Neutral Citation Number: [2024] EWHC 1811 (Comm)

Case No: LM-2023-000044

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

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

Date: 15/07/2024

Before :

MR ANDREW HOCHHAUSER KC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

(1) ROBIN JOSEPH LEE **(2) LEEWAY SERVICES LTD**	**Claimants**
- and -	
NATIONAL WESTMINSTER BANK PLC	**Defendant**

- -
- -

Tim Welch (instructed under the **Direct Access Scheme**) for the **Claimants**
Scott Ralston (instructed by **DLA Piper UK LLP**) for the **Defendant**

Hearing dates: 25 (pre-reading) and 26 February 2024
Further draft amended Particulars of Claim 4 March 2024
and written submissions 11 and 18 March 2024

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

ANDREW HOCHHAUSER KC

This judgment was handed down remotely at 2pm on 15 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR ANDREW HOCHHAUSER KC:

Introduction

1. By an Application Notice dated 9 October 2023, the Defendant applies to strike out the Claimants' Claim Form and the Par ticulars of Claim both dated 17 February 2023, in whole or in part, pursuant to CPR r3.4(2)(a) and (b), alternatively an Order for summary judgment pursuant to CPR 24.2.

The parties

2. The First Claimant ("**Mr Lee**") is a businessman and the sole director and shareholder of the Second Claimant ("**LSL**"), a company selling, among other things, livestock and pet products (the "**Business**"), primarily on Amazon's online marketplace. Initially the Business was carried on by Mr Lee as a sole trader and then by LSL after its incorporation on 7 December 2015. I shall refer to them collectively as the Claimants.

3. The Defendant ("**the Bank**") is a well-known national retail bank, regulated by the Financial Conduct Authority (the "**FCA**") and the Prudential Regulation Authority (the "**PRU**"). At all material times it provided banking services to consumers and business clients.

Representation

4. At the hearing the Claimants were represented by Mr Tim Welch of Counsel and the Bank was represented by Mr Scott Ralston of Counsel. I am grateful to them for their oral and written submissions.

The factual background for the purpose of the Application[1]

5. On 9 November 2011, the Bank agreed to provide Mr Lee with banking services by reference to a sole trader account in his name under account number ending 4770 ("**Account 4770**").

6. After LSL was incorporated in December 2015, it used Account 4770 as its business bank account without objection from the Bank and it was its *de facto* account holder. From 2016 Mr Lee would pay quarterly VAT rebate cheques made out to LSL into Account 4770. Those cheques were paid by the Bank into Account 4770. There is a dispute of fact as to whether the Bank agreed to this.

7. On 9 September 2021, Mr Lee drew down £15,650 by way of personal loan on Account ending 3353, which was repayable in monthly instalments of £395.24. This was in addition to a "Bounce Back" loan on Account ending 1383.

8. On 15 December 2021, Mr Lee presented a VAT rebate cheque in the sum of £5,298.33 ("**the Cheque**") at the Bank's Manor Royal Branch and asked to deposit it into Account 4770 in the normal way. The Bank, however, refused to accept the Cheque because it was made out to LSL and not Mr Lee. Mr Lee then deposited the Cheque using the ATM. However, on 20 December 2021 the Bank returned the Cheque unpaid

[1] The Bank stated that it did not necessarily accept the factual basis on which the Court is bound to determine an interlocutory application of this kind. I did not understand this submission. The Application was to strike out the claim or obtain its summary dismissal.

by post.

9. On 20 December 2021, Mr Lee complained to the Bank about this. The Bank advised Mr Lee to change the name on Account 4770 to that of LSL, whereupon the Cheque would then be accepted. Mr Lee agreed to this (the "**Name Change Agreement**"). He completed a 'Change details request agreement' and deposited the Cheque once again at the Manor Royal Branch. The Bank accepted the Cheque which cleared into Account 4770 on 23 December 2021. However, in late January 2022, the Bank then decided that the Name Change had been "*implemented in error"*[2] and unilaterally changed the name of Account 4770 back to that of Mr Lee (the "**Name Change Reversal**").

10. On 7 February 2022, a business account ending in 4804 ("**Account 4804**") was opened in the name of LSL by Mr Lee. It is alleged that the Bank failed to make Account 4804 available for LSL to use in that: (1) it failed to provide LSL with a card reader to activate the account, (2) sent the card pin number to the wrong address and (3) failed to adequately investigate LSL's complaints in respect of Account 4804 (see paragraph [11] below). It then took the Bank around seven weeks until 4 April 2022 to resolve the errors and make Account 4804 usable. During that time, it continued to charge fees and interest on Account 4770.

