Neutral Citation Number: [2021] EWHC 3038 (Ch)

Case No: F4PP0192

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 17/11/2021

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

BANK OF SCOTLAND PLC	**Claimant**
- and -	
PETER LISNEY HOSKINS	**Defendant**

- -
- -

Tim Calland (instructed by **TLT LLP**) for the **Claimant**
Gerard McMeel QC (instructed by **GL Law**) for the **Defendant**

Hearing dates: 1-2 July 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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HHJ Paul Matthews :

Introduction

1. This is my judgment on an application by the claimant by notice dated 21 December 2020, for an order striking out the defence and counterclaim of the defendant, alternatively for summary judgment. It is made in the context of a claim brought by the claimant for possession of a dwelling-house and surrounding land, owned by the defendant but mortgaged to the claimant, on the basis that the mortgage repayments are in arrears. The defendant not only defends the possession claim, but has also made a counterclaim for damages for alleged breaches of contract (duties of good faith) and in "fraud", both in his own right and as assignee of a company called EiRx Therapeutics plc ("EiRx").

Procedure

2. The claim form was issued on 14 May 2019 in the County Court at Plymouth, seeking possession of Morwell House, Tavistock, Devon on the grounds of mortgage arrears. It is said in the particulars of claim dated 10 May 2019 that the loan secured on the property was for £2,625,000, and that at the date of issue there were arrears of £150,854.52 in repayments. It is also said that the amount required to redeem the whole mortgage as at 10 May 2019 was £2,911,392.11, including interest and costs. Whilst the claim for possession is denied by reason of a defence and counterclaim, no alternative case is made by the defendant as to the numbers set out in the particulars of claim. On 17 September 2019 DDJ Healy, sitting in the County Court at Plymouth, transferred the claim to the Bristol District Registry of the High Court, Chancery Division, on the basis that the defendant intended to raise a substantial counterclaim.

3. On 6 January 2020 I gave directions for the future conduct of this claim. A defence and counterclaim was served on 17 January 2020 and a reply to the defence and counterclaim was served on 3 March 2020. Because of the effect of the Covid-19 legislation, it was necessary to serve a reactivation notice on 29 September 2020. Following this, the present application notice was issued on 21 December 2020. It was supported by a witness statement dated the same day by the claimant's solicitor Emma Davey, and one exhibit. This exhibit included documents from an earlier set of possession proceedings begun in 2021 between the same parties, but also involving the defendant's wife as second defendant ("the first proceedings"). This claim had been compromised, and a Tomlin order made, following a successful mediation of the dispute. The settlement agreement by which the claim was compromised is however very much in issue in the present proceedings. On 6 January 2021 DJ Woodburn directed that the application of 21 December 2020 be listed before me. (In fact, the order of 6 January was not sealed until 12 April 2021. I do not know why.)

4. I should mention that some aspects of the relief sought by the application of 21 December 2020 are no longer live, having already been dealt with. These include an application by the claimant for permission in this claim to refer to the witness statement of the defendant dated 2 July 2013 in the first proceedings. In addition to this, the defendant, by notice dated 16 June 2021 applied for permission to refer in this claim to a witness statement of Christopher Strain in the first proceedings. This was not opposed, and at the hearing I granted the application. I also gave the

defendant permission to file and serve a reply to the defence to counterclaim of the claimant.

Background

5. Before I go further, I should say something about the background to this claim and the first proceedings. The claimant is of course a well-known bank, engaged in retail and commercial banking for individuals and businesses. After a long independent history, it merged with Halifax plc (formerly the Halifax Building Society) to form HBOS. It was badly affected by the worldwide credit crunch of 2007-08, and was taken over at the beginning of 2009 by Lloyds TSB Bank. It remains part of the Lloyds Group, though trading under the name Bank of Scotland. The defendant is a biotechnologist and entrepreneur in the biotechnology sector, and well known in the City of London. He invested in and promoted EiRx, as a company listed on the Alternative Investment Market.

6. The regulatory context in which the event is the subject of this litigation took place should be noted. The claimant was an authorised deposit taker under the Financial Services and Markets Act 2000, and was then regulated by the Financial Services Authority. It was required to act in accordance with that Authority's rules. EiRx was required by the rules of the Alternative Investment Market to comply with the rules of the Financial Services Authority. These rules concerned amongst other things announcements concerning the company and its shares that were made to the market, and required the company to appoint a professional person as the nominated adviser, to advise on the content of announcements.

7. The first proceedings arose from an overdraft facility granted by the claimant to the defendant, and secured on Morwell House. The monies borrowed using this facility were apparently put into EiRx. When these were not repaid, the claimant brought proceedings against the defendant and his wife for repayment and for possession of Morwell House. The defendant counterclaimed for damages in respect of losses claimed to have been suffered by an alleged failure on the part of the claimant to honour its lending commitments to EiRx. The defendant counterclaimed not only in his own right but also as assignee of the company. As I have said, the claim was ultimately compromised by an agreement dated 24 December 2013, which was then embodied in a Tomlin order of the court. I will return to this agreement later.

8. The present proceedings arise, as previously indicated, out of a different claim by the claimant against the defendant. This is the loan made to the defendant in order to purchase Morwell House, which loan was secured by a mortgage on the property. Repayments having fallen into arrears, the second proceedings have been issued. However, the defence and counterclaim to these proceedings raise issues based on more or less the same facts as the counterclaim in the first proceedings. Accordingly, the claimant says that the counterclaim (at least) is barred by the settlement agreement of December 2013. The defendant rejects this view, and for good measure argues that the settlement agreement is liable to be set aside in any event, either because of fraudulent nondisclosure or because of breach of contractual duties of good faith. In addition, the claimant takes other points on the formulation of the counterclaim, which I shall mention later. The application accordingly seeks an order striking out the counterclaim (though not the significant part of the defence), or in the alternative

summary judgment on the counterclaim on the basis that it has no real prospect of success.

9. In November 2015, a report was published by the Bank of England, the Prudential Regulation Authority and Financial Conduct Authority, entitled *The failure of HBOS plc (HBOS) [-] a report by the Financial Conduct Authority (FCA) and the Prudential Regulation* Authority. This report was critical of the board and management of HBOS, as it then was. The Defence and Counterclaim in these proceedings relies heavily on that report.

This application

10. The relevant orders sought by the application notice in this case are as follows:

> "2. The Defence and Counterclaim (save for paragraphs 65-69 of the same) be struck out under CPR rule 3.4(2) on the ground that (i) it discloses no reasonable ground for defending the claim or bringing the counterclaim, (ii) it is an abuse of process and/or likely to obstruct the just disposal of the proceedings, and (iii) there has been a failure to comply with a rule and/or practice direction.
>
> 3. Alternatively to 2 above, the Defence and Counterclaim (save for paragraphs 65-69 of the same) be summarily dismissed under CPR rule 24.2 as they have no real prospect of succeeding and there is no other good reason why they should be disposed of at a trial".

Law

Civil Procedure Rules

11. The court's jurisdiction to strike out arises under CPR rule 3.4:

> "(2) 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."

12. CPR Practice Direction 3A relevantly provides:

> "1.4 The following are examples of cases where the court may conclude that particulars of claim (whether contained in a claim form or filed separately) fall within rule 3.4(2)(a):
>
> (1) those which set out no facts indicating what the claim is about, for example 'Money owed £5,000',
>
> (2) those which are incoherent and make no sense,

> (3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.
>
> 1.5 A claim may fall within rule 3.4(2)(b) where it is vexatious, scurrilous or obviously ill-founded."

13. The court's jurisdiction to give summary judgment (either against the defendant in favour of the claimant, or vice versa) arises under CPR rule 24.2, which relevantly 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; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

On an application for summary judgment, the burden of proof rests on the applicant: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [9].

