Neutral Citation Number: [2021] EWHC 2213 (Ch)

Case No: BL-2019-000994

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

Rolls Building
7 Rolls Buildings,
London, EC4A 1NL

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Date: 09/08/2021

Before:

MASTER KAYE

- -

Between:

(1) Fida Hussain	**Claimants**
(2) Nelim Ali	
- and -	
(1) Waqar Ahmed	**Defendants**
(2) Farhat Ahmed	

- -
- -

Maurice Rifat (instructed by **W H Matthews & Co**) for the **Claimants**
Marc Delehanty (instructed by **PCB Bryne LLP**) for the **Defendants**

Hearing date: 19 May 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Master Kaye :

1. This Judgment concerns the following applications which were before me on 19 May 2021:

2. The claimants' application to amend their particulars of claim dated 11 February 2021 ("**the claimants' third amendment application**"). It is supported by the fourth witness statement of Fida Hussain, the first claimant, and the first witness statement of Nelim Ali, the second claimant;

3. The defendants' application dated 4 May 2021 to strike out/for summary judgment of parts of the particulars of claim ("**the defendants' third strike out application**"). It is supported by the third witness statement from the defendants' solicitor;

4. The claimants' application for a stay of enforcement of a costs order pending the conclusion of these proceedings dated 18 January 2021 ("**the claimants' stay application**"). It is supported by the first and second witness statements of the first claimant;

5. The defendants' application to stay the proceedings pending payment of the outstanding costs orders and other relief dated 26 January 2021 ("**the defendants' stay application**"). It is supported by the second witness statement from the defendants' solicitor and opposed by the third witness statement of the first claimant.

6. In addition, on 19 May 2021 I made costs orders against the claimants in relation to the claimants' second application to amend, the defendants' second application to strike out and the defendants' part 18 application, all of which had been determined on 12 October 2020. I summarily assessed those costs in the sum of £27,500.

Conclusions:

7. I refuse the claimants' third amendment application to amend to the fifth/sixth iteration of the particulars of claim to plead a share sale contract entered into in June 2016. The original contractual claim based on an oral contract including the acquisition of leasehold property remains struck out pursuant to my order of 12 October 2020.

8. I substantially allow the defendants' third strike out application as set out below. The fraudulent misrepresentation claims that survive are more limited and will need to be repleaded.

9. I refuse the claimants' stay application but I allow the defendants' stay application. The stay will include payment of the costs orders made on the 19 May 2021 and the stay period will be four months.

10. If a successful application is made to lift the stay in due course, it appears to me that based on the apparent value of the remaining claims; the claim would be suitable for transfer out of the High Court. That will be a matter to be considered if such an application is made.

Background

11. This claim was issued in May 2019. In concerns events which occurred between February 2016 and about July 2017. The claimants say that they and the second claimant's company ("**FCCL**") have paid over some £232,000 to the defendants or their company ("**FCPL**") on the expectation and understanding that they would in return take over the business carried out from the Food Court, Purley ("**the Food Court**"). The Food Court premises were held under a non-assignable lease in the name of FCPL. The claimants say they did not know this until about 8 May 2016.

12. The Food Court appears to have comprised of a lease of the premises and a business running or managing a number of food outlets including a Subway franchise considered by the claimants to have significant value.

13. It is common ground that a meeting took place on 24 February 2016 ("**the Meeting**") at the Hilton Hotel in Purley Way between the claimants and the first defendant. It is common ground that at the Meeting the basis on which the claimants would acquire the Food Court was discussed.

14. The claimants say that express representations were made at the Meeting and further express or implied representations were made between the Meeting and 2 March 2016 on which they relied when progressing their acquisition of the Food Court.

15. The claimants say that in reliance on, and induced by, the representations they entered into contractual arrangements with the defendants or FCPL to acquire the Food Court, paid over sums of money, and then took up partial occupation of the Food Court on 2 March 2016. They thereafter undertook management and maintenance work at the Food Court and expended money and time on it. In the first six months of their partial occupation, even without the Subway franchise, they say they had takings of £385,000. They say that the representations were, in fact, false and they have suffered loss as a result. Their claims include losses for breach of contract and fraudulent misrepresentation.

16. In July 2017, the landlord served a S.146 notice on FCPL, forfeited the lease and evicted FCPL from the Food Court and consequently the claimants were evicted.

17. The precise mechanism by which the claimants say they were to acquire the Food Court, the nature of any contractual arrangement between the parties and the nature of any representations made, what reliance was or could have been placed on such representations and their effect on the arrangements between the parties (and who were the correct parties) has already been the subject of two applications to amend and two applications to strike out as set out below.

The History of the Particulars of Claim

18. The original particulars of claim, dated 14 May 2019, were signed by the claimants with a statement of truth ("**the first iteration**"). The first iteration sets out nine representations said to have been made at the Meeting (paragraph 3) which induced the claimants to purchase the Food Court as follows:

> "a. That the First Defendant wished to sell the Food Court Business, thereby impliedly representing to the Claimants that he had good title to the lease of the property and was able to assign or otherwise transfer his title to the Claimants;
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> b. The Food Court Business included, as going concerns, the food business outlets at the property consisting of 'BBQ Express', 'Karahi Cuisine', 'China Wok', 'Subway' and 'Kaspas Ice Cream' for the Claimants to operate and profit from;
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> c. That the asking price for the Food Court Business including the food business outlets above was to be £250,000;
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> d. That the Claimants could go into occupation of the property upon the First Defendant receiving an initial immediate payment of at least £50,000, and the balance of the purchase price to paid by monthly instalments of £6,000 thereafter;
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> e. That rent of the lease of the property was very good value at £17,875 per quarter;
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> f. That the property was in good condition and that no further or additional works were necessary;
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> g. That the equipment at the Food Court Business was in good condition;
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> h. That the maximum needed to bring the Food Court Business and the property into perfect condition was £5,000;
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> i. That the Food Court Business and property had potential for improvement both by good management and by carrying out works to create an additional seating area for customers ("the Improvement Works");
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> [j. That the first Defendant was making approximately £10,000 per month profit from the Food Court Business outlets and that 70% of this was generated by the 'Subway' and 'Kaspas' outlets.]" (added by the third iteration)

19. A further six representations are said to have been made expressly or impliedly between the Meeting and prior to the 2 March 2016 (paragraph 4) as follows:

> "a. That the First Defendant had good title to the lease of the property;
>
> b. That the First Defendant was not in breach of any covenants in the lease with the Lessor ("the Lessor") [, nor would be by transferring or assigning his interest to the Claimants;] (deleted by the fifth iteration)

> c. That the First Defendant had the required consent from the Lessor to transfer or assign his interest in the property to the Claimants, alternatively that consent was not required;
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> d. That the Claimants would be able to take over the relevant operations in relation to each of the food business outlets operating from the property;
>
> e. That the Food Court Business was compliant with all health and safety and food safety requirements.
>
> f. That to the extent the First Defendant remained in control of the Food Court Business or any part of it he would take all reasonable steps to ensure it was in compliance with the terms of the lease and all health and safety and fire regulations and requirements including ensuring the Food Court Business and the property were regularly inspected and maintained and carrying out all necessary works promptly."

20. Induced by and in reliance on those representations the claimants plead that they agreed to purchase the leasehold interest in the Food Court for £230,000 (paragraph 7). This was therefore an oral contract for the acquisition of the leasehold interest in the Food Court from the first defendant.

21. The claimants pleaded that in reliance on or induced by those representations they made payments (paragraph 8) and took partial possession of the Food Court on 2 March 2016 (paragraph 9).

22. The first iteration pleaded that the representations were false, and that the first defendant knew the representations to be false when made, identifying what the claimants rely on in paragraph 24 before setting out the claims for losses. The first iteration includes claims for constructive trust, monies had and received, unjust enrichment and restitution of the monies paid over in the sum of £232,000.

23. In the first iteration, at paragraph 11, the claimants plead that sometime between March 2016 and May 2016 they discovered that the first defendant was not the leaseholder of the Food Court, the lease being owned by FCPL and that the lease was non-assignable. At paragraph 12 of the first iteration the claimants plead as follows:

> "… It was consequently proposed in about May 2016 by the First Defendant that he sell 100% of the shares of [FCPL] to the Claimants. The Claimants, having already paid in excess of £108,000, having made two further payments to the First Defendant of £15,000 each on 11th April 2016 and 12th April 2016, had no choice but to agree **in principle** to this proposal, which they did on or about 15th June 2016. On or about 15th August 2016 a draft Agreement for Sale of Shares was produced and drafted by the Defendant's solicitors J H Hart and Co. which for reasons which are currently unknown to the Claimants showed a purchase price of £180,000." (**emphasis added**)

24. The claimants remained in partial occupation and monies continued to be paid to the defendants or FCPL. The share sale did not complete. In May 2017, the first defendant notified the claimants that he was not proceeding with the share sale. The Lessor forfeited the lease of the Food Court in July 2017.

25. The claimants' pleaded in the alternative that if it was found that was a share sale contract, which was not their case that the first defendant was in repudiatory breach of it (paragraph 34).

26. The claimants served voluntary further particulars of claim on 5 June 2019 ("**Voluntary Particulars**"). Those set out additional claims for loss, additional detail in relation to the claims and losses, and included additional representations. In combination, the first iteration and the Voluntary Particulars set out a wide range of claims for loss and damage, which had a value estimated to be in excess of £1m.

27. The defendants' defence served on 26 June 2019 pleaded that there was a different contract between the parties. The defendants' case was that the first defendant orally agreed terms with the claimants at the Meeting to sell the defendants' shareholding in FCPL to the claimants for £230,000 which sum would be paid over time. In the meantime, the claimants would be able to operate the Food Court under a licence arrangement pending full payment and the transfer of the share in FCPL. Annexed to the defence was a written agreement called "Asset and Share Sale of Food Court Purely Limited" which included the licence to occupy on terms, which appeared to be signed by the claimants and dated 2 March 2016. Thus, the defendants say that the monies paid over were a combination of sums paid as part of the purchase of the share in FCPL and for the licence to occupy.

28. The claimants provided the first draft amended particulars of claim ("**the second iteration**") on 16 October 2019. The second iteration was still based on an oral contract for the acquisition of the leasehold interest in the Food Court but now pleaded that it was part of a broader overall transaction to acquire a business. Paragraph 12 although renumbered was otherwise unamended. Paragraph 34 was renumbered and included a further alternative breach of trust/constructive trust claim. No attempt had been made to incorporate the Voluntary Particulars.

29. On 12 November 2019, the defendants applied to strike out or for summary judgment of the contractual claim, in particular because it pleaded an oral contract in respect of the leasehold interest, which was inconsistent with the requirements of S2 LPMPA. The defendants sought to strike out other elements of the claim including the fraudulent misrepresentation claims for various failures in the formulation of the claims such as what was said to be a failure to plead intention and particulars of knowledge of falsity.

30. The claimants issued a cross application to amend to the second iteration. In December 2019, I was considering the first and second iterations of the particulars of claim together with the Voluntary Particulars and the first strike out application.