11. The Bank's conduct resulted in Mr Lee making a series of complaints. The Claimants alleged that the Bank failed properly to investigate those complaints (the "**Complaints Claim**"). Because the Bank had refused to accept the Cheque on 15 December 2021, it is alleged by the Claimants that Mr Lee missed a loan repayment and incurred charges and then interest on those charges. Further, they alleged that the Bank failed to adhere to its promise to assist in the reversal of the charges and place them on hold whilst the complaints were considered. The result was that for a period of time the Claimants had no operating business bank accounts.

12. There is a further allegation relating to the provision by the Bank of unfavourable credit references to third party credit agencies in relation to both Claimants by reference to the financial standing of Account 4770 (the "**Negligent Misstatement Claim**"). There is a dispute about the nature of the duty of care that the Bank owed to the Claimants, causation and any loss claimed.

13. Finally, there is an allegation which has been withdrawn in part. On 10 April 2022, LSL applied to the Bank for a credit card. The Bank rejected that application automatically based on both Claimants' now damaged credit score, which the Claimants allege was caused by the Bank's provision of information referred to in paragraph 12 above. Mr Lee's credit score also prevented him and/or LSL from obtaining a credit facility from other lenders. By May 2022 Account 4770 was overdrawn by £20,723.14. The claim in relation to the credit card has been dropped, but the claim for the inability to obtain a credit facility remains.

14. Amazon required LSL to have a credit facility as a condition of trading on its platform. As a consequence of its failure to obtain a credit facility, despite having a new bank account since February 2022, LSL was unable to continue trading on Amazon and essentially lost its business. I should add for completeness, as part of the background, that on 4 May 2020, Amazon withdrew a large sum of money from Account 4770. That

[2] §7.2 Amended Defence.

triggered fraud alerts and the Bank put a temporary stop on that account. The Bank advised Mr Lee not to use the bank card relating to that account.

15. The circumstances surrounding the withdrawal by Amazon resulted in LSL issuing High Court proceedings against Amazon. According to §11 of the draft Amended Particulars of Claim (the "**draft APOC**"), from May 2020 until the conclusion of the litigation, LSL was unable to trade on Amazon, access any trading data or pay VAT or file accounts at Companies House. Those proceedings were settled in February 2022. The terms of the settlement were apparently confidential, but at §17 of Mr Lee's Third Witness Statement dated 17 November 2023, he stated that LSL received about £600,000 and "*LSL could return to its trading position on Amazon with an express condition that it had to re-enter a credit card into the Amazon Platform in the name of Lee Services Ltd. The credit card could be limited to £1, to by-pass the Amazon AI to start re-trading. The NatWest group was fully aware of this credit card condition. It was discussed with my NatWest Business Relationship manager and with the complaint handlers*."

The Procedural History

16. The Claim Form and the Particulars of Claim were issued on 17 February 2023. It is not clear when the original Defence was served, but on 30 June 2023 the Bank provided responses to two requests from the Claimants seeking further information. On 19 September 2023 the Claimants served a response to the Bank's Notice to Admit Facts. The Bank's Application Notice in the application presently before me was issued on 9 October 2023. On 27 October 2023, a Costs and Case Management Conference came before HHJ Keyser KC, sitting as a Judge of the High Court, when he gave a series of directions, including directions for a 5 day trial (with a day's judicial reading) and directions for the hearing of the present Application. Pursuant to the Orders of HHJ Pelling KC dated 16 November and 4 December 2023, an Amended Defence was served on 20 November 2023 and an Amended Reply was served on 8 January 2024. On 12 February 2024 the Bank responded to a Notice to Admit Facts from the Claimant dated 22 January 2024.

The materials before me

17. The evidence and correspondence in this case has been voluminous. The hearing bundle ran to 1769 pages. The Bank served two witness statements with exhibits from Christopher Harvey, a partner in DLA Piper UK LLP: his second dated 9 October 2023, and his third dated 15 December 2023. The Claimants served two witness statements with exhibits from Mr Lee: his third dated 17 November 2023 and his fourth dated 12 February 2024.