Caselaw

14. This being an application to strike out or alternatively for summary judgment, it is important to be clear what the court's role in such a case is. There was little or no difference between the parties on this point. So far as concerns striking out, I was referred to the recent decision of Roger ter Haar QC in *Benyatov v Credit Suisse Securities (Europe) Ltd* [2020] EWHC 85 (QB). There the judge said:

> "57. As a preliminary matter, the Court of Appeal explained in *Partco Group Ltd v Wragg* [2002] EWCA Civ 594 at [28] that:
>
> 'If an application involves prolonged serious argument, the court should, as a rule, decline to proceed to the argument unless it harbours doubt about the soundness of the statement of case and is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of the trial itself'.
>
> […]
>
> *No reasonable grounds for bringing the claim*
>
> 60. The following principles are relevant to this head of CPR 3.4(2):

(1) In *Biguzzi v Rank Leisure Plc* [1999] 1 WLR 1926 at 1932-1933 *per* Lord Woolf MR, the Court of Appeal referred to strike out as a "draconian" step: the striking out of a valid claim should only be taken as a last resort.

(2) In a strike-out application the proportionality of the sanction is very much in issue; see *Walsham Chalet Park Ltd v Tallington Lakes Ltd* [2014] EWCA Civ 1607 at [44].

(3) If the Court is able to say that a case is "unwinnable" such that continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides it may be struck out: see *Harris v Bolt Burdon* [2000] CP Rep 70; [2000] CPLR 9 at [27].

(4) An application to strike out the claim should not be granted where there are significant disputes of fact between the parties going to the existence and scope of an alleged duty of care unless the court is "*certain*" (emphasis in original) that the claim is bound to fail: see *Hughes v Colin Richards & Co* [2004] EWCA Civ 266; [2004] PNLR 35 at [22].

(5) Where "the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition), or is in any way sensitive to the facts, an order to strike out should not be made": per Sir Thomas Bingham in *E (A Minor) v Dorset CC* [1995] 2 AC 633 at 694B.

(6) It is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact: see *Farah v British Airways*, The Times, 26 January 2000, CA at [42] referring to *Barrett v Enfield BC* [2001] AC 550 (see 557) and *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at page 741.

(7) A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence: see *Bridgeman v McAlpine-Brown* 19 January 2000, unrep (CA) at [24].

Abuse of process or otherwise likely to obstruct just disposal

61. Paragraph 3.4.3 of the White Book 2019 says:

> ‘Although the term "abuse of the court's process" is not defined in the rules or practice direction, it has been explained in another context as "using that process for a purpose or in a way significantly different from its ordinary and proper use" (*Attorney General v Barker* [2000] 1 FLR 759, DC, per Lord Bingham of Cornhill, Lord Chief Justice).’

62. Examples of abuse of process arguments are given in paragraph 3.4.3 of the White Book 2019, but none of them have any relevance to the present case, for example where litigation is conducted in a manner designed to undermine the object of a fair trial (such as relying on forged documents and perjured evidence), or where matters are already *res judicata*, or the claim involves a collateral attack

> on a previous decision or is of such limited value to the Claimant that 'the game is not worth the candle'. None of these have any relevance to the present case."

15. So far as concerns summary judgment, I was referred to the well-known decision of Lewison J (in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch)) as well as that of Mr ter Haar QC in *Benyatov*. Both of these cases concerned applications by defendants for summary judgment against claimants. This corresponds to the present case, where the claimant is applying for summary judgment against the defendant in respect of his counterclaim. I was also referred to dicta of Lord Collins of Mapesbury, giving the advice of the Privy Council in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2021] 1 WLR 1804. It will be sufficient to make some relevant citations from these cases.

16. In *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch), Lewison J said:

> "15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91 ;
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

17. In *Benyatov v Credit Suisse Securities (Europe) Ltd* [2020] EWHC 85 (QB), Mr ter Haar QC summarised much of this, and said:

> "50. The Court of Appeal confirmed in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301 at [24] that the proper approach to be taken by the Court on summary judgment application is conveniently summarised by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. Relevant considerations include the following:
>
> > (1) The court must consider whether the claimant has a '*realistic'* as opposed to a '*fanciful'* prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
> >
> > (2) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
> >
> > (3) In reaching its conclusion the Court must not conduct a 'mini-trial': *Swain v Hillman*;
> >
> > (4) In reaching its conclusion the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;
> >
> > (5) If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the Court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success.

> 51. Complex claims, cases relying on complex inferences of fact, and cases with issues involving mixed questions of law and fact where the law is complex are likely to be inappropriate for summary judgment: see *Three Rivers District Council v Bank of England (No. 3)* [2003] 2 AC 1 (HL) at [95] *per* Lord Hope. A trial 'can often produce unexpected insights' and 'a judge will often find that his first impression of a case, when reading into it, is not the same as his final conclusion': see *Playboy Club London Ltd v Banca Nazionale del Lavora SpA* [2019] EWHC 303 (Comm) at [26].
>
> 52. Further, the general rule (which can be called the "*Altimo*" principle", based on *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, see [84] and the authorities there cited) is that it is not normally appropriate in a summary procedure such as an application to strike out or for summary judgment to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts. Further, a summary procedure ought not to be applied to an action involving serious investigation of ancient law and questions of general importance. Where the law is not settled but is in a state of development it is normally inappropriate to decide novel questions on hypothetical facts.
>
> 53. Where disputed issues are such that their conclusion largely depends upon the expert evidence relied on by each side, an application for summary judgment will usually be inappropriate particularly where the exchange of experts' reports has not yet occurred and joint statements of the experts have not yet been produced: see *Hewes v West Hertfordshire Hospitals NHS Trust* [2018] EWHC 2715 (QB) [45]-[50].
>
> 54. When deciding whether the respondent has some real prospect of success the Court should not apply the standard which would be applicable at the trial, namely the balance of probabilities on the evidence presented: see *Royal Brompton Hospital NHS Trust v Hammond (No.5),* [2001] EWCA Civ 550 [18] and [82] *per* Aldous L.J. and [109] *per* Clarke L.J.. Indeed, 'nothing like a probability of success' is required: see *Playboy Club London Ltd v Banca Nazionale del Lavora SpA* [2019] EWHC 303 (Comm) at [13]."

18. The reference in the judgment of Mr ter Haar QC to the "*Altimo* principle" is to the following passage in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804, where Lord Collins said:

> "84. The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts: e.g. *Lonrho Plc v. Fayed* [1992] 1 A.C. 448, 469 (approving *Dyson v Att-Gen* [1911] 1 KB 410, 414: summary procedure 'ought not to be applied to an action involving serious investigation of ancient law and questions of general importance ...'); *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 741 ('Where the law is not settled but is in a state of development … it is normally inappropriate to decide novel questions on hypothetical facts'); *Barrett v Enfield London BC* [2001] 2 AC

> 550, 557 (strike out cases); *Home and Overseas Insurance Co. Ltd. v Mentor Insurance Co. (U.K.) Ltd.* [1990] 1 WLR 153 (summary judgment). In the context of interlocutory injunctions, in the famous case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 407 it was held that the court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It was no part of the court's function 'to decide difficult questions of law which call for detailed argument and mature consideration'."