31. Judgement was handed down 2 March 2020. I did not strike out the particulars of claim. Despite concerns about the particulars of claim, I concluded that the majority of the claims should be allowed to proceed at that time. However, in relation to the

contract and constructive trust claims I found they were susceptible to be struck out but I provided the claimants with an opportunity to replead them.

32. I noted that parts of the particulars of claim required greater particularisation and the opportunity to replead was not limited to the contract and constructive trust claims. I further directed that the claimants' Voluntary Particulars should be incorporated into any amended particulars of claim if the claimants sought to rely on them.

33. At that stage, no further permission to amend was given and the first iteration remained the claimants' particulars of claim subject to any further amendment or strike out.

34. In March 2020, the claimants' draft second amended particulars of claim ("**the third iteration**") sought to avoid the difficulties that had arisen in the first and second iterations in respect of section 2 LPMPA. It maintained a plea that an oral contract was entered into in February 2016, but this was now in respect of the acquisition of the Food Court, which included the transfer of the leasehold interest. The claimants now pleaded that this oral contract was **varied** by an **in principle** agreement to enter into a share sale agreement on 15 June 2016. Paragraph 12 remained the same save for the addition in the second line as set out below.

> "… It was consequently proposed in about May 2016 by the First Defendant ***instead of the assignment of the lease of the property as part of the transaction, which would have been impossible,*** that he sell 100% of the shares of [FCPL] to the Claimants. The Claimants, having already paid in excess of £108,000, having made two further payments to the First Defendant of £15,000 each on 11th April 2016 and 12th April 2016, had no choice but to agree **in principle** to this proposal, which they did on or about 15th June 2016. On or about 15th August 2016 a draft Agreement for Sale of Shares was produced and drafted by the Defendant's solicitors J H Hart and Co. which for reasons which are currently unknown to the Claimants showed a purchase price of £180,000." (**emphasis added, red underlined italic section added in third iteration**)

35. Transaction was not defined in the third iteration. The pleaded contract remained an oral contract, which included the acquisition of a leasehold interest, but which was said to have been subsequently varied. The claimants sought to incorporate parts of the Voluntary Particulars by adding an additional misrepresentation to paragraph 3(j) and revising their heads of loss. The existing representations in paragraphs 3 and 4 were said to have become terms of the contract but otherwise remained unchanged. The third iteration, although provided by way of substitution, was not a wholesale redraft but an attempt to shoehorn into the existing structure the revised contract claim.

36. In March 2020, I had criticised the kitchen sink approach taken in the first and second iteration, noting the need for the claimants to set out their claim with all the requisite elements clearly identifiable. The opportunity to amend was not used to address those

concerns. The defendants did not consent to the amendments. The claimants' second amendment application was issued on 27 April 2020.

37. The defendants raised a part 18 request ("**RFI**") in June 2020, which identified issues with and sought to clarify the third iteration. The claimant declined to engage with the RFI until after consideration of their application to amend.

38. In September 2020, the defendants issued their second application to strike out. They sought to strike out the original contract claim in the event that permission to amend were refused and sought an order requiring the claimants to respond to the RFI.

39. The applications came before me on 12 October 2020. At the outset of the claimants' submissions and throughout the course of the hearing, Mr Rifat made further amendments to the third iteration. By the conclusion of the hearing, a number of further amendments and concessions had been made. I was therefore considering a **fourth iteration** by the time I gave judgment. The Order following the hearing on 12 October records the deletions made over the course of the hearing and records the permitted minor amendments.

40. I refused permission to amend to either the third or fourth iteration save for the minor amendments referred to in the order. I struck out the contract claim in the first iteration. However, I gave the claimants an opportunity to seek to plead a share sale contract concluded in or about May 2016.

41. Although no order was made requiring a response to the defendants' RFI (the third iteration to which it related not having been permitted), I encouraged the claimants to address the RFI as part of the next version of amended particulars of claim ("**the fifth iteration**").

42. On 12 October 2020, I determined the liability for costs from the March 2020 hearing substantially against the claimants with the quantum to be determined on paper. The liability for and quantum of costs arising from the October 2020 were determined at the 19 May 2021 hearing.

43. On 21 October 2020, the defendants' solicitors wrote to the claimants setting out what they would expect to see in the fifth iteration, a road map to pleading the claims the claimants had identified. Whilst an unusual approach, given the history of the particulars of claim, it was not an unreasonable approach. Having considered the letter it fairly sets out what would have been required to plead the claims that the claimants were seeking to put forward. It was not adopted by the claimants.

44. The claimants sought to shoehorn the further amendments into the original structure. The fifth iteration was served on 20 November 2020; it was another substitute particulars of claim. It was not a helpful document. It pleaded a separate oral contract formed on 15 June 2016 for the sale to the claimants of the defendants' shareholding in FCPL, which held the leasehold interest in the Food Court. It did not address the RFI.

45. The tracked version of the fifth iteration had been tracked against the third iteration not the fourth iteration and neither incorporated the further amendments and

concessions made during the course of the October hearing nor did it identify/include the permitted minor amendments.

46. The fifth iteration pleaded that the parties entered into negotiations at the Meeting, not an oral contract, for the purchase of the Food Court. But for the deletion of the wording at the end of representation 4(b), as identified above, the representations at paragraphs 3 and 4 were unchanged. It still pleaded an agreement that the claimants could take up partial occupation after part payment of the purchase price. As in the earlier iterations, it pleaded that in reliance on and induced by the representations, which were said to be false, the claimants made payments to the defendants and entered into partial occupation on 2 March 2016. The same representations were said to have induced the claimants into the share sale in June 2016.

47. The first part of paragraph 8 of the fifth iteration was new and pleaded as follows:

> "The Claimants originally thought that they would be purchasing the lease of the property at which the Food Court Business was based, however, the agreement to purchase on 24th February 2016 was not in writing and did not comply with section 2 of the Law of Property (Misc. Provisions) Act 1989…"

48. This still pleaded that there was an oral agreement to purchase the leasehold interest at the Meeting rather than just negotiations as now pleaded earlier in the fifth iteration. This inconsistency of pleading was a feature of the fifth iteration. The fifth iteration (as further revised by the sixth iteration) then set out the new version of the contract at paragraphs 10 to 12 as set out below. The key difference in paragraph 10, which was otherwise substantially the same as its equivalent, paragraph 12, in the previous versions, was the loss of the words "in principle" in relation to the June 2015 agreement**.** Paragraph 11 then asserted that an oral share sale contract was entered into on 15 June 2016.

> "The Contract
>
> 10. It was subsequently disclosed by the first Defendant in early May 2016 that the first Defendant personally did not own the said lease, it was actually owned by the Defendants' company, [FCPL]. Because of this, it was consequently orally proposed by the first Defendant in about May 2016, that instead of the transfer of the lease which would have been impossible, that he and the second Defendant sell 100% of the shares of [FCPL], to the Claimants so as to avoid having to formally transfer the Lease. The Claimants, having already paid in excess of £108,000, and having made two further payments to the First Defendant of £15,000 each on 11th April 2016 and 12th April 2016, had no choice but to agree to this proposal, which they did orally on or about 15th June 2016. On or about 15th August 2016 a draft Agreement for Sale of Shares was produced and drafted by the Defendant's solicitors J H Hart and Co. which for reasons which are currently unknown to the Claimants showed a purchase price of £180,000.

> 11. The Claimants assert that in the circumstances on or about ~~**between –**~~15th June 2016 the parties orally agreed that Defendants would sell and the Claimants would buy the shares of [FCPL] (the Contract) in order to carry into effect the purchase of the Food Court Business the other terms of which had already been agreed between the parties as set out above. The previous proposed transfer of the lease was abandoned by the parties as being impossible. The agreement between the parties to purchase the Food Court Business manifested itself and was to be facilitated by an agreement to transfer the shares of [FCPL] from the Defendants to the Claimants, such transfer not being a disposition of land and consequently not rendered void by section 2 of the Law of Property (Misc. Prov) Act 1989.
>
> 12. The Claimants assert that they were induced by and relied upon the representations of the first Defendant as set out in paragraphs 3 & 4 above, in (a) entering into occupation of the property and commencing payments as set out in paragraph 8 hereinabove and in (b) **save for paragraphs 3(a) and 4(a) above,** subsequently agreeing to and entering into the contract to purchase the shares of [FCPL]. (The underlined sections are part of the sixth iteration)

49. By November 2020 despite five iterations of the particulars of claim, there was no witness evidence from either of the claimants, which might explain the changes or what in fact their evidence was about the events in 2016.

50. Between the provision of the fifth iteration in November 2020 and the hearing of these applications in May 2021 the claimants filed the following evidence.

51. On 13 December 2020 the claimants belatedly filed replies to the RFI ("**RRFI**") signed with a statement of truth. A number of the answers in the RRFI were inconsistent with the first and/or fifth iteration. Those inconsistencies were not limited to the contractual claim on which the proposed amendments were focussed. No revised iteration was provided to address the differences between the RRFI and the fifth iteration.

52. In the meantime, the parties filed the written submissions in relation to the outstanding costs assessments from 12 October 2020. The claimants did not raise any issue of impecuniosity or inability to pay. I determined that the claimants should pay £10,800, which was recorded in an order dated 7 January 2021.

53. The claimants' stay application was issued on the last day for payment of the costs liability. The claimants' supporting evidence provided some information about their financial position and the first claimant's ill health.

54. The defendants' stay application was issued on 26 January 2021. It sought to stay of the claim pending payment of the outstanding costs orders and a repleaded claim and, in default of both by a specified date, the defendants sought dismissal of the claim.

55. On 29 January 2021, the first claimant filed a third witness statement further addressing the claimants' financial position and providing information about how the claimants were funding the litigation.

56. Despite having provided the fifth iteration on 23 November 2020 it was not until 11 February 2021 (the last day of the extended period for doing so) that the claimants finally issued the claimant's third amendment application supported by the fourth witness statement of the first claimant. This was a relatively detailed witness statement running to some 64 paragraphs. It set out for the first time the first claimant's evidence about the events giving rise to the claim. As with the RRFI it does not appear that any consideration was given to the effect of its contents on either the first or fifth iteration. The first claimant's evidence was inconsistent with the fifth iteration. It raised doubts about not only the way in which the contractual claim was now advanced in the fifth iteration but undermined other elements of the claim, in particular the fraudulent misrepresentation claims. The first claimant nonetheless both confirmed that the contents of his witness statement were true and that the contents of the fifth iteration were true despite their inconsistency and despite having previously confirmed that the contents of the RRFI were true.

57. There has been no explanation as to how the inconsistent positions were to be maintained or reconciled with the fifth iteration and no further amendments were proposed. The additional amendments in the sixth iteration were a tidying up exercise to bring the fifth iteration in line with the decisions already made by the court. They did not and were not intended to address the inconsistencies identified in the fifth iteration both internally or with the claimants' evidence.

58. The second claimant's statement does no more than confirm the matters set out in the first claimant's witness statement. She also confirms that the facts and matters set out in the fifth iteration are true. The two positions being on their face irreconcilable.

