragraph 7(a) the first sentence of (b), (c), (e) and (f) (subject to sorting out the wording).

146. I will not allow (d) and (g). (d) is inadequately expressed or evidenced to enable it to be a particular of knowledge relevant to Unit 12C in the RAPOC. If it turns out to be a relevant particular of knowledge it will be made good in disclosure or witness evidence in due course and (g) if relevant at all can be dealt with in evidence and is not, as expressed, a particular of knowledge to be included in the RAPOC.

147. The amendments to paragraph 12 of the RAPOC seem to have carried over some previous parts of an earlier paragraph and make no sense. Mr Wright needs to revisit this paragraph. It may be that any amendments to this paragraph will enable it to be agreed.

148. The amendments to paragraph 14 of the RAPOC appear to seek to plead a new position on the rent arrears for the Units and the Containers which is inconsistent with the position pleaded in both the POC and the APOC. There is no explanation for this change and no evidence to support it. Each of the POC and the APOC are signed with a statement of truth. It is difficult to see on what basis without some proper explanation and evidence the court should simply allow a further amendment to the arrears figures.

There are still admitted arrears just for a lower amount. Ultimately the rent arrears will be what they are found to be by the court as a matter of fact. In the meantime I am not prepared to allow the amendment.

149. Paragraph 15 to 18 of the RAPOC seek to raise various new matters including unparticularised agreements which may well amount to new claims in relation to set offs against the arrears and the costs of reinstatement. I am not persuaded they are simply particulars of an existing claim, they appear to be new claims albeit that the suggestion is that they amount to set offs against the arrears. There is no proper explanation as to why in 2023 but not in 2020 or 2022 Mr O'Boyle was able to recall these unparticularised unwritten agreements. In so far as they do amount to new claims they will be barred by limitation. But in any event even if they could be argued to be further particulars they fail at the first hurdle as they remain wholly unparticularised. I am not persuaded they are simply particulars of an existing claim.

150. Neither the parties nor the terms of the agreements the claimants want to rely on are pleaded. No evidence has been advanced as to where when or what works were said to have been undertaken. Any attempt to advance this amendment would have to address the inconsistencies between this proposed version of events and the previous POC and APOC. This would have to have been supported by credible evidence including an explanation for the two previous versions of the claim as set out in the POC and the APOC. None of that had been addressed in either the RAPOC or the evidence in support. The claimants have had ample time to get this right.

151. The claims are not properly particularised and seem to me to be inconsistent with the previous versions of events that were relied on in the POC and APOC and inconsistent with the evidence. I am not prepared to allow these amendments.

152. Paragraph 23 of the RAPOC sought to improve the APOC claim in relation loss and damage. As set out above the claim for loss of profit and lost opportunity at £1.3m which was one of the matters raised in the second strike out application has been amended out.

153. The defendant objects to these amendments primarily on the basis that the claimant considers that the claim for loss and damage arising from the alleged unlawful eviction from the Units is based on the wrong measure of damages. The claim for loss of the term demised has been supplemented with an unparticularised head of loss claiming the costs of adapting alternate premises.

154. The claim for loss of the term demised featured in both the POC and the APOC and was not subject to either the first or second strike out applications. Mr Wright argues that the amendments are an attempt to clarify or make clear the losses claimed. Ms Gleyze says the loss has been calculated on the wrong basis and argues that there is no or limited loss particularly if the additional new claim for the costs of works to other premises is taken into account.

155. It appears to me that there is some force in Ms Gleyze's general complaints about the particulars of losses claimed. But a dispute about the correct basis for calculating damages for the loss of the term demised if recoverable at all is ultimately a trial matter and/or a matter for evidence. The claims themselves and the head of loss has been part of the claim from the outset.

156. The new head of loss is however, wholly unparticularised. It appears to me that it is likely to result in double recovery or substantially affect any claim for loss of the term and may result in the claimant needing to give a credit. Mr Wright submitted that there was a proper basis on which the claimants could claim both the loss of the term and the costs of converting the new premises. That may be right in some cases. Here however where the alternate premises were Mr O'Boyle's own premises and it appears there was no continuing rent so it may be more difficult to maintain an entitlement to all the different heads of damages sought at the same time.

157. Whilst it did not form part of the second strike out application and ultimately whether the heads of losses claimed would be properly recoverable would be a matter for trial I still need to be satisfied that the amendments are ones that should be permitted and which overcome the low bar for amendment. Mr Wright should revisit this new head of loss. He should provide further particulars in relation to the claimed cost of converting the alternate premises. Given the time it has taken to reach this stage I am not prepared to allow this amendment in its current form without any particularisation. The RAPOC should so far as possible be in a form that does not require the defendant to immediately have to seek further particulars.

158. Ms Gleyze had objected to paragraph 24 of the RAPOC on the basis that it was a new allegation and was inconsistent with other evidence. In fact I am satisfied that it was already pleaded and contained in paragraphs 13 and 14 of the POC and APOC and has simply been moved and tidied up but the substance is the same. It relies on a verbal agreement or assurance. It remains insufficiently particularised, inconsistent with other evidence and/or parts of the claim and is a weak claim but that will have to be a matter for evidence and trial.

159. The paragraph 25 amendments should be allowed in light of my determination in relation to the partnership question and paragraph 24. This leads into the issues which arise in relation to the moulds.