19. So far as concerns the relationship between striking out and summary judgment, it is clear that an application under rule 3.4 is not one for summary judgment: see *eg Dellal v Dellal* [2015] EWHC 907 (Fam). It is generally concerned with matters of law or practice, rather than with the strength or weakness of the evidence. So on an application to strike out, the court usually approaches the question on the assumption (but it *is* only an assumption, for the sake of the argument) that the respondent will be able at the trial in due course to prove its factual allegations. On the other hand, on an application for summary judgment, the court is concerned to assess the strength of the case put forward: does the respondent's case get over the low threshold of "real prospect of success"? If it does not, then, unless there is some other compelling reason for a trial, the court will give summary judgment for the applicant. But, as stated the court must not indulge in a mini-trial, and must make allowances for the fact that disclosure and cross-examination have not been available, as they would if the matter went to trial.

20. Nevertheless, there is an overlap between the two types of application. As Mr ter Haar QC explained in *Benyatov*,

> "63. A statement of case which discloses no reasonable grounds may also be an abuse of the court's process, and may also justify summary judgment. As seen from the above discussion of the relevant legal principles, there is no exact dividing line between strike out and summary judgment, and some similar considerations apply to both, although there are different considerations relevant to each."

Evidence

21. On an application for striking-out or for summary judgment, the evidence (in relation to the striking-out application, so far as there is any) is nowadays given in the form of witness statements (although sometimes affidavits), and cross-examination is not normally ordered. In *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488, Rimer LJ (with whom Ward and Jacob LJJ agreed) said:

> "58. As regards the need for oral evidence, Mr Ashworth reminded us that it is well-settled practice that if a court finds itself faced with conflicting statements on affidavit evidence, it is usually in no position to resolve them, and to make findings as to the disputed facts, without first having the benefit of the cross-examination of the witnesses. Nor will it ordinarily attempt to do so. The basic principle is that, until there has been such cross-examination, it is ordinarily not possible for the court to disbelieve the word of the witness in his affidavit and it will not do so. This is not an inflexible principle: it may in certain circumstances be open to the court to reject an untested piece of such evidence on the basis that it is manifestly incredible, either because it is inherently so or because it is shown

> to be so by other facts that are admitted or by reliable documents. Mr Ashworth referred us in support to *Re Hopes (Heathrow) Ltd, Secretary of State for Trade and Industry v. Dyer and others* [2001] 1 BCLC 575, at 581 to 582 (Neuberger J). He also referred us to paragraphs 17 and 18 of the judgment of Mummery LJ in *Doncaster Pharmaceuticals Group Ltd and Others v. The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661, which provides a reminder of the caution the court should exercise in granting summary judgment in cases in which there are conflicts of fact which have to be resolved before judgment can be given. Mr Ashworth said that these principles apply equally to the case in which the evidence is given by witness statement rather than by affidavit, and I agree."

The earlier proceedings

The claim

22. The previous proceedings that were compromised in 2013 were a similar claim for possession, but based on failure to repay an overdraft facility secured on the property. These proceedings were commenced by claim form dated 20 January 2012. A defence and counterclaim dated 27 February 2012 was subsequently filed, as was a reply and defence to counterclaim dated 27 March 2012. However, after disclosure had been given in the claim, the defence and counterclaim was amended on 3 April 2013, pursuant to the order of Paul Girolami QC dated 4 December 2012. It is necessary to consider the terms of this amended defence and counterclaim in order properly to understand what claims were being settled by the subsequent compromise between the parties.

23. The defence in the first case begins with a lengthy exposition of background and a detailed chronology of events from the point of view of the defendants. It then makes allegations leading to three separate legal bases of claim, namely (1) breach of contract, (2) estoppel by convention and (3) breach of duty of care and/or misrepresentation. At the end of the defence there is a claim for the first defendant to set off, against the sums claimed by the claimant,

> "damages for breach of contract and/or misrepresentation and/or breach of a duty of care and/or is entitled to rely on equitable set off sufficient to extinguish any prima facie debt".

24. There is then set out a Part 20 Claim as follows:

> "Paragraphs 1 to 54 hereof are repeated. In the premises as Mr Hoskins, on behalf of himself personally and as assignee of EiRx Therapeutics plc, claims damages for breach of contract and/or misrepresentation and/or breach of a duty of care, to be assessed. Mr Hoskins will rely on expert evidence at trial to quantify the losses resulting from the breach(es) of duty and/or misrepresentation by BoS. Furthermore Mr Hoskins seeks rescission of the two personal guarantees."

25. As to breach of contract, the defendants pleaded that in 2008 the claimant in breach of contract failed to make further lending available to EiRx ([43]), whilst representing that such lending *would* be made available ([44], [44A]). EiRx and the first defendant understood that the EiRx facility had been agreed in February 2008, informing that company's statements to AIM about funding having been obtained, whereas internal

bank documents showed that no such commitment had been made ([44B], [44D], [44E]), even though the claimant was aware of the impact of statements to AIM on the company's fortunes ([44C]). The facility was refused on 14 July 2021 ([44F], [45]), leading to EiRx's announcement to AIM on 15 July 2021 that the claimant had withdrawn funding, its suspension from trading, and its eventual entry into administration ([46]).

26. The defendants claimed that the claimant's breaches of contract caused loss and damage to EiRx, including the loss of valuable intellectual property rights.

27. As to estoppel by convention, the claim is that the course of dealing between the parties already pleaded means that the claimant was estopped by convention from denying that its conduct from the end of January 2008 constituted an undertaking to make the overdraft facility available to EiRx, and various documents are pleaded as relied on in this respect ([49]). It is then said that EiRx and the first defendant relied on the claimant's representations, assurances and conduct such that it would be unjust or inequitable to permit the claimant "to depart from the parties' conventional understanding of the position" ([50], [50A]).

28. As to the claim for breach of duty of care and/or misrepresentation, it is said that the claimant owed a duty of care to both EiRx and the first defendant (as guarantor of, and investor in, EiRx) not to misrepresent its policy on providing funding to the company ([51]), and that the first defendant relied on the claimant not to misrepresent such policy ([52]), but that "in breach of duty the claimant misrepresented its policy and/or failed to disclose timeously its change in policy", as a result of which the company and/or Mr Hoskins suffered loss and damage ([53]). Reliance is placed on internal bank documents provided upon disclosure in this claim to establish that the claimant's policy was "entirely hostile alternatively very negative and entirely inconsistent with the positive messages" in communications to the company and the first defendant ([53A]-[53C], [53F]), but these documents or their contents were not communicated to the company or to the first defendant ([53D]).

29. It is then sought to be inferred that the claimant had no intention of providing any further lending support to the company from about October 2007, beyond a temporary £200,000 facility, contrasting with the positive messages to the company, which permitted the communication of a misleading picture of its financing arrangements to AIM and the wider investment community between September 2007 and July 2008 ([53E]). Based on the misrepresentations or nondisclosure pleaded, the first defendant claimed to be entitled to rescind his personal guarantees to the claimant of 8 November 2007 and 14 February 2008.

30. Because it is relevant to something which arises later, I mention that on 28 May 2012 the claimant made a request for further information to the defendants. No satisfactory response was forthcoming, and the claimant duly applied for and obtained an order from the court on 1 November 2012 that the defendants provide a substantive response. That was provided on 19 November 2012. A number of the responses given were of minimal utility. Some of them are simply unhelpful. Of particular relevance were requests for further and better particulars of the loss and damage alleged to have been suffered by the defendants. The answer was generally along the lines of "this is a matter for expert evidence for the purposes of the trial", and that the best particulars which the first defendant could give was a stated money value.

The compromise

31. The compromise agreement by which the previous proceedings were settled is, as I have already said, dated 24 December 2013. It is scheduled to a consent order of the same date submitted to the court and made as a Tomlin order. Clauses 1 to 5 of the agreement set out the terms on which the proceedings are to be settled. These involved the payment of a significant sum by the claimant to the defendant, though before me the defendant characterised it as a small proportion of the total value of the counterclaim.