59. The fundamental change in the fifth iteration was to move the date upon which any contractually binding agreement was said to have been entered into to 15 June 2016. However, the claimants continued to rely on the same representations. Some of those representations were now demonstrably inconsistent with the claimants' evidence and/or known to be false before the claimants paid over monies to the defendants (or FCPL) and/or entered into occupation of the Food Court and/or the June 2016 contract.

60. Some of the representations no longer had any relevance given the change in the proposed contract type and date. Some of the representations were in fact now know to be true and relied on as true. No attempt had been made to reconcile the representations, the evidence and the fifth iteration whether in relation to the contractual claim, the fraudulent misrepresentation claim or at all.

61. On 4 May 2021, the defendants issued their third strike out and summary judgment application. This application focused on the effect of the claimants' evidence on the misrepresentation claims. The defendant sought to strike out the fraudulent misrepresentations which were now inconsistent with the claimant's evidence and/or the RRFI or which were irrelevant given the new proposed contract date and form of contract.

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62. I have taken into account the written and oral submissions of both Mr Rifat and Mr Delehanty and I have read with care the evidence in support and opposition to the applications even if I have not set out in detail all of the submissions and evidence I have considered.

63. Mr Delehanty identified that a number of paragraphs in the fifth iteration were ones which had already been deleted by the claimants during the course of the October 2020 hearing. He identified other paragraphs which should have been deleted in the fifth iteration as a result of the strike out of the first iteration of the contract claim.

64. Mr Rifat accepted the errors identified by Mr Delehanty explaining that they were, in part, caused by technical difficulties arising from his use of a Mac.

65. Following the hearing, at my direction, Mr Rifat filed a further version of the amended particulars of claim in which he deleted those paragraphs that remained in the fifth iteration in error and made an additional amendment to paragraph 12 identified during the course of the hearing to make it clear that the new contract claim/fraudulent misrepresentation claims did not rely on representations 3a and 3b concerning the first defendant having good title to the leasehold interest. This tidying up was **the sixth iteration** of the particulars of claim.

66. Whilst I have included the sixth iteration amendments in red and underlined where I have referred to them in this judgment, there is currently no permission to amend the first iteration beyond the strike out of the oral contract in February 2016 and the minor amendments permitted in October 2020. There is no document available that represents the claim the claimants are permitted to advance in the absence of any permission to amend.

67. There are two preliminary points Mr Rifat sought to raise in relation to the defendants' third strike out application.

68. He argued that the technical requirements for an application for summary judgement had not been met and thus the application could not proceed. This was a misunderstanding. I was satisfied that the technical requirements had been met and that the defendants could pursue their application.

69. Secondly, he sought to argue that the defendants' third strike out application was abusive on the grounds that the defendants had sought to strike out elements of the fraudulent misrepresentation claim in December 2019 and were unsuccessful.

70. As Mr Delehanty submitted that the first application was based on challenges to the manner in which the fraudulent misrepresentation claim had been pleaded. The defendants had argued that the first and/or second iteration were deficient in that they failed to plead intention, particulars of knowledge of falsity and sought to claim expectation losses.

71. The defendants' third strike out application was based on the claimants' witness evidence and the RRFI, which was only provided between December 2020 and

February 2021 and could not have been relied on at the time of the first strike out application.

72. I agree with Mr Delehanty. The first application was a legal or technical challenge based on the manner in which the fraudulent representations had been pleaded. The current application seeks to rely on the unsustainability of the fraudulent misrepresentation claims in light of the claimants' evidence and the contemporaneous documents that were not available in November 2019.

73. Although the fraudulent misrepresentation claims were not struck out, in March 2020 Mr Rifat did not use the opportunity to amend to provide more clarity to the fraudulent misrepresentation claims in any of the subsequent iterations nor did he revisit them in light of the claimants' evidence and the contemporaneous documents. The fraudulent misrepresentation claims in the fifth iteration remain substantially as they were in the first iteration.

74. This application is being considered in May 2021 and I cannot ignore the changes to the claim or the evidence that has become available. The defendants are not precluded from bringing the further application in those circumstances.

Claimants' third application to amend

75. The claimant's third application to amend is governed by CPR 17.3. The legal principles for an amendment application are fairly well established and can be stated simply. Whether to allow an amendment is ultimately a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Thus, the court must deal with all cases justly and at proportionate cost which includes ensuring that cases are dealt with expeditiously and fairly whilst allotting an appropriate share of court's resources to any particular case.

76. Applications to amend involve the court striking a balance between any injustice to the applicants if the amendment is refused and the injustice to the respondents if it is allowed. The court must therefore have regard to all the circumstances before granting permission.

77. The test to be applied an application to amend is similar to that applied on summary judgment. An amendment should be refused if it is clear that it has no real prospect of success. The applicants must therefore demonstrate that the amendment has a more than merely fanciful prospect of success and carries some degree of conviction. It is therefore necessary to consider whether the fifth/sixth iteration to plead an oral contract for a share sale in or about 15 June 2016 has a real as opposed fanciful prospect of succeeding. At the stage of considering the proposed amendment, the test to be applied imposes a relatively low bar. The question is whether it is clear that this proposed amendment has no prospect of success.

78. Mr Delehanty referred me to *Kawasaki Kisen Kaisha v Kemball* [2021] EWCA Civ 33 where the Court of Appeal restated these requirements and in doing so made it clear that the amendment must be supported by evidence, which establishes a factual basis, which meets the merits test. It is not sufficient simply to plead allegations, which if true would establish a claim, there must be evidential material, which establishes a sufficiently arguable case, that the allegations are correct.

79. Importantly for this case, the Court should reject an amendment seeking to raise a version of facts that is inherently implausible, self-contradictory, or not supported by the contemporaneous documents. The court should reject an amendment if it can say with confidence that the factual basis of the proposed amendment is fanciful and entirely without substance. However, it is no part of my role to engage in a mini trial or determine contested factual matters as opposed to consideration of inconsistent or self-contradictory evidence from the amending party, which does not support its own proposed amendment. I have to be satisfied that the claimants' evidence provides material which establishes that the amended contract claim they contend for in the fifth iteration is sufficiently arguable to meet the low bar required on an application to amend.

80. As set out above, since the fifth iteration was prepared the claimants have now filed five witness statements, an RRFI, and some contemporaneous documents are now available. This provides the factual basis for the claim to enable me to consider whether the fifth iteration meets the merits test. Whilst it is necessary to be cautious not to conduct a mini trial or to delve too deeply into the merits of the claim, it is necessary to form a view on the proposed amendments for which purpose the claimants' evidence, RRFI, and contemporaneous documents can and should be considered.

81. In May 2019, when the claim was issued, the first iteration relied on an oral agreement reached at the Meeting to purchase the Food Court lease. This agreement "changed" in May/June 2016. As set out above, paragraph 12 described the position on 15 June 2016 as an agreement **in principle** to enter into a share sale agreement following the discovery of the non-assignability of the lease. This pleading of an agreement in principle was repeated in the first four iterations of the particulars of claim.

82. The letter of claim dated 2 April 2019, consistent with the first iteration, relied on an oral contract arising out of the Meeting. However, in respect of the events of 15 June 2016 it states that the claimants *"decided to proceed with [the defendants] suggestion to acquire 100% shares in [FCPL] on a* ***subject to contract*** *basis and* ***subject to acceptable relies to enquiries****."* Although not the claimants' pleaded case, the assertion of a subject to contract agreement appears to be inconsistent with the share sale agreement now contended for in the fifth/sixth iterations.

83. The contemporaneous documents appear to be inconsistent with the fifth/sixth iteration. An email from the first defendant's then solicitors J H Hart to Markand and Co, the claimants' former solicitors, dated 1 April 2016 enclosed a draft share sale agreement and a licence to occupy which appear to be inconsistent with any version of the claimants' claim to date. From at least 1 April 2016, the claimants' solicitors knew that the first defendant did not hold the lease, that it would not be possible for it to be transferred to the claimants, and that an alternative share sale was proposed/agreed or progressing. Whilst the claimants say they did not know this themselves until 8 May 2016 it was plainly within the knowledge of their legal representatives from 1 April 2016.

84. The now pleaded oral contract of a share sale having been agreed on or about 15 June 2016 appears inconsistent with the subsequent contemporaneous documents. Between 22 June 2016 and September 2016 the claimants' solicitor was told by the first

claimant that he was liaising with his accountants about the draft agreements and discussing further terms directly with the defendants and was not happy with the draft agreement. This appears more consistent with an in principle or subject to contract agreement.

85. The first claimant's evidence (inconsistent with the fifth iteration) is that there was an oral agreement reached at the Meeting to buy the Food Court and that the claimants understood that agreement to mean that they would be get an assignment of the lease and that once they had paid a certain amount of the purchase price they could take up occupation of part of the Food Court.

86. The first claimant acknowledges that the documents attached to that email of 1 April 2016 make it clear that the lease was held by FCPL and also that the price was to be £180,000. He says that his solicitor must have told him the transaction was proceeding by way of share sale as he contacted his accountant. He accepts that by 8 May 2016 the claimants knew that the first defendant did not hold the lease personally. They parties agreed to change the oral agreement reached at the Meeting and to continue with a share sale. He explains that he raised some "**initial enquiries"** about the proposed share sale in his email of 15 June 2016. This is inconsistent with a binding contractual agreement having been reached on 15 June 2016 as now pleaded in paragraph 11 of the fifth iteration.

87. The claimants explain at RRFI no.10 that the proposal to sell the share was made orally at a meeting at the Food Court sometime before 8 May 2016 and was confirmed in writing on 15 June 2016 when the defendants' solicitors sent an amended share sale agreement to the claimants' solicitors but that that agreement was incorrect referring to £180,000. They separately say that following the conversation the first defendant emailed the claimants to tell them that he had asked his solicitor to draft the share sale agreement.

88. The first claimant says his solicitor sent him an amended share sale agreement on 21 June and a further version on 15 August 2016. He does not believe the documents were progressed after that date.

89. This suggests that there were discussions about a share sale prior to 8 May 2016 and that an earlier draft share sale agreement was in circulation. This appears more consistent with the 1 April correspondence. Certainly, the reference to an amended draft share sale agreement in June 2016 suggests some earlier version had been in existence. Whilst it would appear to be inconsistent with the in principle agreement of 15 June 2016 pleaded in the first four iterations of the particulars of claim, it also appears to be inconsistent with the fifth/sixth iteration.

90. In May 2017, the claimants' solicitor told them that the share sale agreement had never completed and reminded them that he had been waiting for instructions but not had any communication from anyone since September 2016. This would appear to be more consistent with an in principle or subject to contract and/or enquiries agreement in or about June 2016.

91. Mr Rifat sought to rely on correspondence between the claimants' subsequent solicitors, Callistes, and J H Hart in 2017. This correspondence denied the defendants' version of events but asserted an oral share purchase agreement in February 2016.

This has never been part of the claimants' pleaded case and is not relied on in any iteration of the claim to date neither is it consistent with the claimants' witness evidence or the RRFI. It is arguably more consistent with the defendants' position of a share sale agreement signed on 2 March 2016.