160. Paragraphs 26 and 27 raise the question of ownership of the moulds and this continues into the schedules and some of the other paragraphs of the RAPOC. As I have set out in my preliminary conclusion the determination of who owns the moulds will be a matter for trial. Mr O'Boyle says that when he made a mould in most cases he owned them. In some cases he says there was a different arrangement whereby he entered into some form of commercial agreement with the relevant artist. His evidence and the RAPOC provide evidence of a number of different types of arrangement. Apart from Mr O'Boyle's witness evidence there is little to support his claims. The defendant has obtained evidence from some of the artists for whom Mr O'Boyle was undertaking work in 2014. This evidence is primarily in the form of correspondence in which they explain that they considered the moulds to be their moulds. Indeed in many cases they had arranged to collect them between September 2014 and March 2015. This is contested factual evidence about what was agreed between Mr O'Boyle and these third party artists in 2014 or earlier. It may be that Mr O'Boyle's claims are weak or even improbable but it is not unarguable and cannot be said to be entirely fanciful for him to say that something he made in his sculpture foundry to enable him to cast a bronze of an artist's work was his. This issue will have to go to trial.

161. However, this part of the claim needs work. I will not allow the amendment in the second half of paragraph 26 which still cross refers to witness evidence and the Consent

Order. The part of paragraph 27 in brackets was in a previous version of the POC/APOC and whilst I agree with Ms Gleyze that it does not appear to advance matters there is no application to strike it out so it remains.

162. More generally as set out above I agree with Ms Gleyze that the claimant needs to be clearer about which goods and which party the claims relate to. This section of the RAPOC refers to claimants' goods generically and does not differentiate between the claimants. "Goods" and the generic phrase "a number of moulds" are ambiguous. Mr Wright needs to seek to address these elements of the RAPOC. This will form part of the amendments which need to address claims against the partnership and which claims can be maintained given the date of Mr Wallis' death.

163. I do not agree with Ms Gleyze that the reference to 10 – 15 moulds in Unit 12C is new. It is clear that it formed part of the schedules to the APOC for which a general permission was given in the Consent Order. Mr Wright has simply attempted to make sense of the APOC by moving it around in the RAPOC.

164. Paragraph 30 of the RAPOC needs to be amended as discussed in the hearing to include both details of when it is said that the defendant refused to deliver up the "Goods" and which goods the "Goods" refers to. It is not sufficient to say that the defendant will know whether she was asked.

165. Paragraph 31 simply reflects an attempt to take information that was in the schedules of the APOC and make it more consistent with a more conventional pleading. However, although in substance is not new, the amendments have sought to claim a loss of profit at 40% rather that loss of revenue. The figures and the basis of the loss have been amended but with no explanation for the change or where the figure of 40% has come from. Whilst in general loss of profit may be the more appropriate measure of damages Ms Gleyze raised concerns about the new basis of loss and the lack of any proper evidential basis for it. It seems to me that some further particulars and a proper basis for the figures and % is needed even if the underlying claim to the items identified in paragraph 31 is not new.

166. Ms Gleyze also objects to paragraph 33 but this is another paragraph where Mr Wright has sought to make sense of information in the schedules and has moved it into the RAPOC. However, in simply moving the section from the schedule to the RAPOC it is not obvious how it interacts with the existing claims and it certainly appears on one reading to contradict other parts of the RAPOC. Mr Wright says that it simply flows from the conversion claim but to anyone reading the RAPOC it is not obvious. He needs to revisit this paragraph to make that connection clearer.

167. The second strike out application has very little left to it after the amendments made by Mr Wright subject to the further work required. In that sense it has been largely successful. However, for the reasons set out above I have determined that the claim against Mrs Wallis in relation to the Containers can continue.

168. What all of this demonstrates clearly is the dangers of permitting amendments without a draft of those amendments having been produced in advance of any consent. Every one of the issues that now arises would not have arisen if a draft had been produced and scrutinised by both the defendant and the court in 2022. The claimant would simply not have been given permission to amend in the form of the APOC and Mr Wright would

not have been left trying to shoehorn into that document the RAPOC which by the very nature of the exercise has been unsatisfactory for the court, the defendant and Mr Wright. The defendant would not have had to make the second strike out application and the claim would not have been delayed nearly 2 years.

169. This claim is now very stale. It has been hanging over Mrs Wallis since 2020 and relates to matters that date back to 2014. As I have set out above I will be considering making any permission to amend conditional on a payment into court as well as making appropriate costs orders.

170. Mr O'Boyle is already well beyond the final chance he was given in August 2023 and his claim remains in a state of disarray. He should reflect carefully on the issues that arise and consider which parts of his claim he intends to continue with. As I have set out it appears to me that his claim, and not only those parts which were subject to the second strike out application, is weak and parts are improbable. Any conditional order is likely to reflect both the weakness of his case and the conduct to date in relation to the claim.

171. Whilst this claim has been poorly put together and has been ongoing for far too long without any real progress I am satisfied that the fair and just approach having regard to the overriding objective is to allow some of the amendments. In particular for the reasons set out above I am satisfied that the partnership claim has always formed part of this claim and subject to the clarifications and further amendments I have directed should be allowed to go forward.

172. As set out above the claim will continue on any basis as the claim in relation to the leases and the Units remains live. A number of the claims appear weak but many will turn on the oral evidence of what happened in 2014.

173. I do consider therefore that the balance between the parties is managed by a combination of effective and robust case management going forwards coupled with conditions which if not met may well result in the claim coming to an end.