32. Clause 6 contains the release of claims, and needs to be set out in full:

> "The agreement of the Claimant in clauses 1 to 5 in these Terms of Settlement is in full and final settlement of the claim and counterclaim in the proceedings between the parties in the High Court of Justice, Chancery Division, under claim number HC12B03406 ("the Proceedings") and of all claims, past present and future, that the First and Second Defendants may have against the Claimant (and/or its servants or agents or other companies within the Lloyds Banking Group) arising out of or in any way relating to the Proceedings or the subject matter thereof, whether or not such claims are presently known to the First and Second Defendants or either of them."

33. Clause 7 contained a covenant not to sue:

> "The First and Second Defendants on behalf of themselves and their assigns, hereby agree not to make, issue or bring in any jurisdiction any complaint, allegation and/or claim (including before an adjudicator or a regulatory or statutory or similar body or any court of law) in relation to the subject matter of the counterclaim."

34. Clause 8 provided expressly for a saving in respect of the claimant's rights under two specified charges on the Property. It is not necessary to set that out, or indeed any other provision from the agreement.

The present proceedings

35. The present proceedings were begun in May 2019 as a conventional mortgage possession claim, but based on arrears of mortgage instalments. This claim is denied, though, as I say, no alternative case is made as to the figures alleged as the principal and interest owing. Instead, reliance is placed on section 36 of the Administration of Justice Act 1970, and also on a substantial counterclaim relating back to the relationship between the claimant, the defendant and EiRx. Significant parts of this need to be set out.

36. The Defence and Counterclaim relevantly allege as follows:

> "**F: the Duties of the Bank: Fraud and Good Faith**
>
> 55. The Bank had a duty at common law to refrain from fraudulent conduct, statements and representations, and to avoid fraudulent concealment. Communications should not omit matters which as a matter of good faith the

Bank knew or could be disclosed or would convey a half-truth or a false impression.

56. The relationship between the Bank and EiRx, as a listed corporate customer, and/or Mr Hoskins, as a serial entrepreneur and promoter of fledgling companies, were relational contracts:

(a) The banking services contracts with EiRx and Mr Hoskins were long-term ones, and interconnected, with the mutual intention of the parties being that these would be long-term relationships.

(b) The parties intended that their respective roles be performed with integrity, and with fidelity to their bargain.

(c) The parties were committed to collaborating with one another in the performance of the contract.

(d) The parties each reposed trust and confidence in one another.

(e) The contracts required a high degree of communication, cooperation and predictable performance based on mutual trust and confidence, and expectations of loyalty

(f) There was a degree of significant investment or substantial financial commitment by Mr Hoskins and EiRx in the venture, with Mr Hoskins's personal commitment being in the region of £2 million.

(g) The relationship was exclusive.

57. Accordingly there were terms implied into the banking services as a matter of law that the Bank would:

(a) Communicate at all times with Mr Hoskins and EiRx in an open and cooperative manner.

(b) Refrain from taking steps that would inhibit (prevent other party from complying with its obligations under or by virtue of the contract.

(c) Would provide EiRx and Mr Hoskins with reasonable cooperation as was necessary to the performance of that others obligations under or by virtue of the contract.

(d) Not take steps which would undermine the relationship of trust and confidence between the parties. (collectively "the Implied Duties of Good Faith").

58. In the circumstances:

(a) The Bank was undercapitalised, overleveraged, illiquid and overexposed to the highly cyclical commercial property and associated sectors, to which it preponderantly devoted its capital where available.

(b) The Bank had no significant experience or expertise of lending highly specialised field of fledgling biotechnology companies, and the risks and profiles of that business sector.

(c) The Bank's agents, both in credit sanctioning and in relationship management, lacked the experience or expertise to deal with fledgling biotechnology companies and with the listing of such businesses on AIM or similar markets.

(d) In the circumstances as a matter of good faith the Bank ought to have informed Mr Hoskins and EiRx that it was not sufficiently experienced or expert to provide the banking and related services which they required, from the outset of the relationship with EiRx and its group companies, going back to about 2005. Mr Hoskins and EiRx should have been informed that they should re-bank and seek banking and lending services from a suitable bank or financial institution.

(e) Furthermore, in the circumstances as a matter of good faith the Bank ought to have informed Mr Hoskins and EiRx that it was not sufficiently the solvent and/or capitalised and/or liquid to provide commercial banking services to EiRx either from the outset of the relationship with EiRx or subsequently, but certainly prior to September 2007, or by the latest by March 2008. Mr Hoskins and EiRx should have been informed that they should re-bank and seek banking and lending services from a suitable bank or financial institution.

59. At the date of the mediation the cause of action for breach of an implied duty to act in good faith of a relational commercial contract was not recognised at common law and therefore as a matter of construction the Settlement Agreement would not in any event apply to that claim. Mr Hoskins will rely upon *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251.

G: Breach of Duties

60. Fraudulently and/or in breach of the Implied Duties of Good Faith and each of them the Bank:

(a) Failed to inform Mr Hoskins and EiRx that it was not sufficiently experienced or expert to provide the banking and related services which they required, from the outset of the relationship with EiRx.

(b) failed to inform Mr Hoskins and EiRx that it was not sufficiently solvent and/or was undercapitalised and/or overleveraged and/or to illiquid to provide commercial banking services to EiRx either from the outset of the relationship with EiRx or subsequently, but certainly prior to September 2007, or at the latest by March 2008.

In the circumstances as a matter of good faith Mr Hoskins and EiRx should have been informed that they should re-bank and seek banking and lending services from a suitable bank or financial institution.

H: Causation and Loss

61. In consequence of the matters aforesaid and each of them Mr Hoskons [sic] and/or EiRx suffered loss and damage.

62. Mr Hoskins is a biotechnologist and serial entrepreneur who has used his scientific skills to invest in biotechnology companies. He was very well connected within the City of London and was formerly Sir John Major's Constituency Vice-President. As a consequence of the Bank's fraud and/or breaches of duty Mr Hoskins was unable to raise finance for a sway of fledgling companies, his reputation as an entrepreneur was irreparably damaged, he has had to sell many of his most valuable possessions, and he even had difficulty in opening a bank account.

PARTICULARS OF LOSS AND DAMAGE

Mr Hoskins will seek to rely on expert evidence as to the financial and non-financial consequences of the fraud and/or breaches of duty, including the failure of EiRx, and the loss of its valuable intellectual property rights, and his inability to raise finance for other fledgling companies and to carry on as a serial entrepreneur. The best particulars that Mr Hoskins can give is that his personal financial losses exceed £10 million. Pursuant to the assignment of EiRx's claims to him, Mr Hoskins is also entitled to recover and will produce evidence to quantify the losses incurred by EiRx which are estimated to exceed £25 million.

63. Mr Hoskins will set off the sums in respect of his losses in extinction or diminution of the Bank's claims.

64. Furthermore, Mr Hoskins seeks rescission of the Settlement Agreement on the grounds of fraud and/or breach of the Implied Duties of Good Faith.

[…]

J: COUNTERCLAIM

70. Paragraphs 1 to 64 are repeated.

71. Mr Hoskins and EiRx have suffered loss and damage as the result of the fraud and breach of duty by the Bank. As stated above, Mr Hoskins will apply to adduce expert evidence to quantify his and EiRx's losses.

72. Further, Mr Hoskins seeks rescission of the Settlement Agreement on the grounds of fraud and/or breach of the Implied Duties of Good Faith."