92. Mr Rifat submits that the fifth iteration is simply an amendment to reconcile the statements of case. It is not he says an attempt to add a new claim or a new party, nor is he seeking to rely on new facts or remedies.

93. He reminds me that at its heart the claim is one where the first defendant promised to sell the Food Court to the claimants and in reliance on that promise, the claimants paid over £232,000. He says that the facts and arrangements between the parties are complex. In such a case, a statement of case has to deal with alternatives. The fifth iteration is aimed at crystallising the claim.

94. He argues that any agreement entered into at the Meeting for the purchase of the lease was inchoate or unenforceable and was crystallised in an agreement to purchase the sole share in FCPL in June 2016 by which means the claimants would acquire the leasehold interest. He seeks to rely on the claimants having pleaded the acquisition of the share as an alternative. However, this does not assist him. The alternative pleaded in the first iteration at paragraph 34 is:

> "Further or alternatively to the relief sought above, the Claimants assert that the First Defendant and/or the Defendants are in repudiatory breach of contract, if a contract is found to have been formed between the parties for the sale of shares in the Food Court Purley Limited, such repudiatory breach having been accepted and they thereby claim damages for recission of the contract."

95. He seeks to argue that the defendants' reliance on a share sale agreement demonstrates that all parties are now agreed that there was to be a share sale whether that was agreed in March, May or June 2016, a difference he says of a matter of weeks. The defence, the first claimant's evidence and, at least, the 2017 correspondence support the existence of a share sale. He argued that the only disagreement was about its terms and when it was entered into. This he submits is enough to demonstrate that there is a prospect of success, and the claim is more than merely fanciful.

96. He seeks to persuade me that the inconsistencies in the claimants' case are all good cross-examination points and should be part of the fact-finding carried out by the trial judge. The relevant consideration is not whether the claimants can prove their case at the amendment stage but whether the proposed amendment overcomes the low bar required on an application to amend. The benefit of the doubt should be given to the amending party. An application for permission to amend should not he says be about how to draft. I should therefore allow the amendment and let it play out at trial.

97. Mr Delehanty's submissions objecting to the amendment application had two limbs. The first was focused on the inconsistency between the fifth iteration and the evidence now available arguing that as a consequence the fifth iteration could not satisfy the merits test. The second focused on the unsustainability of the various allegations of

breach and loss as a result of the evidence now available. The claimants had not sought to reconcile the new contractual plea with the evidence.

98. As set out above, the fifth iteration is inconsistent with the first claimant's evidence. The first claimant's evidence remains that an oral agreement was reached at the Meeting, which included the acquisition of the leasehold interest in the premises. His evidence is that there was no binding contract for a share sale on 15 June 2016. Consistent with that evidence the previous four iterations went no further than saying that there was in principle agreement in June 2016.

99. Given the inconsistencies, Mr Delehanty submits that in order to pursue the fifth iteration there would have needed to be evidence from the claimants to explain the change in position. How the claimants came to remember the current version of events after the original contractual claim based on the leasehold interest was struck out. He suggested that such evidence might have included evidence in relation to the advice the claimants received and the instructions they gave. Of course, a significant difficulty for the claimants was that the evidence postdates the fifth iteration so it was difficult to see how such evidence could have been provided since the claimants' evidence served after the fifth iteration was inconsistent with it.

100. Mr Delehanty points to not only the first claimant's evidence, which post-dates the fifth iteration, but also the contemporaneous documents in 2016 neither of which support the current agreement pleaded in the fifth iteration. He notes that there was no attempt to explain the contemporaneous documents from 2016, which I note, are more consistent with the first claimant's evidence.

101. He highlighted deficiencies in the fifth iteration such as its failure to plead terms of the agreement in June 2016 such as when the share in FCPL was to be transferred. This would have been a fundamental term of any agreement but particularly where the value of the share in FCPL depended on the value of the leasehold interest. Here the lease was forfeited in July 2017. The date on which the claimants assert that the share should have been transferred may have a significant impact on the value of the claim and any loss. It could result in the claim being worthless. This would affect case management including cost budgeting.

102. Finally, in relation to his first limb he submits that the fifth iteration is commercially incredible. The claimants' evidence is that having discovered the falsity of many of the contractual representations they contend for, between the Meeting and 8 May 2016, they nonetheless proceeded to enter into a share sale agreement on 15 June 2016, at the same price they had originally agreed at the Meeting.

103. His second limb focussed on the inconsistent and unsustainable claims for breach and loss arising from the changes in the contract date. In summary, he submitted that the claims for breach and loss he had identified were now contradicted by either the fifth iteration, the RRFI, the claimants' evidence or indeed, what remained of the first iteration.

104. I take just one example; Mr Delehanty identified the claims for breach and loss said to arise from the condition of the Food Court property that were now directly contradicted by the claimants' evidence and the RRFI. At 35(iii)(i) of the fifth iteration and RRFI no. 21 the claimants plead that in breach of contract the Food

Court was not in a sanitary condition and required immediate repairs and cleaning when they entered into partial occupation. At paragraph 36(f) of the fifth iteration, they claim the initial repair and replacement costs. The claimants' evidence and RRFI no.13 however, confirms that having taken up partial occupation on 2 March 2016, the claimants discovered the unsanitary condition and the need for immediate repairs during the first week of their occupation in March 2016. This was three months before the 15 June 2016 share sale agreement. It is also before many of the payments made for the acquisition of the Food Court.

105. Not only did this feed back into his overarching commercial credibility argument but this theme of inconsistency and unsustainability is at the heart of the defendants' third strike out and summary judgment application addressed below. There had been no attempt in the fifth iteration to grapple with questions of breach and loss flowing from the failure to transfer the share. Mr Delehanty accepted that it might have been possible to address some of the inadequacies in the fifth iteration by a further RFI but he pointed to the history of the previous RFI served in June 2020 and replied to in December 2020 and not then incorporated into the fifth iteration.

106. Mr Delehanty therefore argues that even if I were to be satisfied that the fifth iteration met the merits test, I should not give permission to amend in any event because of all the attendant difficulties with the fifth iteration, including but not limited to, the failure to address the consequences of the change in the contract date to 15 June 2016 on the claims for breach and loss.

107. Finally, he reminds me that even if I refuse the amendment and indeed allow his application that the unjust enrichment claim, and the claims that relate to monies paid to the defendants for which the claimants say they got nothing, essentially the monies had and received claim remain.

108. I have carefully considered Mr Rifat's submissions and his skeleton argument. It did not seem to me to amount to a persuasive justification for the number of iterations of the particulars of claim nor the failure to grapple with the inconsistencies between the fifth iteration, the claimants' own evidence, the RRFI and contemporaneous documents. This is not a case where the court was being asked by the defendants to prefer its version of events. It is the contradictions and inconsistencies between the claimants' own evidence, the RRFI, the contemporaneous documents, and the six iterations of the particulars of claim that are the cause for concern.

109. In *Kings v Stiefel* [2021] EWHC 1045 (Comm) at [145] to [149] Cockerill J set out the requirements of a proper pleading and its purpose. What she says applies equally to a claim in the Business List of the Chancery Division:

> 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."

110. Whilst on an application to amend the bar that the amending party has to overcome is low, there is still a bar. In March 2020, the claimants had been given an opportunity to revisit their particulars of claim not limited to amending the contract claim.

111. The contract claim is now in its fifth/sixth iteration. Rather than looking afresh at the claim, the claimants focussed on the narrow issue concerning the form or type of contract claim rather than considering the claim as a whole. No attempt had been made to address the consequent amendments that would be needed in light of the change of the date and type of contract. This was particularly stark in relation to the claims for breach and loss identified by Mr Delehanty. The fifth/sixth iteration was inconsistent with the claimants' own evidence, the RRFI and the contemporaneous documents. It is difficult to see how this could be said to meet any of the three purposes of pleading identified by Cockerill J.

112. Many of the criticisms made by Mr Delehanty in relation to the fifth iteration had considerable force. Whilst it remains my view that it is not part of the court's role to mark the quality of the drafting in each of the iterations it is nonetheless necessary for the particulars of claim to meet the basic requirements of pleading. Here the fifth/sixth iteration, in trying to address the fundamental difficulties with an oral contract to acquire a leasehold interest, has become more confused and confusing and internally inconsistent.

113. Mr Rifat had sought to persuade me that it is precisely because of the complexity of the factual matrix that the particulars of claim are vague. However, it seems to me that the more complex the factual matrix and the range of causes of action a party intends to rely on the more important it is that there is clarity. To meet the first and second purpose of pleading, the claim should set out the building blocks and/or essential facts, which go to make up each cause of action. It is all too easy to plead a cause of action in a vacuum, without letting the facts and evidence get in the way. Rules of pleading are intended to operate to ensure that the opposing party knows the case it has to meet and can respond to it. It seems to me that is even more essential where there are an abundance of facts not all of which are relevant to the core allegations or causes of action. This goes to the heart of the second purpose of pleading as set out above.

114. Here, Mr Delehanty relies in particular on the third purpose of pleading identified by Cockerill J at [148]. I agree that in this case it seems clear that the process of pleading did not operate as a critical audit to ensure that there was a complete cause of action and all the relevant terms of the share sale were included, or indeed, at a more basic level, that the fifth/sixth iteration was not only internally consistent but was consistent with the claimants' own evidence.

115. Whilst on an application to amend the court has a broad discretion and must consider the overriding objective and the injustice to the claimants in the event that permission is not granted, the amendments have to have a more than fanciful prospect of success.

116. I have considered the claimants' evidence, the contemporaneous documents and the RRFI in order to consider whether the fifth iteration has some prospect of success and is more than merely fanciful. I can and should consider the fifth iteration not in a vacuum but against the claimants' evidence. This is not a situation where permission is sought to amend to bring a claim in line with the evidence for example where an issue of potential inconsistency has arisen following disclosure or witness evidence. Here if the amendments were permitted, they would be inconsistent with the evidence and the documents, which ought to form the factual basis for the claim as made.

117. The amendments are not just about a different legal characterisation of the same facts. In the face of the claimants' own evidence, the RRFI and the contemporaneous documents the proposed amendments in the fifth/sixth iteration cannot be sustained. The claimants' evidence simply does not support or establish the factual basis for the fifth/sixth iteration. If the facts in the witness evidence and RRFI are true, the fifth iteration cannot succeed. They are contradictory. No consideration appears to have been given to the legal consequences of changing the type of contract and moving the date of the contract by three months to June 2016 on the claims of breach and loss as pleaded by the claimants.

118. I refuse the claimants' application to amend the contractual claim as proposed in the fifth/sixth iteration. It seems to me as pleaded it is unsustainable. Indeed, I am reinforced in that view in circumstances where the fifth/sixth iteration would not be the final version of the particulars of claim on any view. The starting point would have to be the sixth iteration but that would be subject to further amendment to address the claims for breach and loss, which are simply unsustainable based on a contract date of 15 June 2016. Whilst on an interlocutory application to amend the court should not conduct a mini trial it should not permit an amendment that is inherently implausible, self-contradictory, or not supported by the contemporaneous documents. And that is before the difficulties identified by Mr Delehanty in relation to the fraudulent misrepresentation claim as currently formulated.