The way in which the Claimants' case has altered

18. It is fair to say that there has been a sea-change in the way the case has been advanced on behalf of the Claimants.

19. Shortly before the hearing, on 20 February 2024, Mr Lee wrote to the Bank and its solicitors, DLA Piper UK LLP, indicating that:

> "*11) We have already indicated that it may assist the Court if the claim is*

amended, particularly given that it can now include the information derived from the Defendant's current limited partial and belated disclosure, so narrowing the issues. The claim can be further refined. The Claimants reserve their rights to further amend pending full disclosure at the Disclosure stage.

12) Therefore, at this stage, the Claimants have given consideration as to how to narrow the issues with a view to streamlining the claim and in the interest of cost efficiencies. The Claimants are therefore willing to withdraw certain allegations within the claim to clarify the key issues and assist the Court.

13) For ease, these allegations which the Claimants propose no longer to seek to pursue given the facts and matters now available to them, but which had not previously been available, are referred to from the paragraphs in the Particulars of Claim. The First Claimant is referred to as C1. The Second claimant is referred to as C2.:

Implied terms (C1 & C2):

1. Accepting C2 cheques (POC§16.1);

2. Duty of good faith (POC§16.2/20.1); and

3. Fair treatment (POC§16.3/20.2).

Breaches of contract (C1):

1. Failure to cash cheques (POC§23);

2. Failure to reverse charges (POC§25);

3. Failure to place hold on charges (POC§26);

Breaches of contract (C2):

1. Failure to provide a functioning account (POC§29); and

2. Refusal to provide a credit card (POC§30).

14) On the basis that the above allegations are no longer pursued, the Claimants consider that the remaining allegations will help focus the issues between the parties and should be explored at a full Trial.

15) For the avoidance of doubt, those allegations which the Claimants propose should proceed to Trial are as follows:

C1 and C2:

1. An agreement to vary Account 4770 to change the name from C1 to C2 (POC§5). It is understood the Defendant accepts that it allowed C2 to cash a cheque made out to C2 on 23 December 2021. There is a dispute about whether that was performance of the variation agreement. In any event, the Court will need to make a finding of fact as to which party (either C1, C2 or both) was the account holder of Account 4770 at the relevant times.

2. Breach of that agreement by reversing the name from C2 to C1 (POC§24

& POC§28)

3. Failure to log and or investigate complaints (POC§27);

4. Poor credit reference (POC§31). It is understood that the Defendant accepts it provided financial information about C2 by reference to the financial standing of Account 4770 to CRAs but that the Defendant's pleaded case is C2 was not the account holder of Account 4770. As above the Court will need to make a finding of fact as to which party was the account holder of Account 4770 at which time.

5. This claim relies on breaches of the Defendant's complaints procedure (POC§15.3) and the implied term of reasonable care & skill (POC§16.5).

6. Clearly Braganza considerations will also apply.

16) We consider the Defendant will have no objection in the Claimants seeking to refine the claim in this manner. Particularly given the effect of narrowing of the issues is reasonable and helpful to both parties and the Court. On the basis the claim is so narrowed, the Claimants again invite the Defendant to withdraw its Application for Summary Judgment/Strike Out of the entirety of the claim and the claim can proceed."

20. It will be seen, therefore, that even before the hearing began, substantial parts of the case had been dropped. No draft amended pleading was produced at the hearing, indicating what had been abandoned. During the course of the hearing, again, things changed. Mr Welch admitted in the course of the argument that there were significant aspects of the claim on which he now relied, which had not been pleaded; that in relation to the change of name claim that the losses should be limited to LSL and there were areas where further particularity was needed. It was also unclear to me upon exactly which parts of the Particulars of Claim he no longer relied, because parts which I thought had been abandoned, in fact had not.

21. I was referred by Mr Welch to the decision of Tugendhat J in *Kim v Park* [2011] EWHC 1781 (QB) at [40], where he held that where a court finds that there is a defect in a pleading, it is normal for the court to refrain from striking out the pleading and it would be "*wrong in principle… to strike out the claim without giving the Claimant an opportunity of rectifying the defect in his case, provided that there is reason to believe that he will be in a position to put the defect right.*"

22. I took the view that the correct course of action was to require the Claimants to submit a draft APOC which set out clearly in a track-changed format which part of their case was abandoned, those aspects which remained in amended form and those additional points now relied upon. I therefore ordered that this be done by 4 March 2024. I also afforded Mr Ralston to file further submissions commenting upon the draft APOC. This he did on 11 March 2024. I granted the Claimants permission to make an additional written submission in so far as it addressed new points not already covered in the hearing. He filed these on 18 March 2024. I will now consider the Bank's application in relation to the draft APOC, and the Claimants' case as it is now framed. Obviously, there may be costs consequences that arise, but that can be addressed at the hearing of consequential matters, once this judgment is handed down.