Submissions

37. The claimant says that the release of claims in the settlement agreement of December 2013 covers the counterclaim, which must therefore fail, and it should be struck out. The defendant says that, as a matter of construction, the agreement does not extend to the counterclaim, but that, even if it did, that agreement is liable to be set aside for fraudulent misrepresentation. (I mention in passing that Mr McMeel QC for the

defendant accepted in argument that breach of implied terms of good faith would not be sufficient for this.) The claimant rejects these arguments as a matter of law. However, it goes on to argue that, even if the agreement does not effectively protect it against the counterclaim, the fraud claim should still be struck out both as a matter of law and also for lack of particularity, and the breach of good faith duties claim should also be struck out as a matter of law. Alternatively, the claimant says that these latter aspects of the case are so weak that there is no real prospect of the defendant succeeding on them and summary judgment should be given to the claim in respect of them.

38. It will be seen that the *events* which were pleaded and relied upon to put forward the counterclaim in the 2012 proceedings are also the basis for the counterclaim in the present case. The main difference is that the *causes of action* are now said to be different. The claim for breach of contract is not for failing to lend the money that was said to be promised to be lent. Instead it is for breach of implied duties of good faith, in failing to make clear to the company and to the defendant that the claimant was not in a position to lend any further money to the company, or did not have the experience to be able to do so. The claim for misrepresentation is no longer a claim for negligent misrepresentation, but instead for fraudulent misrepresentation, that is, deceit.

The issues

39. It seems to me that the issues before me accordingly are the following:

1. Can the applicant demonstrate that, as a matter of construction, the present counterclaim falls within the scope of the Settlement Agreement, or at any rate that there is no real prospect that it falls outside that scope? If not, the counterclaim must go to trial.

2. But, even if it can do this, can the applicant *also* demonstrate that there is no real prospect of the defendant's showing that the Settlement Agreement should be set aside? If not, the counterclaim must go to trial.

3. If neither of these, and the counterclaim must go otherwise to trial,

(1) Should the fraud counterclaim nevertheless be struck out, either (i) for inadequate pleading, and/or (ii) because there is no reasonable ground for bringing it?

(2) Should the counterclaim based on good faith duties be struck out, because there is no real prospect of showing that there was either (i) a relational contract, or (ii) a breach of the alleged implied duties of good faith?

(3) Should the damages counterclaim be struck out as time barred?

(4) Should the pleading of loss in the counterclaim be struck out as an abuse of process (because poorly pleaded)?

The first issue: construction

40. The first issue is accordingly the matter of construction of the Settlement Agreement, and whether it covers the claims put forward in the present counterclaim. I am

satisfied that this question can properly be determined on this application, as set out in *Easyair*, [15](vii). The critical words in clause 6 are:

> "full and final settlement of the claim and counterclaim in the [first] proceedings … and of *all claims, past present and future,* that the First and Second Defendants may have against the Claimant … *arising out of or in any way relating to* the [first proceedings] or the subject matter thereof, *whether or not such claims are presently known to*" the defendant (emphasis supplied).

41. As I have already observed above, although the causes of action pleaded the present counterclaim are said to be different from those in the first, the events which are pleaded and relied upon to give rise to such claims are the same events. Indeed, I cannot see why the defendant could not have pleaded in the first set of proceedings the causes of action now put forward in the present counterclaim. And it may therefore be that the counterclaim is barred by application of the rule in *Henderson v Henderson* (1843) 3 Hare 100, 115, discussed recently by the Supreme Court in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160. But I do not need to go that far. It is enough if the counterclaim falls within the scope of clause 6.

42. On the face of it, it clearly does. The claims put forward in the new counterclaim plainly *relate to* the subject matter of the first proceedings. It is not necessary for me to decide whether they also *arise out of* that subject matter, though I think they do that as well. The words "relating to", used in clause 6, are about the widest words of connection in the English language. And there are no limits on what counts as such a connection for this purpose, because of the use of the phrase "in any way" to qualify those words.

43. The defendant however relies on the decision of the House of Lords in *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 that, on the facts of that case, a general release contained in a settlement agreement in 1990 between the bank and a former employee who had been made redundant did not on its true construction cover a claim by the former employee for "stigma" in the employment marketplace arising out of the subsequently discovered frauds committed in the course of the bank's business.

44. The release clause in that case read as follows:

> "The Applicant agrees to accept the terms set out in the documents attached in full and final settlement of all or any claims whether under statute, Common Law or in Equity of whatsoever nature that exist or may exist and, in particular, all or any claims rights or applications of whatsoever nature that the Applicant has or may have or has made or could make in or to the Industrial Tribunal, except the Applicant's rights under [the bank's] pension scheme"

45. All the members of the House that sat on that occasion agreed that there were no special rules of interpretation applicable to a general release, which should be construed in the same way as any other contract. But the majority (Lord Hoffmann dissenting) held that, at the time when the agreement had been entered into in 1990, neither party could realistically have supposed that a claim for damages in respect of disadvantage on the labour market was a possibility. As Lord Bingham put it (at [8]), "*in the absence of clear language*, the court will be very slow to infer that a party

intended to surrender rights and claims of which he was unaware and could not have been aware" (emphasis supplied).

46. The claims now sought to be pursued were not regarded as viable in principle until the decision of the House of Lords in *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20. Accordingly, the parties could not be held to have intended the release to apply to such a claim. Lord Hoffmann, however, would have held that the language of the release was wide enough to cover the "stigma" claim, even though not yet recognised by the English courts. He pointed out that the language of the document was very wide, and that the impression it conveyed to him was that the draughtsman meant business, having gone to some trouble to avoid leaving anything out.

47. The defendant in the present case seeks to apply the majority decision here. He submits that, at the time the settlement agreement was entered into on 24 December 2013, claims for breach of duties of good faith in relational contracts were not recognised in English law. Hence, he submits, the parties could not be held to have intended the release to cover such claims.

48. As an example of a factor to be taken into account in considering the intention of the parties in entering into a general release, the decision of the House of Lords is (if I may respectfully say so) obviously right. But it has to be borne in mind that in considering the construction of a document drafted to meet the circumstances of a particular case, every case is different. Just because the same factor is taken into account, it does not mean that the same conclusion must be come to as to the parties' intentions. The surrounding circumstances are not exactly the same.

49. For one thing, there was no dispute in the *BCCI* case which was being compromised. It was accepted that the employee had a claim in respect of redundancy, and the general release was included as part of that transaction. In the present case, however, there was actual litigation between the parties, based on pleaded events and assumed causes of action, which was intended to be and was compromised, and for "a substantial sum".

50. For another thing, the words used in the two releases are different. The words in the present release go rather further than those in the *BCCI* case, extending to claims "past, present *or future*", and to claims "whether *or not* such claims are presently *known*" to the defendant (emphasis supplied). This is the "clear language" that Lord Bingham referred to in *BCCI v Ali,* [10], but which was lacking in that case. The choice of different words may be influenced by a number of matters, including the parties' reasons for entering into the releases (which may not be exactly the same), and the parties' respective appetites for risk (which may be different in different cases).

51. A third important difference between the *BCCI* case and the present one is that, in the former case, the release covered claims arising out of the termination of employment, but the new claim arose from an entirely different matter, the damage caused to the employee's future employment prospects by the bank's fraudulent activities. Yet in the present case the new claim arises out of the same events as the first one.

52. The claimant submits that, in any event, the defendant is wrong to say the claims for breaches of duties of good faith in relational contracts were not recognised in December 2013. This is for two separate reasons. The first is that the judgment in an early case on relational contracts, *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) was handed down almost eleven months earlier, on 1 February 2013. It therefore cannot be said that the parties could not be held to have had it in their contemplation at the time of the general release.