119. That being the case it is difficult to see how the fifth/sixth iteration of the contract claim can be said to be more than merely fanciful and to have some prospect of success on any basis.

120. In refusing the amendments, I take into account the prejudice to the claimants who will not now be able to pursue a contractual claim in these proceedings. However, they have now sought to reformulate that contractual claim in at least four different ways over two years. I balance that prejudice against the prejudice to the defendants. They have had to incur the costs and time of having to address the proposed amendments much of which will have been wasted. Even if the adverse costs orders had been paid that would not have indemnified the defendants in relation to their costs nor would it have alleviated the wasted time and resource taken up by the proposed amendments.

121. It is now two years since the claim was issued and it has not yet reached close of pleadings. It is for the claimants to progress their claim. The slow progress of the amendment applications demonstrates a lack of urgency and has delayed progress of the claim and been wasteful of the courts' resources as well as the parties'.

122. For the reasons set out above the fifth/sixth iterations are inherently implausible, self-contradictory, and not supported by the claimants' own evidence or the contemporaneous documents. These are not minor inconsistencies to be addressed in cross-examination; they go to the very factual basis for the claim. Even if it were not inconsistent with the claimants' evidence and the documents, it remains deficient. It would need further amendment to address the terms of the share sale and the issues of breach and loss identified by Mr Delehanty. Although I do not accept Mr Rifat's suggestion that the only disagreement between the parties was as to the terms and date of the share sale agreement, he had not in fact pleaded out the terms in any event.

123. To allow the fifth/sixth iteration of the contract claim to go forwards in its current form is not consistent with the overriding objective to manage cases justly efficiently and at proportionate cost. As set out above, the claimants' evidence simply does not establish the factual basis for the amendments sought in the fifth/sixth iteration, it is fanciful and there is not the slightest prospect of success. The amendments should be refused. It is time to bring this to an end.

124. In any event, there are yet further difficulties with the fifth iteration as highlighted by the defendants' third strike out application as set out below. Although not strictly relevant to the application to amend the contract claim, the issues that arise in relation to the fraudulent misrepresentation claims, which rely on the same representations as the contract claim, add to the overall effect when considering the exercise of the court's discretion.

Defendants' third strike out application

125. The defendants' third strike out/summary judgment can be taken relatively shortly. Having dealt with two of the preliminary points as part of the Housekeeping section, I turn to the substance of the application.

126. The defendants' third strike out application is made pursuant to CPR 3.4 and CPR 24.2 and for further directions for further amendments, in so far as the fraudulent misrepresentation claims are not struck out or summarily dismissed in their entirety.

127. The CPR 3.4 (2) provides:

> 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; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order.
>
> (3) When the court strikes out a statement of case it may make any consequential order it considers appropriate.
>
> …
>
> (5) Paragraph (2) does not limit any other power of the court to strike out a statement of case.

128. The court uses its power to strike out sparingly and only in a clear and obvious case, but will use it where a party is pursuing a claim/part of a claim which has no reasonable basis or is an abuse of process or where there would be a waste of resources to all parties if the claim/part of the claim continued.

129. Claims can be struck out where the statement of case relied on discloses no reasonable ground for bringing or pursuing a claim or part of a claim. If for example it discloses no legally recognisable claim or is incoherent or does not make sense, or where it identifies an unwinnable case where allowing the proceedings to continue is without any possible benefit and would be a waste of resources of both parties and the court.

130. Once the applicant has established the grounds for striking out the burden is then on the respondent to persuade the court that it would be inappropriate or unjust to make the order to strike out.

131. The court has to have in mind the overriding objective. This includes considering the overall effect of the order to strike out if made.

132. On a strike out application the court's focus is on the claim, itself and it should not be considering contested factual disputes or conducting a mini trial. The test is whether the court can be certain the claim is bound to fail.

133. CPR 24.2 provides:

> The court may give summary judgment against a claimant or defendant on the whole of a 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 … and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

134. The principles to be applied are fairly well established and were summarised by Lewison J (as he then was) in *Easy Air Ltd v Opal Telcom Ltd* [2009] EWHC 399 (Ch). I must be satisfied that the claimants' fraudulent misrepresentation claims have a realistic as opposed to a fanciful prospect of success. The fraudulent misrepresentation claims must be more than merely arguable. Although I must not conduct a mini-trial, I do not need to take everything that the claimants say at face value and without analysis. It may be clear that the factual assertions or, in this case, the fraudulent misrepresentations relied on are contradicted by for example factual evidence and contemporaneous documents.

135. In reaching a conclusion, I should take into account that other evidence might become available but I should not hesitate to make a final decision without a trial where reasonable grounds exist for believing that further evidence or investigation would not add anything.

136. The defendants must therefore establish that the claimants have no real prospect of success and there is no other compelling reason for the fraudulent misrepresentation claims in question to go to trial.

137. Whilst the court is limited to focussing on the statements of case when considering a strike out application, a broader approach is possible on a summary judgment application where the court considers the evidence.

138. It seems to me plain that at least some of fraudulent misrepresentation claims are no longer sustainable and should be struck out and others are susceptible to summary judgment, as they simply cannot survive the claimants' evidence, the RRFI or the contemporaneous documents.

139. Mr Delehanty identified as a preliminary point that the fifth/sixth iteration had not sought to amend the fraudulent misrepresentation claim to address the strike out of the contract claim in the first iteration in October 2020. Mr Rifat accepted that any of fraudulent misrepresentation claims that still relied on the struck out contract claim would fall away and there would need to be an amendment. As I have not permitted the claimants' third amendment application there is currently no pleaded contract claim at all. It follows that any claim for fraudulent misrepresentation said to have induced the claimants to enter into a contract of any type should fall away and be struck out.

140. However, even if I had given permission to amend to the fifth iteration that would not have saved the majority of the claimants' fraudulent misrepresentation claims. As with the contract claim, no consideration had been given to the effect of the change to both the date and type of contract contended for nor to the effect of the claimants' evidence or the contemporaneous documents on the fraudulent misrepresentation claims. The same issues arose in relation to the fraudulent misrepresentation claims as had arisen with the third amendment application.

141. The claimants' own evidence coupled with the RRFI was that they knew of the falsity of many of the representations they say they relied on before they relied on them, whether that was to enter into a contract or pay over monies, whether that was in March, April, May or June 2016. The claimants cannot have been deceived if they knew the true position and/or knew of the falsity of the representation before acting on it.

142. In addition to those representations, which were known to be false before they were said to have induced the claimants to act in any particular way, Mr Delehanty identified other categories of misrepresentations, which he says do not/cannot support the fraudulent misrepresentation claims. The defendants complain that some the representations relied on are either not said to be false at all or are positively pleaded as true. Some are not in the nature of actionable representations and others, based on the claimants' evidence, were not made at all.

143. It seems to me that many of these deficiencies could and should have been identified and rectified in advance of the fifth iteration or at latest when it became apparent that they were unsustainable based on the claimants' evidence, the RRFI and the contemporaneous documents. The claimants' evidence undercuts the very basis for many of the allegations of fraudulent misrepresentation in advance of this hearing.

144. An application of the third rule of pleading as identified by Cockerill J ought to have caused the claimants to reassess the fraudulent misrepresentation claim.

145. Mr Delehanty had set out what he said the position was in relation to the fraudulent misrepresentations in tabular form. For ease, I have inserted that table below but have amended some of the content.

TABLE B: MISREPRESENTATION CLAIM

REPRESENTATION (the representations pleaded in paragraphs 3 (said to have been made at the Meeting) and 4 (said to have been made between the Meeting and 2 March 2016))	**This column sets out the date the Claimants discovered the representation was false or, why it is said to be irrelevant / unsustainable primarily by reference to the fifth iteration and the claimants' evidence**
#1: LEASE IN D1's NAME PoC, 3(a): "*That the First Defendant wished to sell the Food Court Business, thereby impliedly representing to the Claimants that he had good title to the lease of the property and was able to assign or otherwise transfer his title to the Claimants*" PoC, 4(a): "*That the First Defendant had good title to the lease of the property*" PoC, 4(c): "*That the First Defendant had the required consent from the Lessor to transfer or assign his interest in the property to the Claimants, alternatively that consent was not required*"	**Discovered to be false: 1 APRIL 2016** (Claimants' solicitor told. The defendants say his knowledge is imputed to the claimants, which is not accepted by the claimants.) W/S Hussain 4, para 59: "*In June 2017 (after the dispute started with Waqar) my then solicitors Callistes obtained a copy of Markand and Co.'s file which contained 2 emails from Vikesh to Sean dated 1 April 2016 ... I have only annexed the mail not the enclosures although these are available if required. To the best of my knowledge this email was not shared with me at the time. which stated that the lease to the Food Court was not held by Waqar but by FCP and that the price was to be £180,000.*" **Discovered to be false: 8 MAY 2016** (Claimants told directly) First Iteration, para 10: "*Between March 2016 and May 2016 it was disclosed for the first time by the First Defendant that he did not personally own the lease…"* Fifth Iteration, para 10: "*It was subsequently disclosed by the first Defendant in early May 2016 that the first Defendant personally did not own the said lease, it was actually owned by the Defendants' company, Food Court Purley Limited*" W/S Hussain 4, para 7(d): "*It subsequently transpired that the lease was not owned by Waqar but by his company Food Court (Purley) Limited. I believe we learned this around 8 May 2016.*"

#2: LEASE COVENANTS PoC, 4(b): "*That the First Defendant was not in breach of any covenants in the lease with the Lessor*"	**Irrelevant and/or Unsustainable:** • No plea in any iteration that this statement was false • The Defendants argue that, even if made, it was incapable of being false as the first defendant was not a party to the lease
#3: KASPAS & SUBWAY OUTLETS AVAILABLE TO Cs PoC, 3(b): "*The Food Court Business included, as going concerns, the food business outlets at the property consisting of 'BBQ Express', 'Karahi Cuisine', 'China Wok', 'Subway' and 'Kaspas Ice Cream' for the Claimants to operate and profit from*" PoC, 4(d): "*That the Claimants would be able to take over the relevant operations in relation to each of the food business outlets operating from the property*"	**Discovered to be false: 2 MARCH 2016** (references in the quotations below to "*Hussain*" are to an associate of the first defendant not the claimant.) Fifth Iteration, para 14 and the First Iteration, para 13: "*after entering into occupation of the property and taking partial control of the Food Court Business the Claimants were advised by the representative of the First Defendant, a Mr. Hussain, that 'Kaspas Ice Cream' had already been sold to a third party*" RRFI, no.11: "*The meeting took place at about 10 AM at the Food Court on 2 March 2016. Hussain said words to the effect that the Claimants could not operate Kaspas because it had been given away and was under a management agreement to the Rehman brothers*" W/S Hussain 4, paras 27–36: "[27] *On 2 March 2015* [sic] *we met Hussain outside the Food Court at approximately 10 am. …* [32] *We were introduced to the staff by Hussain who told them we were assisting with managing the business. Despite this it was clear to me that some of the staff had guessed the true position. I wanted to start work in the Subway outlet but was subsequently told by Hussain not to involve myself in this business until I had paid the £105,000 i.e. just under half the contract sum, and the franchise had been transferred to us.* [33] *Hussain also told me that I could not operate Kaspa's Ice-cream because it had been given under a management agreement to Qasim and Azhar Rehman. …* [36] *… Whilst I was pleased to be in occupation I was extremely disappointed that the two most valuable units which accounted for approximately 50% of the revenue were being retained by Waqar and the Rehmans.*"