The law in relation to summary judgment

23. There was little dispute as to the principles to be applied to the applications. The power to award summary judgment is to be found in CPR 24.2, which, so far as material, states that:

> "*The court may give summary judgment against a claimant or a defendant on the whole of the claim or on a particular issue if-*
>
> *(a) it considers that -*
>
> *(i) that claimant has no real prospect of succeeding on the claim or issue; or*
>
> *(ii) that defendant has no real prospect of successfully defending the claim; and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial.*"

24. The relevant principles were summarised by Floyd LJ in *TFL Management Services Limited v Lloyds TSB Bank Plc* [2014] 1 WLR 2006 at [26] to [27]. In that passage, Floyd LJ referred to an earlier decision of Lewison J (as he then was) in *Easy Air Limited (Trading as Open Air) v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15], where he summarised the principles in the following way:

> "*... the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at*

> *trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
>
> *vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.*"

25. I also remind myself of the following:

    (1) the criterion "real" is not one of probability, it is the absence of reality: see Lord Hobhouse in *Three Rivers District Council v Bank of England (Number 3)* [2003] 2 AC 1, [158];

    (2) an application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issues having regard to all the evidence: see *Apvodedo NV v Collins* [2008] EWHC 775 (Ch);

    (3) in relation to the burden of proof, the overall burden of proof rests on the applicant to establish that there are grounds to believe the respondent has no real prospect of success and there is no other compelling reason for trial. The standard of proof required of the respondent is not high; it suffices merely to rebut the applicant's statement of belief.

The law in relation to the strike-out application

26. The Claimants have also applied under CPR 3.4(2), pursuant to which "*the Court may strike out a statement of case if it appears to the court (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings…*". The parties before me drew no material distinction between the test to be applied here and that to be applied under CPR 24.2, although Mr Ralston drew my attention to the decision of Picken J in *Arcelormittal USA LLC v Ruia* [2022] EWHC 1378 (Comm) at [29], CPR r.3.4(2)(a) which stated

that the facts pleaded must be assumed to be true and requires submissions on the pleaded case, not evidence. He also referred to the decision of Teare J in *Towler v Wills* [2010] EWHC 1209 (Comm) at [18], where the learned judge stated that a vague and incoherent case does not permit the defendant to prepare its case in response and interferes with the Court's ability to save unnecessary expense.

The applicable principles when considering whether to grant permission to amend a statement of case

27. The test to be applied in an opposed application to amend a statement of case is the same as the test applied to an application for summary judgment. The question is whether the proposed new claim has a real prospect of success: see *Slater & Gordon (UK) 1 Ltd v Watchstone Group plc* [2019] EWHC 2371 (Comm) at [34]-[37] per Bryan J)], my decision in *SPI North Ltd v Swiss Post International (UK) Ltd* [2019] EWHC 2004 (Ch) at [5], *Hewson v Times Newspapers* [2019] EWHC 1000 (QB) at [17] per Nicklin J. In that regard I refer to the authorities summarised at paragraphs 24 and 25 above.

28. By reference to the principles stated by Nicklin J in the *Hewson* case at [15]-[16], it is clear that the Claimants' application is made at an early stage of the proceedings, with no limitation issues arising and it would be in accordance with the overriding objective to permit the amendments if they have a real prospect of success.

29. Mr Ralston also relies upon the principles set out at the notes in the White Book to CPR 17.3 at 17.3.6, which states that:

> "*A proposed amendment must be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence that establishes a factual basis for the allegation: see Kawasaki Kisen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33 at [18]"*, and
>
> *"The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation. See Collier v P & MJ Wright (Holdings) Ltd [2007] EWCA Civ 1329; [2008] 1 W.L.R. 643 (a set aside case), Carey Group Plc v AIB Group (UK) Plc [2011] EWHC 594 (Ch) and Shah v HSBC Private Bank (UK) Ltd [2011] EWCA Civ 1669; [2012] Lloyd's Rep. F.C. 337*."

The draft APOC

30. As Mr Ralston points out in his further written submissions dated 11 March 2024, the draft APOC is a substantial revision. Eight of the implied terms relied upon in the original Particulars of Claim have gone – see §§16 and 20. The Claimants have withdrawn the claim that the Bank was in breach of contract in failing to grant LSL's application for a credit card. The case on quantum has been completely re-pleaded in contrast to the Schedules of Loss produced and relied upon at the hearing. As Mr Ralston states at §4 of his further written submissions: "*The Proposed APOC thereby enables the Bank (and the Court) finally to see an explanation of how the claims are said to work, and to engage with the causation and quantum issues arising,"*.