53. The second reason is that it has subsequently been held that that decision does not establish any new principle of law. In *Cathay Pacific Airways Ltd v Lufthansa Technik AG* [2020] EWHC 1789 (Ch), Deputy Judge John Kimbell QC said:

> "197. … Both *Yam Seng* and *Sheikh Tahnoon* are applications of the general law of implied terms as restated by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Trust Company (Jersey) Ltd* [2015] UKSC 72; [2016] QB 742 albeit applied in the particular context of a category of contracts which may be referred to as 'relational contracts'."

54. In my judgment, it is possible for parties in English law to enter into a contract to release claims which they do not know that they have, or which have not yet been recognised by English law. The only question is whether, as a matter of construction, that is what they intended to do. In my judgment, it is clear that, on the true construction of the words which the parties have used in the release of December 2013, they must be taken to have intended to cover claims of the kind subsequently introduced into the counterclaim in the current proceedings.

55. First of all, and as I have pointed out, the words used are wider than in *BCCI v Ali*, and are expressed to cover unknown and future claims arising out of or relating to the subject matter of the first proceedings. Secondly, the events out of which the defendant now seeks to raise his counterclaim are the same events out of which the counterclaim in the first proceedings was born, and the parties deliberately compromised those proceedings, including that counterclaim. Thirdly the claimant paid the defendant "a significant sum" for this compromise. Fourthly, (although this is not necessary for my decision), there can be no suggestion in any event that English law has undergone some kind of revolution since 2013, so that the claims which the defendant now puts forward in his counterclaim were incapable of being put forward then, or would have been struck out as disclosing no reasonable cause of action at that time.

The second issue: setting aside the compromise

56. I therefore turn now to the second issue, which is whether the applicant can demonstrate that there is no real prospect of showing that the settlement agreement should be set aside. At paragraph 64 of his defence the defendant says that he "seeks rescission of the Settlement Agreement on the grounds of fraud and/or breach of the Implied Duties of Good Faith". He repeats these precise words at paragraph 72 of his counterclaim. He does not however give in either paragraph any particulars of the fraud or of the breaches alleged, or refer to any other paragraph where such particulars may be found. However, paragraph 60 (only a few paragraphs before paragraph 64) begins with the words "Fraudulently and/or in breach of the Implied Duties of Good Faith", and then continues with allegations of failure by the claimant

to inform the defendant of various matters in 2007 or 2008. In the context, I infer, and therefore proceed on the basis, that those are the particulars of fraud and breaches of duties of good faith relied on.

57. There are a number of problems with this part of the pleading. One is that an integral part of the claim to the remedy of rescission is missing. This is that the defendant was *induced* by fraud, misrepresentation or some other initiating factor to enter into the settlement agreement: see *SK Shipping Europe plc v Capital Vlcc 3 Corp* [2020] EWHC 3448 (Comm), [115]-[116], set out below at [65]. This is very important in the present case. There is no obvious connection between the events of 2007-08 and the decision by the defendant to enter the settlement agreement several years later. There was no suggestion at the hearing before me of an application by the defendant to amend his pleading to remedy this deficiency. It is no answer to an application to strike out simply to say that "a request for further information would have been a proportionate response". The rules of pleading are there for a purpose, and should be observed by one party without the need for a request from the other.

58. The defendant relies upon a presumption of inducement as an inference of fact. He refers to the decision of the Supreme Court in *Zurich Insurance Co Ltd v Hayward* [2017] AC 142, a case involving the tort of deceit, where Lord Clarke (with whom the other justices agreed) said:

> "34. As to sub-para (iii), the 'presumption' of inducement, it is not a presumption of law but an inference of fact. For example, *Chitty* on Contracts, 32nd ed (2015), vol 1, put it thus at para 7-040:
>
> > 'Once it is proved that a false statement was made which is "material" in the sense that it was likely to induce the contract, and that the representee entered the contract, it is a fair inference of fact (though not an inference of law) that he was influenced by the statement, and the inference is particularly strong where the misrepresentation was fraudulent.'
>
> 35. Lord Mustill put it in this way in *Pan Atlantic* [*Insurance Co Ltd v Pine Top Insurance Co Ltd (No 2)* [1995] 1 AC 501] at p 551. He said that the representor:
>
> > '… will have an uphill task in persuading the court that the ... misstatement ... has made no difference … [T]here is a presumption in favour of a causative effect'…"

59. However, all that the (rebuttable) presumption of fact supplies is evidence *to prove an allegation*. It does not provide *the allegation itself*. The defendant must set out his case in full. And that is what is lacking here. The defendant submits that striking out would be a disproportionate sanction. I would agree, in the case of an unrepresented litigant who had not previously been alerted to the importance of pleading his full case. But the defendant is not a litigant in person. On the contrary, he is represented by experienced lawyers who will have been well aware of the rules of pleading and of the importance of observing them. And yet, as I say, there has never been a suggestion of an application for permission to amend in order to cure the defect. I do not consider that any kind of "unless" order would be appropriate in this case.

60. Another problem is that the matters complained of, and actually pleaded in paragraph 60, if proved to have taken place, must have taken place in 2007-2008, some five or six years *before* the settlement agreement was entered into. Yet the settlement agreement was entered into *in order to* compromise the claims arising out of the events of 2007 and 2008. As I have already held, on the true construction of the release of 2013, *all* claims arising out of or relating to those events were given up, *even* if they were not then known to the defendant. In my judgment, it is not possible to rely on claims which are being given up by a particular settlement agreement as a basis for rescinding that settlement agreement. It would be like pulling yourself up with your own bootstraps.

61. In my judgment, the claim to rescission of the settlement agreement as pleaded is unsustainable, and must be struck out.

62. Mr Calland, for the claimant, further submitted that, even if the defendant could show that the claimant had made a false representation in 2007-08, the defendant could not say *both* that he and/or EiRx would have had a claim for damages, and *also* that the false representation induced the settlement agreement. The defendant's case was that, if any such false representation had instead been true, the defendant and/or EiRx would have avoided suffering the losses which it now claimed in this action. (The measure of loss is the difference between the two situations.) But, on the assumption that the false representation had been true (necessary in order to get home on the damages claim), the alleged false representation could not have induced the settlement agreement, because it would not have been false. I see the force of the argument, but I do not think it is necessary to rely on it for the purposes of my judgment.

Consequence of the first two issues

63. The combination of my decisions on the first two issues means that the counterclaim should be struck out. It is not strictly speaking therefore necessary for me to go further, and to deal with the remaining issues. However, in case this matter should go further, I will briefly set out my conclusions on the other issues.

The third issue: strike out the fraud allegations?

64. The third issue is whether the allegations of fraud in the defence and counterclaim should nevertheless be struck out either because inadequately pleaded or because there is no reasonable ground for making them. As I have already stated, at paragraph 55 of the defence and counterclaim the defendant alleges that the claimant owed a duty to him at common law "to refrain from fraudulent conduct, statements and representations". Then at paragraph 60 of the defence and counterclaim the defendant alleges that the claimant "fraudulently" failed to inform him and EiRx that it was neither sufficiently experienced or expert provide the services which they required or sufficiently solvent or capitalised to do so. There is no such tort in English law as "fraud" or "fraudulent behaviour". Nor (if this is different) is there any tort such as failing to refrain from fraudulent conduct. It is therefore necessary to plead all the elements of a relevant established tort, such as the tort of deceit, of which fraud is but one element.

65. What that requires is set out in the recent judgment of Foxton J in *SK Shipping Europe plc v Capital Vlcc 3 Corp* [2020] EWHC 3448 (Comm):

"113. First, the defendant must establish that a representation was made …

114. Second, the representation must be false. …

115. Third, for the statement to have been made fraudulently:

i) One of the two mental states established in *Derry v Peek* (1889) 14 App Cas 337 must be established: the statement must have been made knowing it is untrue, or recklessly, not caring whether it is true or not.