#4: PRICE PoC, 3(c): "*That the asking price for the Food Court Business including the food business outlets above was to be £250,000*"	**Irrelevant and/or Unsustainable:** • Statement not made – price proposed by first claimant not first defendant W/S Hussain 4, paras 19&20: *"Waqar asked me what I thought would be a fair price for the lot and I said £230,000. For my part I thought that if the Subway was worth at least £150,000 it would be worth paying at least £70,000-£80,000 for the other units i.e. £230,000 for the full Food Court.* *To my surprise Waqar did not attempt to negotiate (although he told us he was thinking in the region of £250,000) …*" • No plea in any iteration that this statement was false
#5: Cs' OCCUPATION PoC, 3(d): "*That the Claimants could go into occupation of the property upon the First Defendant receiving an initial immediate payment of at least £50,000, and the balance of the purchase price to paid by monthly instalments of £6,000 thereafter*"	**Irrelevant and/or Unsustainable:** • No plea in any iteration that this statement is false
#6: RENT PoC, 3(e): "*That rent of the lease of the property was very good value at £17,875 per quarter*"	**Irrelevant and/or Unsustainable:** No plea in any iteration that this statement was false *when made* (*i.e.,* £17,875 was the true rent level at the time the statement was made; rent was only later increased by third party lessor from July 2016) W/S Hussain 4, para 53: "*On 5 March 2016 Waqar*

	emailed us an invoice from FCP for our contribution towards the rent and rates for the balance of the December 2015 quarter in the sum of £2,938.81 plus VAT (FH6 page 9)." Exhibit FH6, page 9: "*Date: March 3, 2016 … Description: Quarterly Rent 25/12/15 – 24/03/16; Unit Price: £17,875*" Cs' Initial Disclosure Doc No. 89: "*Date: March 27, 2016 … Description: Quarterly Rent 27/03/16–29/06/16; Unit Price: £17.875*" Fifth Iteration, para 17: "*on or about 1st July 2016, by way of an invoice for rent from the Defendants' company, Food Court Purley Limited, the Claimants were notified for the first time that the rent for the Food Court was to increase by approximately 70% from £17,875 to £31,250 per quarter*"

#7: PROPERTY CONDITIONS	
PoC, 3(f): "*That the property was in good condition and that no further or additional works were necessary*" PoC, 3(g): "*That the equipment at the Food Court Business was in good condition*" PoC, 3(h): "*That the maximum needed to bring the Food Court Business and the property into perfect condition was £5,000*" PoC, 4(e): "*That the Food Court Business was compliant with all health and safety and food safety requirements*"	**Discovered to be false: 2 MARCH 2016** W/S Hussain 4, para 37: "*After taking occupation of the parts allowed to us the first thing we did was to thoroughly inspect the premises and the equipment to see what needed to be done.*" RFI, request no.13: "*Under paragraph 18, of the whole paragraph*; *Please identify the dates when each of the matters referred to were discovered by the Claimants and the dates when such matters were repaired/cleaned*" RRFI, no.13: "*within the first week or so of occupation of the Food Court by the Claimants*".

#8: IMPROVEMENT POTENTIAL PoC, 3(i): "*That the Food Court Business and property had potential for improvement both by good management and by carrying out works to create an additional seating area for customers*"	**Irrelevant and/or Unsustainable:** No plea in any iteration that this statement was false
#9: PROFIT LEVEL PoC, 3(j): "*That the first Defendant was making approximately £10,000 per month profit from the Food Court Business outlets and that 70% of this was generated by the 'Subway' and 'Kaspas' outlets.*"	**Irrelevant and/or Unsustainable:** • No plea in any iteration that this statement was false • In fact the Claimants plead loss on the basis that it is true: Fifth Iteration, para 36(f)(iii) third iteration para 34(e)(c): "*£14,000 for the failure to transfer the Subway and Kaspas franchise outlets from 24th October 2016 until 21st December 2016 (2 months @ £7,000 per month = £14,000). (the sum of £7,000 per month is calculated on Subway and Kaspas accounting for 70% of the of the claimed monthly profit of £10,000 per month)*" Fifth Iteration, para 36(f)(v): "*... £900,000 for loss of profit for the period 9th July 2017 to 8th December 2024 (90 months @£10,000=£900,000) using the figure provided by the First Defendant ...*" See also: paras 26(d) and 36(f)(iv).
#10: HEALTH AND SAFETY STEPS PoC, 4(f): "*That to the extent the First Defendant remained in control of the Food Court Business or any part of it he would take all reasonable steps to ensure it was in compliance with the*	**Irrelevant and/or Unsustainable:** • No plea in any iteration that this statement was false when made • Not a representation of fact (*i.e.*, instead it is in the nature of a promise as to what the first defendant would do in the future)

terms of the lease and all health and safety and fire regulations and requirements including ensuring the Food Court Business and the property were regularly inspected and maintained and carrying out all necessary works promptly"	

146. Mr Rifat suggested that the schedule was inaccurate and pointed to paragraph 13 in the fifth iteration (and the equivalent in the earlier iterations) in which the claimants pleaded that the representations were false. However, whilst paragraph 13 pleads that the representations were false it then gives particulars of the falsity by reference to only some of the representations in paragraph 3 and 4. Where there are no particulars of falsity alleged in respect of any representation in paragraph 13, Mr Delehanty has included it in his schedule as one for which no plea of falsity is made. This only sought to highlight the difficulties caused by using the same representations as both contract terms and fraudulent misrepresentations where in fact some were only part of the overall narrative background or were relied on as being true.

147. Mr Rifat accepted that at least some of the fraudulent misrepresentation claims were no longer be sustainable. However, he submitted that there was still a substantial claim for losses, which he calculated to be in the region of £74,000 for monies paid over before the claimants discovered the falsity of the representations, for example, in relation to the condition of the Food Court when they took up partial occupation.

148. He sought to argue that the date from which the claimants could be said to have had knowledge that the lease was not held by the first defendant was the date on which they had direct knowledge in May 2016 not when their solicitor knew in April 2016. This would affect the quantum of the claims in respect of the monies paid over since further sums were paid in April. It seems to me that there may be difficulties with any claim in respect of monies paid over after 1 April 2016.

149. Mr Rifat accepted, however, that the claimants would need to replead the fraudulent misrepresentation claims so far as they related to the monies paid over. He can therefore reflect on the legal position in relation to the claimants' date of knowledge in respect of the lease given my decision on the defendants' stay application.

150. The claimants' claim for fraudulent misrepresentation from the outset has lacked clarity and whilst I was not prepared to strike it out in March 2020, the claimants failed to take up the opportunity to reconsider the fraudulent misrepresentation claim when considering the third iteration and do not appear to have revisited it since.

151. As with other aspects of the fifth iteration, the fraudulent misrepresentation claims are now in many cases inconsistent with the claimants' own evidence and the contemporaneous documents. Mr Delehanty rightly identified that in any future pleading there would be a need for the misrepresentations to link up and correlate

with the claims to which they relate. Should the claimants pursue that course then a critical audit of the type identified by Cockerill J will be essential in this case.

152. In light of the claimants' evidence and the contemporaneous documents, there is no factual basis for many of the fraudulent misrepresentation claims. It seems to me that the claims of fraudulent misrepresentation, which rely on representations 3c, 3d, 3e, 3i, 3j, 4b, and 4f, do not have a real prospect of success and should be summarily dismissed in their entirety. The fraudulent misrepresentation claims which rely on representations 3a, 3b, 3f, 3g, 3h, 4a, 4c, 4d and 4e should be summarily dismissed for the same reason save to the extent that they relate to claims for loss resulting from acts of the claimants said to have been induced by the representations prior to the claimants discovering their falsity. As a consequence, the majority of the fraudulent representation claims will be limited to the claims for monies paid to the defendants prior to the discovery of the falsity of the representations as set out above. In so far as the claimants continue to pursue other claims for losses said to arise from the fraudulent misrepresentations in paragraph 26 of the fifth iteration they will need to set out how it is said that the representations caused the loss claimed in light of the evidence now available.

153. It is not practically possible to itemise the paragraphs or sentences which should be removed or remain in part due to the kitchen sink approach taken at the outset. As a consequence, the various different claims made by the claimants are impossibly interwoven and entangled. This judgment and its consequences may finally provide an opportunity and incentive for the claimants to start with a blank page and to reformulate their claims having regard to both the rules of pleading and their evidence.

154. It is not consistent with the overriding objective and good case management to allow fraudulent misrepresentation claims to proceed in their current form when it is now clear that the majority of these very serious allegations are unsustainable. They are inconsistent with and/or contradict the claimants' own evidence and in some cases the contemporaneous documents. There is no sustainable factual basis for them.

155. For all the reasons set out in this judgment, the majority of the fraudulent misrepresentation claims based on the representations set out in paragraph 152 above, like the amendments to the contractual claim, are entirely fanciful and have no prospect of success and there is no other compelling reason to permit them to proceed and should be summarily dismissed.

156. However, the defendants accept that even if the third application to amend is refused and the third application to strike out is successful part of the claim will remain (although they say they may seek to appeal the March 2020 order in relation to some aspects of those remaining claims). The restitutionary claims would however, on any basis need to be repleaded but in broad terms at least the claims for monies had and received, the remaining constructive trust claim and as set out above potentially some aspects of the fraudulent misrepresentation claims would remain but with a far reduced scope and potential value.

157. Whether it is this reduced claim or otherwise, the defendants do not want to incur further costs in defending their position until the claim is in its final form and until the

outstanding costs orders in their favour have been paid. It is this that then gives rise to the defendants' stay application.

Claimants' stay application and Defendants' stay application.

158. The claimants seek to stay payment of their costs liability under the 7 January 2021 order until the disposal of the claim. They do not seek time to pay or to pay by instalments. The defendants' stay application seeks an order providing for a stay of the proceedings for a period of time pending payment of the outstanding costs orders and a fully repleaded claim with dismissal of the claim if there is no application to lift the stay before the end of the stay period.

159. In substance, the claimants say that they are impecunious and, without a stay, their meritorious and respectable claim against the defendants for a substantial sum of money would be stifled. They argue that they should not therefore be required to pay the adverse costs orders until the conclusion of their claim and that requiring them to do so would make them vulnerable to enforcement action by the defendants.

160. They say that their impecuniosity and severe financial difficulties arises from their removal from the Food Court, which wiped out their savings. Mr Rifat says this is itself part of the narrative supporting their restitutionary claims. He says they have no money as a result of the defendants' actions and cannot pay the costs. However, the claimants also rely on Covid-19 and their health issues.