31. The pleading seeks to clarify the following three claims, which form the entirety of

the case:

(1) The Complaints Claim (draft APOC §27 & 28A);

(2) The Name Change Agreement claim (draft APOC §24 & 28); and

(3) Negligent Misstatement Claim (draft APOC §31).

32. It also advances a new Complaints Claim on behalf of LSL on the basis that Account 4770 became LSL's bank account following the Name Change Agreement and the complaints from that date were therefore made by Mr Lee on LSL's behalf.

33. The Bank's position is that it objects to the draft APOC on the basis that it is defectively pleaded and lacks any real prospect of success. It submitted that the Claimants do not have viable claims for compensatory damages and the entire case should be struck out.

The Claimants' repleaded claims

34. Having read the parties' further written submissions carefully, I shall consider each in turn. I will not set out every point made in the 26 pages of those submissions.

The Complaints Claim

35. The Claimants allege that in breach of one express term (draft APOC §15.1A) and two implied terms (draft APOC §16, (in what was 16.4 and 16.5) to §18) in the contract governing Account 4770, the Bank failed or refused to investigate complaints about "*account charges*" made by Mr Lee (draft APOC §27) and/or the Company (draft APOC §28A) placed on Account 4770. Mr Lee and LSL Company seek:

(1) declarations of breach of contract (draft APOC §36); and

(1) damages in the sum of £11,670 being account charges and interest placed on Account 4770 (draft APOC §§37.6 and 37.11).

36. The Bank objects to the formulation of the implied term at §16.4, which provides:

> "*The Bank would act fairly in determining any disputes between the parties in accordance with its complaints procedure.*"

The original formulation was:

> "*The Bank would provide fair procedures for determining any disputes between the parties.*"

37. The latter was the subject of extensive oral argument at the hearing. Issue is taken by the Bank in the use of the words "*fair*" and "*determine*". In relation to the word "*fair*", in his first skeleton argument, at §63, Mr Ralston submitted that in relation to the Negligent Misstatement Claim, in alleging that the Bank's duty encompasses fairness, the Claimants were advancing a claim that was not known to the law. He abandoned this submission when his attention was drawn to the decision of *Gatt v Barclays Bank Plc* [2013] EWHC 2 (QB), a decision of HHJ Moloney QC, sitting as a Judge of the High Court, which, at [8], drew an analogy (more than just semantic) between job references and credit references, thereby following the approach of the Court of Appeal

in *Bartholomew v London Borough of Hackney* [1999] IRLR 246, a decision which followed the approach of the House of Lords in *Spring v Guardian Assurance* [1994] ICR 596. In the *Bartholomew* case, Robert Walker LJ (as he then was) at [19] said that "*It is therefore necessary to see whether or not the reference provided by Hackney was in substance true, accurate and fair*." I note that at §47 of the Bank's further submissions the point is no longer pursued on the basis that the Claimants confirmed that they were advancing a case requiring the statements to be accurate and not misleading. On re-reading the transcript of the hearing at pp81-82, it is clear that there was little between the parties. In my judgment, however, the word "*fair*" is properly to be included, as Robert Walker LJ made clear. It is not too vague.

38. By parity of reasoning in my judgment, it is strongly arguable that in carrying out the express obligation set out in §15.1A, it falls to be implied, applying the officious bystander test, that the Bank would act fairly. Mr Welch's submission that "*the idea that a bank can reserve a right to operate a complaints procedure unfairly, is absurd*." has some force in my view. Certainly, I am not prepared to refuse permission to amend on the basis that there is no real prospect of success.

39. Similarly, I do not think that there is anything in the Bank's criticism of the use of the word "*determine*", where the express term talks of being able to "*resolve your complaint*". I accept Mr Welch's submission that the words "*resolve*" and "*determine*" are interchangeable.

40. Further the Bank made two further closely connected objections:

    (1) the Claimants have not pleaded any case on causation and therefore the claim cannot succeed as a matter of law. Reliance was placed on the decision of Master McQuail in *Finnan v Charles Russell Speechlys LLP* [2023] EWHC 3058 (Ch) at [99].

    (2) it is bound to fail in any event due to the lack of any factual causation argument with a real prospect of success.