…

iii) Actionable fraud involves an intention on the part of the representor to induce the representee to act as he did. It is not necessary for the representor to intend to induce the specific action taken by the representee in reliance on the misrepresentation. It is only necessary that there should be an intention that the representation should be acted on.

iv) The standard of proof in a case of fraud is the balance of probabilities.

116. Fourth, the representee must show that he in fact understood the statement in the sense (so far as material) which the court ascribes to it, and that, having that understanding, he relied on it. The general principles applicable where a misrepresentation is said to have induced the making of a contract are set out in *Chitty on Contracts* (33rd) paras. 7-036 to 7-042. …

117. The principles are as follows:

i) For rescission, it is not necessary that the misrepresentation should be the sole cause which induced the representee to make the contract. It is sufficient if it can be shown to have been one of the inducing causes.

…

iv) Once it is proved that a false statement was made which is 'material' in the sense that it was likely to induce the contract, and that the representee entered the contract, it is a fair inference of fact (though not an inference of law) that he was induced by the statement.

v) The inference is particularly strong where the misrepresentation is fraudulent. …

vi) … In cases of fraud, the representor is not permitted to argue that it was unforeseeable that the representee would be influenced by the lie.

vii) When a claimant seeks damages, whether for negligent or fraudulent misrepresentation, for loss which it alleges it has suffered by entering into a contract on particular terms as a result of that misrepresentation, the court must find that it would not have entered into the contract on those terms but for the misrepresentation: *Chitty on Contracts* (33rd) paras. 7-039-7-040 and 7-055. To this extent, in fraud cases there is a difference between what must

> be shown in order to obtain rescission of a contract, and what must be shown to recover damages."

66. So the elements to be alleged (and proved at the trial) are (i) a representation, (ii) which was false when made, (iii) and made fraudulently, (iv) with an intention that the representation should be relied upon, (v) which was in fact relied upon, and (vi) *either* which was one of the inducing causes of the transaction (in a rescission claim) *or* without which the transaction would not have been entered into (in a damages claim). No allegations of the kind summarised at (iv)-(vi) are made in this case. As a result, so far as concerns the use of the words "fraudulent" and "fraudulently", there is no complete cause of action pleaded.

67. In any event, there is also the question of what is needed in order to plead fraud or fraudulent behaviour when that is one of the necessary elements of the claim. The requirements for pleading fraud are set out in CPR rule 16.4(1)(a), CPR Part 16 Practice Direction, paragraph 8.2, and paragraphs 10.1 – 10.2 of the Chancery Guide. These (or their predecessors) were discussed by Roth J in *Seaton v Seddon* [2012] 1 WLR 3636, [39]-[49], where he also discussed a number of other authorities on the pleading of fraud. In that case it was submitted that the CPR had introduced a significant change in fraud cases by removing or reducing the obligation found in the old Rules of the Supreme Court as to what had to be pleaded where fraud was alleged.

68. The judge rejected the submission. He said:

> "45. … Although I think that the drafting of PD 16 could be improved, I consider that the obligation which it imposes to 'specifically set out … any allegation of fraud', read together with CPR r 16.4(1)(a), is to be interpreted as meaning more than a simple statement that fraud is alleged but also the specific basis of the allegation, ie the facts relied upon."

69. In the present case, no allegation of the facts relied upon as the basis for an allegation of fraud has been made. Given the grave nature of such an allegation, the absence of allegations of supporting facts is a particularly serious matter. The defendant asks the court to infer that this can and will be remedied after disclosure has been given. But, unlike the American civil litigation procedure rules, where it is permissible to make very general claims without any particulars, and then plead a fully particularised case only following discovery, in our system the claimant must plead a full case *before* disclosure.

70. For example, in *Gale v Denman Picture House Ltd* [1930] 1 KB 588, 591, Scrutton LJ (with whom Lawrence LJ agreed) said:

> "A plaintiff who issues a writ must be taken to know what his case is. If he merely issues a writ on the chance of making a case he is issuing what used to be called a 'fishing bill' to try to find out whether he has a case or not. That kind of proceeding is not to be encouraged. For a plaintiff after issuing his writ but before delivering his statement of claim to say, 'Show me the documents which may be relevant, so that I may see whether I have a case or not,' is a most undesirable proceeding."

71. Again, therefore, and for the reasons already given, I would not think it appropriate to make some kind of "unless" order in this case, requiring the defendant to plead his full case. In the circumstances, had I not already decided to strike out the counterclaim, I would simply have struck out the allegation of fraud.

The fourth issue: breach of good faith duties?

72. The fourth issue is whether there is any real prospect of success on the counterclaim based on good faith duties. The defendant's claim is that certain implied duties of good faith arose (which were then breached) because the *relationship* between the claimant and EiRx and the *relationship* between the claimant and the defendant amounted to "relational contracts", which justified the implications of such duties (see paragraph 57 of the defence). The facts pleaded as demonstrating that the *relationships* were relational contracts are that they were long-term, interconnected banking services contracts, intended to be performed with integrity, requiring a high degree of communication, communication and predictable performance, the parties being committed to collaborating with each other, and reposing trust and confidence in each other, with a substantial financial commitment by the defendant and EiRx. It is also pleaded that the relationships were exclusive.

73. In *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), Leggatt J (as he then was) said:

> "142. In some contractual contexts the relevant background expectations may extend further to an expectation that the parties will share information relevant to the performance of the contract such that a deliberate omission to disclose such information may amount to bad faith. English law has traditionally drawn a sharp distinction between certain relationships – such as partnership, trusteeship and other fiduciary relationships – on the one hand, in which the parties owe onerous obligations of disclosure to each other, and other contractual relationships in which no duty of disclosure is supposed to operate. Arguably at least, that dichotomy is too simplistic. While it seems unlikely that any duty to disclose information in performance of the contract would be implied where the contract involves a simple exchange, many contracts do not fit this model and involve a longer term relationship between the parties which they make a substantial commitment. Such "relational" contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long term distributorship agreements."

74. I was also referred to the decision of Fraser J in *Bates v Post Office Ltd (No 3)* [2019] EWHC 606, where the judge discussed the notion of a relational contract in more detail, including the following:

> "725. What then, are the specific characteristics that are expected to be present in order to determine whether a contract between commercial parties ought to be

considered a relational contract? I consider the following characteristics are relevant as to whether a contract is a relational one or not:

1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.

2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.

3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.

4. The parties will be committed to collaborating with one another in the performance of the contract.

5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.

6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.

7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.

8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.

9. Exclusivity of the relationship may also be present.

726. I hesitate to describe this as an exhaustive list. No single one of the above list is determinative, with the exception of the first one. This is because if the express terms prevent the implication of a duty of good faith, then that will be the end of the matter. However, many of these characteristics will be found to be present where a contract is a relational one. In other cases on entirely different facts, it may be that there are other features which I have not identified above which are relevant to those cases."

75. Characterisation of the relevant contracts as "relational" is of course only the first step in the defendant's argument. It is used as a springboard from which to imply duties of good faith which are not made express. In the more recent case of *Cathay Pacific Airways Ltd v Lufthansa Technik AG* [2020] EWHC 1789 (Ch), Deputy Judge John Kimbell QC considered the case law relating to the implication of good faith terms into such contracts in some detail.