161. There are two issues for the court to consider, first whether it has jurisdiction to make the orders sought by the claimants or the defendants and if it does whether it should exercise its discretion to do so. The defendants' stay application is broader than the claimants' stay application, not simply relying on the non-payment of costs orders, and is made pursuant to the court's inherent jurisdiction to govern and police compliance with its own procedures and so is ultimately an exercise of its discretion consistent with the overriding objective. Indeed the defendants rely on the court's broad case management powers under CPR 3.1(2)(m) and 3.4(2)(b) and (c).

Jurisdiction

162. The starting point for the claimants' stay application is perhaps surprisingly CPR 83.7 which provides as follows:

> **Writs of control and warrants – power to stay execution or grant other relief**
>
> 83.7
>
> (1) At the time that a judgment or order for payment of money is made or granted, or at any time thereafter, the debtor or other party liable to execution of a writ of control or a warrant may apply to the court for a stay of execution.
>
> …
>
> (3) Where the application for a stay of execution is made on the grounds of the applicant's inability to pay, the witness

> statement required by paragraph (6)(b) must disclose the debtor's means.
>
> (4) If the court is satisfied that—
>
> (a) there are special circumstances which render it inexpedient to enforce the judgment or order; or
>
> (b) the applicant is unable from any reason to pay the money,
>
> then, notwithstanding anything in paragraph (5) or (6), the court may by order stay the execution of the judgment or order, either absolutely or for such period and subject to such conditions as the court thinks fit.

163. CPR 40.8 A then provides:

> **Stay of execution and other relief**
>
> **40.8A** Without prejudice to rule 83.7(1), a party against whom a judgment has been given or an order made may apply to the court for—
>
> (a) a stay of execution of the judgment or order; or
>
> (b) other relief,
>
> on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms, as it thinks just.

164. There had been some doubt as to whether CPR 83.7 was expansive enough to cover a more general stay of execution. In *Michael Wilson & Partners Ltd v Sinclair (No.2)* [2017] EWCA Civ 55; [2018] 1 W.L.R. 3069, CA, McCombe LJ considered the provenance of CPR 83.7 deriving as it did from RSC Ord 47 which was restricted to execution by writs of fifa now writs of control. At [15] and [16] he said;

> "15. I think also that the debtor can apply for a stay of execution generally under this rule, whether that anticipated execution be by way of writ of control or by other means, for example by third party debt order, attachment of earnings, sequestration or charging order. Indeed, I see no reason why (in appropriate circumstances) a court should not impose a general stay of execution under this rule, such as would in practice prevent the pursuit of bankruptcy proceedings, similar to the grant of a general stay pending an appeal: see the notes under "Stay of execution and bankruptcy petitions" in Civil Procedure 2016 Vol. 1 paragraph 83.7.7. My view in this respect is fortified by the fact that the power to stay execution under CPR 87.3 is not on its face confined to writs of control or warrants: c.f. the old Order 47 rule 1 which was expressly confined to execution by fi. fa : …"

> 16. It seems to me, therefore, that Mr Samek is correct in his argument that rule 83.7 "provides otherwise" so as to preclude the operation of rule 3.1(2)(f) in the case of money judgments. The jurisdiction nonetheless exists (in relatively broad terms) to grant a stay in the light of circumstances that have occurred **since the date of the judgment or order in issue**. However, the court would be likely, in my view, to have regard to the test that applies in respect of money judgments generally under rule 83.7." (**my emphasis**)

165. Mr Rifat relies on [15] as providing for a wide interpretation of CPR 83.7, which he argues, therefore covers the costs order of 7 January 2021. Mr Delehanty submits that even accepting that CPR 83.7 has a wide interpretation beyond writs of control it is clear from [16] that McCombe LJ was reflecting the provisions that already exist in CPR 40.8A.

166. It seems clear to me that *Michael Wilson & Partners Ltd v Sinclair (No.2)* [2017] EWCA Civ 55 is authority for the proposition (with which I agree) that the scope of the power to grant a stay in CPR 83.7 is to the same effect as CPR 40.8A. I therefore consider the claimants' stay application in light of the "matters which have occurred since the date of the judgment or order".

167. An unpaid costs order is the equivalent of a money judgment and can be enforced in the same way. In *Michael Wilson & Partners v Sinclair* [2017] EWHC 2424 (Comm) ("*Michael Wilson*") Sir Richard Field (sitting as a deputy judge of the High Court) had to consider the policy behind the imposition of interim costs orders and their non-payment. Having reviewed the authorities, he set out at [29] the following principles:

> (1)The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the court's inherent jurisdiction.
>
> (2)The court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.
>
> (3)Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Article 6 ECHR; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.
>
> (4)A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of

> justice and/or in breach of Article 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.
>
> (5)Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.
>
> (6)If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order.

168. In *Siddiqi v Aidiniantz* [2020] EWHC 699 (QB) ("*Siddiqi*") Saini J said at [30]

> "when considering whether to stay a claim until an existing costs order is paid, I would summarise the correct general approach of the court position as follows:"
>
> (i)The ultimate aim of the Court is to identify the just order from a case management perspective, bearing in mind the overriding objective.
>
> (ii)In approaching that task, the "working" or "default rule" is that a litigant should not be able to continue with his or her claim without satisfying an existing and non-appealed final costs order, and the court should impose a condition requiring compliance.
>
> (iii)However, if a claimant can show his or her Article 6 rights will be interfered with by such a condition (because they cannot pay, and a genuine claim will therefore be stifled) that is a material, but not conclusive, consideration pointing against such a condition.
>
> (iv)Finally, the Court must take into account all other circumstances of the case, including the procedural behaviour of the defaulting party in deciding on the just order to make.

169. He continued at [36]:

> "the Claimant bears the burden of satisfying me, with appropriate evidence, that if an order is made requiring a

> payment of costs as a condition of pursuing the claim, a genuine claim will be stifled."

170. Although *Michael Wilson* and *Siddiqi* were focused on the matters the court should consider when it is being asked to make a debarring, unless or stay order for non-payment of an interim costs order, to my mind by analogy and consistent with the court's broad case management powers, they have equal applicability to the defendants' stay application.

171. In *Siddiqi*, Saini J explained that when considering applications such as these the court draws assistance by analogy with principles applied in security for costs applications. He explained the approach at [34] as follows:

> "when the Court is considering an assertion that a claim would be stifled, it does not consider only whether the claimant can provide security out of its own resources. The inquiry is a broader one: the Court needs to undertake a wider investigation (with the burden being upon the claimant) to assess whether or not there might be outside sources or backers, such as friends, relatives, business associates or other interested persons, who might be able to provide the security (I will call this "third party assistance")."

172. However, Saini J explained at [35] that the burden on the claimants seeking a stay or seeking to avoid a stay based on a stifling argument was greater where a costs order had actually been made, as here, rather than where the possibility of having to pay a costs order was still prospective.

> "It seems to me that those principles must also apply in the present context. Indeed, in the present context, they apply with substantially greater force. A claimant who faces a final order for costs (not just a potential liability if it fails at trial, as in the security for costs scenario) faces possibly an even higher standard to demonstrate a lack of third party assistance. In the security for costs context, one is looking to see whether or not the claimant will be able to satisfy a potential security for costs order but in that situation of course, no costs order has actually been made. It is simply security for costs which is to be lodged in court in respect of a contingency. A court might in that case be less demanding in terms of evidence than it would be in respect of a person who has failed to meet a final and binding costs order."

173. I agree and consider the claimants' evidence and submissions in relation to impecuniosity and stifling against that background. Mr Rifat accepted that the propositions set out in *Michael Wilson* and *Siddiqi* at [171] and [172] governed, at least, the approach to the defendants' stay application.

174. The first claimant's evidence is that since being evicted from the Food Court in 2017 the claimants have been in severe financial difficulties, which they attribute to the loss of the Food Court.

175. They have been in receipt of universal credit since 17 July 2018 receiving £2,075 per month. They live in private rented accommodation. Their schedule of outgoings exceeds their income from universal credit. They have debts, which are substantial when compared to the universal credit they receive. Some details of these debts are set out in the evidence. However, the expenditure shown in the very limited bank statements provided is not fully explained. Whilst there are some limited documents to support the debts, the state of the claimants' bank accounts does not seem to me to be entirely consistent with the dire financial position described in the witness evidence. The rolling balance on the second claimant's bank statement for the month for which it was provided seems to be substantially in excess of the universal credit payment. The statement shows her having a comparatively substantial credit balance after paying £2,000 to the first defendant – the approximate amount of the universal credit payment. The first claimant's statement for the same month includes receipt of the £2,000 but is also otherwise in credit though by a more modest amount. Although the claimants have debts, those debts appear to be managed with regular payments being made even though on the face of it the outgoings exceed the universal credit received.

176. The first claimant explains that he is 44 and has been married to the second claimant for 24 years. They have three children aged 23, 20 and 16. He does not explain where the older two children live or whether they are working and/or contributing to the household financially or whether they are dependent.

177. He explains that he worked as a self-employed taxi driver at some point between 2017 and 2020 but does not explain when that was or the income derived from that work. He explains that the second claimant undertook an IT course but does not explain when that course was completed or whether the second claimant was able to find any employment as a result of it.

178. He says that since the pandemic the claimants have not been able to find any work. The first lockdown commenced on 24 March 2020. There is no explanation of any income received or work undertaken or what became of any income received between 2017 and 2020. There is no evidence of the steps taken to seek work or the types of work sought during the pandemic or currently.

179. He does not explain what has happened to FCCL since 2017 or to any monies received through FCCL as a result of the partial occupation of the Food Court until July 2017. There is unexplained evidence of purchases from wholesalers by FCCL as recently as December 2020. The claimants say that they had achieved sales/takings of £385,000 in the six months ending in October 2016 equating to sales of just over £48,000 per month. Whilst there was a period in late 2016 to early 2017 when they could not operate the Food Court, in these proceedings they claim that the Food Court was a profitable business.

180. In his third witness statement, the first claimant says that the claimants had savings of approximately £65-£70,000, borrowed £30,000 from family and took out a loan of £25,000 via FCCL, with the claimants as guarantors, to assist the making the payments required to acquire the Food Court.

181. This is not however, altogether consistent with his fourth witness statement in which he says that FCCL had £38,575 in its bank account; the second claimant raised

£10,000 on her credit cards and further money raised from the claimants' families in cash to make the payments in respect of the Food Court in about March 2016. It is not therefore clear where the £65-£70,000 said to have been available in about March 2016 has gone or what it was used for or when.

182. The first claimant says he does not have a computer and cannot afford to buy one and this limits his ability to apply for work online. He did not identify what work he had not been able to apply for online. He does not say whether his wife or children have laptops, computers or printers or why he cannot access the internet by other means. I note that a number of the documents he has exhibited appear to be recently downloaded online statements. The bank statements show him using a mobile phone app to manage an online bank account. He therefore has access to the internet at least through his phone. He does not explain how the bank statements were accessed, downloaded and printed.

183. The evidence of impecuniosity is far from compelling, lacks support and does not appear to stand up to even limited scrutiny.