41. I do not regard the claim for recovery of the account interest and charges as unarguable on the basis of causation, showing no real prospect of success. The particulars of breach are adequately pleaded at §27. In essence the Claimants' case is that had the complaints procedure been properly conducted, those sums would have been waived and refunded.

42. Insofar as it is suggested that LSL should have paid off the £20,000 overdraft on Account 4770, by using the Amazon compensation, which would have prevented the interest and charges accruing, this somewhat flies in the face of the Bank's primary contention that LSL was never the account holder and, in my view, is a matter to be considered at trial.

43. I therefore permit the amendment to the Complaints Claim.

The Name Change Agreement Claim

44. The Claimants allege an express agreement on or around 20 December 2021, by which the Claimants and the Bank agreed that Account 4770 would become the Company's account (draft APOC §§4A-5). The Claimants allege that in breach of that agreement, the Bank unilaterally reversed the position so that Mr Lee was once again the account holder (draft APOC §§24 and 28). As regards remedies:

(1) The Claimants seek declarations of breach of contract (draft APOC §36).

(2) The Company claims: (i) loss of profit of around £1,000 per day trading on Amazon (draft APOC §37.4); and (ii) losses of £11,670 in account charges and interest (Proposed APOC §37.5).

(3) Mr Lee claims nominal damages (draft APOC §37.10).

45. The Bank now agrees that the scope of the Name Change Agreement cannot be determined summarily[3]. However, it submits that in relation to LSL's claim for loss of profit, namely the alleged daily losses of £1,000 arising from the alleged breaches of the Name Change Agreement are fatally flawed.

The Bank' submissions

46. Mr Ralston points to the fact that hitherto the main plank of the Claimants' case was that in order to trade on Amazon LSL needed a credit card, which had wrongly been refused by the Bank and which LSL could not obtain elsewhere because of its poor credit rating, courtesy of the Bank's negligent misstatement. Both in the Claimants' further information response, and in Mr Welch's oral submissions at the CCMC hearing, it was emphasized that in order for LSL to return to trading with Amazon, it was essential to have a credit card. He said:

> "*if the Bank were to provide a £1 credit card, which we're happy to pay the £1 up front, that's I think a very important point. So, we just need that credit card to go back on to Amazon to begin trading and secure our account.*"

At paragraph 17 of his Third Witness Statement dated 17 November 2023, Mr Lee said:

> "*... A confidential settlement agreement was reached [with Amazon] which stated Leeway Services LTD could return to its trading position on Amazon with an express condition that it had to re-enter a credit card into the Amazon Platform in the name of Leeway Services LTD. The credit card could be limited to £1, to by-pass the Amazon AI to start re-trading. The Natwest Group was fully aware of this credit card condition.*" [emphasis added]

47. As stated at paragraph 13 above, the credit card claim has been dropped, and §8 of the draft APOC has been amended to remove the reference to "*credit card*" and instead refer to "*credit facility*" – see also §§12, 14 and in particular the Particulars of loss and damage at §37(1), which states:

> "*Loss of profit of around £1000 a day trading on Amazon. This loss arose as a result of C2 being deprived of the Account 4770 bank card and credit facility as described in paragraph 8 above without which C2 could not trade on Amazon which was at all material times known to D, as described in paragraph 12 above.*" [emphasis added]

48. In effect, the Claimants are now saying that a credit card was not the pre-requisite to trading on Amazon after all, but instead that LSL needed only a "*card with a credit facility registered with it*."[4] Mr Ralston submitted for the reasons at paragraph 39 of his further written submissions, that this new case is inconsistent with the case earlier

[3] See §32 of the Bank's further written submissions dated 11 March 2024.
[4] See §§8,12 and 14 of the draft APOC.

advanced, has major evidentiary gaps and is difficult to follow as a matter of common sense. The bare allegation of £1,000 remains unparticularised, despite the concerns I raised about this at the hearing. Before the dispute with Amazon began on 20 December 2021, the financial statements for LSL for the year ending 31 December 2019 show net liabilities of £73,508 and for the year ending 31 December 2020 show net liabilities of £101, 292. It is unclear how this sits with an alleged annual profit of £365,000.

The Claimants' submissions in relation to the Name Change Agreement Claim

49. Mr Welch submitted that since the Particulars of Claim was prepared, the Claimants have learned that Amazon would have accepted a credit facility, but this was often referred to as a credit card. The amendment reflects that. He does not, however, identify when and how the Claimants became aware of this, and it is to be noted that the original position was still maintained when Mr Lee made his Third Witness Statement on 17 November 2023 – see paragraph 46 above. Furthermore, significantly Mr Welch does not address the points made about the lack of explanation for the claimed daily loss of £1,000.

Discussion and conclusion on LSL's claim for a daily loss of £1,000 relating to the Name Change Agreement Claim

50. I turn first to the switch between the need for a "credit card" and a "credit facility". In my view, given that it is accepted by the Bank that the scope of the Name Change Agreement cannot be determined summarily, these issues going to causation and the Claimants' change of stance between "credit card" and "credit facility" can be addressed in cross-examination. There may be powerful points to be made on that, but I do not find it sufficient to prevent the claim being advanced.

51. I do, however, have grave concerns about the lack of particularity about the basis for LSL's daily loss of profit claim, given the points made by the Bank and the failure by the Claimants to address this at all. The figure of £1,000 per day seems to be plucked from thin air.

52. I have decided not to strike out this claim at this stage, but in my judgment this claim should only be permitted to proceed if the Claimants provide the following documents and further information by 4pm on 31 July 2024:

    (1) Full particulars of how the daily loss of £1,000 is calculated, by reference to LSL's trading performance for the year ending 2019 and 2020, and how this is reconciled with its net liabilities for those years. This should be done with the degree of detail to be relied upon at trial. This information is solely in the possession of the Claimants and no disclosure from the Bank is needed in this regard;

    (2) Amazon's terms of trading with LSL;

    (3) The confidential settlement agreement between LSL and Amazon in about February 2022;

    (4) The amount of any credit, if any, that has to be given for the receipt of the £600,000 paid to LSL by Amazon under the terms of the confidential settlement agreement. There will have to be an explanation as to the period that the Amazon compensation was intended to

> cover. It seems LSL was in dispute with Amazon from about early May 2020.[5] The confidential settlement was reached at some time in February 2022. The £600,000 compensation under that agreement would appear to cover the period from 20 December 2021 when the dispute between LSL and the Bank was on foot and one assumes that credit would have to be given for any losses covered during that period to a point in February 2022.

53. Upon receipt of those documents and that information, the Bank is at liberty to renew its application to me. However, I would remind the parties that the purpose of applications, such as that before me, is not to conduct a mini-trial, and it is only where there is no real prospect of success that the Court will prevent a matter going to trial. There may be cost consequences if the basis for a renewed application is found to be wanting.

54. Finally, on this aspect, I note that at §37.10 of the draft APOC, Mr Lee claims nominal damages under this head of claim. I cannot see the basis for such a claim. By this time the trading activities had been carried on by LSL rather than him personally. I do not permit that aspect of the case to proceed on the basis that it stands no real prospect of success.

The claimed loss for £11,670 in account charges and interest

55. This head of loss seems to refer to the same charges and interest claimed in respect of the Complaints Claim.

56. The basis of it appears at §37.5 of the draft APOC, which states:

> "*This loss arose as a result of [the Company] being deprived of Account 4770 banking services in consequence of which [the Company] was prevented from paying VAT rebate cheques and/or other payments into the account.*"

57. The Bank submitted that LSL's new account was opened on 7 February 2022, very shortly after the Name Change Reversal. Accordingly, there is no reason the Company could not have paid VAT rebate cheques or other payments into Account 4804, and then transferred the funds to Account 4770 as needed. Perhaps the best illustration of this is that on 14 March 2022 LSL was able to receive into Account 4804 the sum of £596,300.49. LSL could have paid off the £20,000 in Account 4770 whenever it liked.

58. The Claimants say that the Name Change Reversal prevented both Claimants from using Account 4770 and this caused the loss of interest and charges.

59. In my judgment, LSL should be permitted to advance this head of loss for the reasons set out at paragraph 42 above.

The Negligent Misstatement Claim

60. The Claimants allege a duty of care in the preparation and provision of information about Mr Lee and the Company to third party credit reference agencies ("**CRAs**") (draft APOC §22). The Claimants further allege that in breach of that common law duty the Bank negligently provided information to third party credit agencies in the period between "*December 2021 and January 2022*" that was not "*fair and accurate*" (draft

[5] See §9 of the draft APOC.

APOC §§31 and 31.1). As regards remedies:

(1) The Company claims: (i) loss of profit of £1,000 per day trading on Amazon (draft APOC §37.7); (ii) loss of £3,500 being cost of material to install a water supply (draft APOC §37.8); and (iii) loss of £61,825.52 in materials and labour to install an electricity supply (draft APOC §37.9).