184. The first claimant says he is restricted in the work he can undertake due to ill health. He says he has a form of bowel disease, which he has been suffering from for 10-years. His evidence is far from clear on the timeline and whether it has had a long-term effect on his ability to work and/or the type of work he can undertake.

185. In the last 10-years the first claimant had taken on the Food Court, had an off license business and at some point had had an embroidery business and worked in car sales. It was not suggested that his bowel condition impaired his ability to undertake any of this work. The only supporting evidence is a patient summary from 2018 from which one can glean that his condition is managed by pain relief drugs and an annual check-up with a specialist. The limited medical evidence suggests it is a long-term managed condition.

186. The first claimant says that in addition, he was diagnosed with a heart problem last year and a heart loop recorder was implanted. He does not explain what if any impact this had on his ability to undertake any paid work between 2017 to date or whether it has any ongoing impact. There did not appear to be any medical evidence in support.

187. Finally, the first claimant says he has recently been diagnosed with a condition which causes numbness and pain in his right hand. The limited supporting medical evidence appears to show an initial investigation in June 2020 and a proposed follow up four months later. There is no further medical evidence and no explanation of what this means to his longer-term employment opportunities and/or what impact it has had on his ability to undertake any work prior to or since June 2020.

188. I accept that from the limited evidence available that it appears that the first claimant has underlying health conditions and it is possible they may have some impact on his day-to-day life but beyond that, the evidence is far from compelling. Given that the claimants have known since at least October 2020 that they would have to meet an adverse costs order and from at least January 2021 that they would not be able to do so, one might have expected that prior to the hearing in May 2021 more compelling evidence would have been provided.

189. Medical evidence which is to be relied on to support an application, whether it be for time to pay or a stay of a liability to pay a costs order, should include information from a medical practitioner of the nature of the medical condition, when it started and the features of that condition which prevent the applicant from undertaking, in this case paid work, and a reasoned prognosis. The court will then have evidence, which it can consider as part of the overall balancing exercise when considering how to exercise its discretion. Here the medical evidence consists of an historic 2018 patient summary in relation to the bowel disease and a note about initial investigations in relation to the right hand pain from mid-2020. It falls well short of the type and quality of evidence which the court would expect to see in support of the claimants' stay application.

190. The first claimant says he and his wife have exhausted any potential funding, loans or borrowing from family or friends. The evidence of what steps they have taken was provided in the third first claimants' witness statement and was far from full. The first claimant says that friends and family are unwilling or unable to assist, his parents are pensioners, and his brothers have refused. The second claimant is not in contact with her father and her sisters have refused or are unable to assist.

191. The defendants identify the lack of detail in this explanation noting that there is a difference between seeking general financial support and seeking assistance with payment of a specific costs order of £10,000. The defendants question whether either FCCL or indeed the claimants' own legal representatives might be sources of third party assistance. I understand that the claimants are funding the claim by a full CFA but without ATE insurance. The claimants' evidence is thin and unsatisfactory and falls well short of the type of evidence identified in *Siddiqi* as being required in relation to third party assistance.

192. As set out in *Siddiqi* where the claimants are seeking a stay of a costs order the investigation that the court needs to undertake is wide and should be demanding. The claimants' evidence is flimsy, providing little evidence in support or clarity around their financial position or inability to pay as a result of their ill health or Covid-19 or indeed stifling.

193. As Mr Delehanty notes, the claimants offered £7,531.50 in respect of the costs liability in their written submissions of 31 October 2020. No reference was made to their impecuniosity. The claimants agreed to the terms of the order made on 7 January 2021 without seeking further time to pay or a stay.

194. Importantly for the issues that arise in relation to the jurisdiction questions on the claimants' stay application, none of the evidence relied on is new or recent. None of the reasons provided for the alleged inability to pay the costs order post-date the making of that order in January 2021 nor even, it appears, the determination of the liability for costs in October 2020. It is all historic as set out above. There was no attempt in the evidence or submissions to suggest otherwise.

195. It seems to me that the claimants' stay application fails at the first jurisdiction hurdle. The power to stay the 7 January costs order only arises if the circumstances relied on are new or have arisen since the order was made. Whether that is October 2020 when the liability for costs was determined or January 2021 when quantum was determined, it is clear that the evidence relied on by the claimants pre-dates those determinations.

196. However, if I am wrong and there is jurisdiction to consider the claimants stay application, I need to go on and consider whether to grant it as a matter of discretion. I address this below at the same time as considering the defendants' stay application, which also requires the court to consider the exercise of its discretion.

197. The first claimant says he has been advised that the claimants will be seeking permission to appeal the 12 October 2020 order (so far as that order relates to costs it relates to the March 2020 order). It is said this is an additional factor to be taken into account when considering the application for a stay. Mr Rifat submits that without a stay there is a risk that the claimants would not even be able to apply for permission to appeal. He suggests that the delay in progressing the proceedings and the fact that the applications for permission to appeal have yet to be considered is an additional factor weighing in favour of the claimants' stay application.

198. It seems to me that two points arise. First, a prospective application for permission to appeal is not a basis for staying a costs order until the determination of the claim. Any such stay application should be made to the court considering any application for permission to appeal whether the first instance or appeal court at the time the application for permission is made. It can be considered on its merits at that stage.

199. No application for permission to appeal has yet been made. Although time to make that application has not yet started to run, the claimants seek to rely on a potential application for permission without even setting out the bare outline of the basis for that application. It is not even clear whether they intend to seek permission to appeal the substantive decisions or even which one or simply the costs decision.

200. If the claimants' intention was to seek permission to appeal the substantive decisions striking out the first iteration contract claim, or refusing permission to amend to the third/fourth iteration in October 2020, that appears inconsistent with pursuing permission to amend to plead the fifth iteration rather than seeking permission to appeal at that stage.

201. Second, more generally the delay in progressing the proceedings primarily rests with the claimants. For example, in October 2020 they sought six weeks to provide a draft amendment and then sought an extension of time to 11 February 2021 to issue their third application to amend.

202. Although Mr Rifat pressed the claimants' stay application, he did not substantially resist the defendants' proposed stay of the proceedings as a whole pending payment of any costs orders and reformulation of the claim. His primary concern was that the claimants should not be caught in what he described as the default trap and have their claim stifled. He said that the two-month stay proposed by the defendants would crush them and sought a six-month stay. This he said would give them time and enable a new pen to cast the claim. He reiterated the claimant's position that they had paid over very substantial sums whilst in effect running the defendants' business for them and had nothing to show for it. They had, he said, been misled.

203. Mr Delehanty submissions can be summarised briefly. The defendants sought the stay, not simply as a result of the non-payment of the costs order, but as a result of the broader context of the claim as set out in this judgment. He relied on the state of the claim generally and the need for it to be repleaded again. He reminded me that the

defendants had never sought to strike out some aspects of the claim. He argued that if there was any stifling it was caused by the way in which the claimants had advanced the claim.

204. There is considerable force in the submission that any stifling is self-inflicted. The claimants made choices about when and how to pursue their claims and those choices have consequences. In this case, that includes adverse costs orders. The claim needs a complete rethink in light of both the claimants' own evidence and the way in which the claimants had previously formulated the claim. It is not a claim that can proceed in the current form. The defendants' applications have been successful because of these shortcomings.

205. However, even if there were some risk of stifling, which is far from clear given the limitations of the claimants evidence, is only one factor to be considered when considering the overall exercise of the court's discretion and its presence or absence is not conclusive either way.

206. As part of the exercise of my discretion, I also need to consider the impact on the defendants of the state of the claim against them, the now substantial unpaid costs orders in their favour, the length of time already taken up by the claim including its wasteful use of court resources.

207. The defendants query how the claimants intend to prosecute their claim given their dire financial position. The claimants have already confirmed that they have used Help With Fees to pay court fees so the defendants understandably question how the claimants will manage to pay for expert evidence. There is no evidence as to whether disbursements would be covered under their CFA.

208. The claim has been proceeding for nearly 2 years and is now in an even more confused state than it was at the outset. The claimants' evidence is inconsistent with the claim sought to be advanced by them. The claimants made serious allegations of fraudulent misrepresentation many of which are no longer sustainable whichever version of the contract they seek to pursue which will at the very least have a substantially diluted effect on the value of any claim.

209. I have considerable sympathy with the defendants' submission that the claim to date has been wasteful of costs and court resources. They suggest that the blame may well lie with the claimants' legal representatives and therefore suggest that their proposed stay provides time for the claimants to reassess the position and if considered appropriate to change their legal team or at least regroup.

210. It does seem to me that the suggestion of a "cooling off" period to allow the claimants to regroup and consider which claims they want to take forward and how can only have merit given where we are.

211. The CPR was designed to create a more level playing field by evening up the negative impact of interim applications on all parties. As a consequence, unsuccessful parties to interim applications make those applications knowing that if they are unsuccessful and a costs order is made against them that they will have to pay it within 14 days in the absence of any other order. The claimants' legal representatives

are funded by a full CFA but this does not protect the claimants from the consequences of adverse costs orders.

212. Whilst it is always a matter for the court's discretion, if the court is not in a position to enforce an interlocutory costs order, the force of the sanction of an adverse costs order in ensuring the proper conduct of litigation and enabling the court to police compliance with its own rules and orders is undermined. The balance between the parties, which the overriding objective seeks to maintain, is also seriously undermined.

213. I have carefully considered the claimants' evidence of impecuniosity, Covid-19, ill health, which the claimants say, is directly attributable to the defendants conduct. I have considered the history of this claim and the risk of stifling and the balance between the claimants and the defendants.

214. Consistent with the overriding objective, the court should seek to manage cases justly, efficiently, and proportionately and at proportionate cost taking into account all the circumstances of a particular case when exercising its discretion.

215. Based on the evidence available and taking into account the matters set out in this judgment, it seems to me that even if the claimants can overcome the jurisdiction hurdle, the fair balance between the parties, consistent with the overriding objective, and as an exercise of the courts' discretion and my broad case management powers, is to refuse the claimants' stay application in any event.

216. For the same reasons I will grant the defendant's stay application. This will allow a further period of time for the claimants to seek advice and consider whether and how they want to reformulate their claim. It will do that without causing the defendants to incur further costs and without using more court resources.

217. Mr Rifat sought an indulgence of 6-months whilst the defendants sought a stay of two-months. It seems to me that there is some force in the suggestion that a stay of only two-months would present additional difficulties for the claimants, particularly if there is to be a regrouping and potentially a fresh or new pen to consider the claim. I need to balance that against the time this claim has already taken to reach this stage and the need for there to be finality. It seems to me that four months provides sufficient time for a cooling off and reformulation of the claim and for the claimants' funding issues to be resolved. I would therefore grant a stay of four-months on the defendants' stay application.

218. Mr Rifat accepted that the 19 May costs orders should be included in the defendants' stay if I granted it. The costs orders to be included in the defendants' stay are therefore both the 7 January costs order and the 19 May costs order.

219. I will hand this judgment down remotely and invite the parties to seek to agree the terms of any order. Any consequentials hearing should be listed as soon as possible, ideally in August 2021 to avoid further delay.