(2) Mr Lee claims losses of £21.11 per year said to have been incurred from being restricted to a pre-payment gas meter (draft APOC §37.12) and £23.34 per year from an alleged restriction to a pre-payment electricity meter (draft APOC §37.13).

(3) The Claimants seek a mandatory injunction requiring the withdrawal of information provided to credit reference agencies (draft APOC §35.1).

61. As earlier indicated at paragraph 37 above, I am satisfied that the scope of the duty at §22 of the draft APOC is properly pleaded with the inclusion of the word "*fair*".

62. The Bank has complained about the way in which the breach has been particularised at §31.2.1-31.2.3 of the draft APOC. The complaint is that §§25 and 26 which contained similar facts have been deleted. In my view it does not in itself prevent them from being included as particulars of breach in §31.2.1-31.2.3 of the draft APOC. However, I agree with the Bank that §31.2.3 should not be permitted to proceed because it relates to a promise relating to the investigation made on 7 April 2022, rather than the negligent misstatement claim in relation to the provision of references between December 2021 and 7 January 2022. This is not a material or relevant particular to this claim. I note that this aspect is not addressed at all in Mr Welch's further written submissions dated 18 March 2024. In my judgment, that sub-paragraph has no real prospect of success in advancing the Claimants' negligence misstatement claim.

63. The Bank further complained that there is simply a date range, rather than specific particular dates which are relied upon for each misstatement. As I understand the position the Bank does not dispute that it gave credit information to the CRAs on the basis that it was "*extracted automatically from D by the CRAs (including Experian) from time to time.*" – see §37.2 of the amended Defence. The content of that credit information will be disclosable upon discovery. It is uniquely in the possession of the Bank. Again, I do not believe that it is disputed that the Bank, if reporting on the state of Account 4770, would have said that it was overdrawn and in arrears on the loan repayments. The Claimants contend at §§32 and 33 of both the original Particulars of Claim and the draft APOC that Mr Lee has made a subject access request (which is not disputed) and the Bank has failed adequately to comply with that request, although yet again no particulars are provided. In my view, in the light of the admissions by the Bank and the fact that the material is solely in their possession, the absence of specific dates as to when the negligent misstatements were made, is not a basis for striking out the claim or granting summary judgment on the basis that it stands no real prospect of success.

Causation and quantum on the Negligent Misstatement Claim

64. If it is established that the Bank provided information negligently to the CRAs, which as a result adversely affected the Claimants' credit rating, and thereby a refusal of credit facilities, they *may* be entitled to the injunctive and declaratory relief sought. However, it is <u>essential</u> to the case advanced, that this must be pleaded with proper particulars and

instances of a refusal or refusals to give credit facilities as a consequence of the diminution in their credit scores. Despite this point being taken by the Bank at the hearing, this has not been done.

65. In my judgment this is fatal to the Claimants' Negligent Misstatement Claim. There is no causal connection established to the new heads of loss, now pleaded for the first time at draft APOC §37.8 and §37.9, which appear with no explanation as to why no mention of them was made in the original Particulars of Claim or the Schedules of Loss produced at the hearing before me. Also, I can see no causal justification for the reintroduction of the daily loss claims of £1,000 and the loss of £11,670 in account charges and interest placed on Account 4770.

66. I therefore find that the Negligence Misstatement Claim should not be permitted to proceed because, as pleaded, it does not stand a real prospect of success and there is no other compelling reason why this aspect of the case should proceed to trial.

Conclusion

67. I grant permission to the Claimants to serve the draft APOC, save in relation to the Negligence Misstatement Claim, all references to which should be excised, as should Mr Lee's claim for nominal damages for breach of the Name Change Agreement at §37.10 of the draft APOC and further that part of the quantum claim relating to the daily losses of £1,000 incurred by LSL in relation to the Name Change Agreement claim, may only proceed upon provision of the further information and documentation referred to at paragraph 52 above by 4pm on 31 July 2024. The Bank's application therefore succeeds only in part, but in the light of a wholesale repleading of the Claimants' Particulars of Claim.

68. I invite the parties to endeavour to agree a draft Order in advance of the hearing of consequential matters arising from this judgment, to review the directions for trial and, if possible, to agree those and to file skeleton arguments in relation to any consequential matters by 4pm on Friday 19 July 2024. Where there is a disagreement in relation to the provisions of the draft Order or the proposed directions, I would ask that the respective position of the parties be track-changed in different colours on the draft and explained in their respective skeleton arguments.