76. He concluded as follows:

"218. Whilst the law is clearly still in a state of development, I find that the present state of the law in this area can be summarised as follows:

a. A term of good faith may be implied in a relational contract as a matter of law under the principles set out by Lord Wilberforce in *Liverpool City Council v Irwin* subject to any contrary express term - see *Sheihk Tahnoon* para [174] and *UTB* [200].

b. The test for incorporation as a matter of law is whether the contract is a long-term contract which requires the parties to collaborate in future in ways that respects the spirit and the objectives of their joint venture but which the parties have not specified or have been unable to specify in detail. The contract will also involve trust and confidence that each party will act with integrity and co-operatively - *Sheihk Tahnoon* para [174] and *UTB* [200].

c. A good faith term may be implied as a matter of fact in a relational contact but there is not special rule for incorporation in a relational contract. Each term must be considered against the usual test for implied terms - *Globe Motors, Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 at para [68].

d. The main test of whether a term of good faith is to be implied in a contract is whether a reasonable reader of it would consider the term to be so obvious as to go without saying or the term is necessary for business efficacy - *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [196] to [205]; *Russell v Cartwright* [2020] EWHC 41 (Ch) *Yam Seng Pte v. International Trade Corp* [2013] EWHC 111 (QB), all of which applied the test in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2016] AC 742 at [16] to [31]

e. The overall character of the contract is an important consideration. In relation to this question the indicia in paragraph 725 of *Bates* may be helpful

f. The implication of a good faith term as a matter of fact is possible even in the case of long, complex and sophisticated contracts expressed in writing - see e.g. *Bates* and *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264."

77. The defendant's pleading on this issue is not user-friendly. It jumps from "relationship" to "contract" and back again, apparently treating the terms as equivalents. A relationship is obviously "relational" in some aspects, but a contract is not necessarily so, as Leggatt J made clear. Just because a *relationship* is relational, it does not follow that any *contract* entered into in the course of that relationship must also be relational. And the test of the implication of terms remains one of necessity. It is not automatic, even in relational contracts.

78. On the face of it, these were ordinary contracts for banking services, with nothing to show that there was anything more, for example, a partnership or joint venture between the parties. Mr McMeel QC says that this "represents an impoverished view of the role of modern banks", but an elegant phrase, however polished, cannot of itself alter the legal position. The reality is that there is a tension between the image that the marketing department of a modern retail banking business wishes to give to its potential customers and the degree of responsibility which that business is actually prepared to undertake.

79. Nevertheless, I must consider the matter on the basis that the defendant would be able at trial to prove all the allegations of fact made in the pleaded case. If all of those things were proved, then it may be that, as a matter of law the contracts of could be held to be relational contracts. Particularly in light of the so-called *Altimo* principle, I do not think it would be right at this stage for the court to seek to determine whether the contracts were relational, on the basis of assumed facts, and, if not, to strike out that part of the case.

80. The alternative application is for reverse summary judgment, on the basis, *either* that there is no real prospect of establishing that these banking contracts are indeed relational contracts in which the relevant terms of good faith can be implied, or that there is no real prospect of establishing that such terms were breached. I am very far from saying that the defendant's case on this issue is a strong one. On the contrary, I think it is implausible, and indeed counter-intuitive, as the several cases cited by the claimant at paragraph 38 of its skeleton show.

81. But I am conscious of the prohibition on conducting any kind of "mini-trial" at this stage. I also bear in mind that the customer company was a listed and not a private company, with all the extra regulatory impositions that that implies. As a result, I cannot say that the prospect of success by the defendant is entirely illusory. The evidence at trial may somehow satisfy the court that this banking case is different from all the other banking cases. So, if it had been necessary for me to deal with this point, I would not have given summary judgment to the claimant on this issue.

The fifth issue: is the damages counterclaim time-barred?

82. I turn now to the damages counterclaim. The claimant says that it is time-barred, since the matters complained of would have taken place in 2007-08, but the claim form was not issued until May 2019. The defendant says the relevant events also occurred in 2012-13, but that might still be more than six years before the claim was issued. However, the defendant applied by notice dated 16 June 2021 for permission to file and serve a Reply to Defence to Counterclaim, to rely on the Limitation Act 1980, s 32(1) (fraud and deliberate concealment), in the form attached to the notice. That application was not opposed, and at the hearing I gave the permission requested.

83. Paragraphs 2 to 4 of the draft Reply to Defence to Counterclaim read as follows:

> "2. The Claimant's ("the Bank") fraud and breaches of the implied duties of good faith are as stated in paragraph 60 in the Defence and Counterclaim.
>
> 3. Mr Hoskins first had knowledge of, or could with reasonable diligence have discovered, within the meaning of section 32(1) of the Limitation Act 1980, the facts giving rise to his claims for fraud and breaches of the implied duties of good faith not before November 2015.
>
> 4. Mr Hoskins acquired his knowledge sufficient to embark on the preliminaries for making a claim from reading publicly available, official reports into the activities of the Bank, and in particular:
>
> 4.1 Bank of England: Prudential Regulation Authority and Financial Conduct Authority, *The failure of HBOS plc (HBOS) [-] a report by the Financial Conduct*

> *Authority (FCA) and the Prudential Regulation* Authority (November 2015); and/or
>
> 4.2 Andrew Green QC and others, *Report into the FSA's enforcement actions following the failure of HBOS* (November 2015)."

84. The claimant accepts that that part of the counterclaim for damages which depends on a valid claim in "fraud" would not be time-barred until six years after the fraud was discovered. The defendant says this was in November 2015, and the issue of the claim form was within six years from that date. However, it has submitted (and I have accepted) that the claim in "fraud" should be struck out for other reasons. So far as concerns that part of the counterclaim for damages which depends on breaches of the implied terms of good faith, the claimant submits that the draft Reply to Defence to Counterclaim does not give any particulars of the allegations of deliberate concealment relied upon, contrary to CPR rule 16.4(1)(a). I agree.

85. No good reason is given for this failure. The defendant simply says that this "might be an appropriate issue for further voluntary particulars after disclosure, or a request for further information at that juncture". In my judgment, that is the wrong approach to take. Moreover, the failure of the defendant to respond meaningfully to a request for further information in the earlier proceeding, coupled with the unhelpful response is given when the claimant obtained a court order that the defendant respond, does not inspire confidence that this is any more than a weak excuse for a serious failure. Had it mattered, I would therefore have struck out the counterclaim in relation to damages for breach of duties in good faith.

The sixth issue: the pleading of loss and damage

86. Lastly, the claimant criticises the defendant's pleading of loss on his counterclaim as an abuse of process. As can be seen from paragraph 62 of the Counterclaim, the claimant estimates his total losses at more than £35 million (at least £10 million for personal financial losses and over £25 million for losses incurred by EiRx), and he says that he will rely on expert evidence to prove those losses. (He said almost exactly the same thing in the response to the request for further information in the earlier proceedings.) The only particulars that he gives are: (i) the failure of EiRx, (ii) the loss of its intellectual property rights, (iii) damage to reputation (including difficulty in opening a bank account), and (iii) his inability to raise finance for other companies and carry on as a serial entrepreneur. Although the defendant says that these losses were "a consequence of the [claimant's] fraud and/or breaches of duty", there is no proper pleading of causation damage or loss. It is difficult to see how any evidence, let alone expert evidence, can be adduced to prove things which have not been pleaded.

87. In my judgment, it is incumbent upon a party making a claim against another to plead what it is he or she says has been lost as a result of the fault of the other party. As the claimant rightly says, unless this is done, it is in no position to evaluate the quantum of the counterclaim, to consider whether the defendant is likely to be able to prove any part of his case, and so on. That frustrates an important objective of having statements of case in the first place, which is to encourage discussion and settlement of disputes. In the present case the defendant must know both what his position was before the actions of the claimant of which he complains, and also what his position is

now. Although he may not be able to ascribe an exact value to each head of loss, because some will be properly the subject of professional valuation (and this is the point at which expert evidence may be necessary), he could at least give a much clearer picture of what his loss and damage consists of. In my judgment, had I not already decided to strike out the counterclaim, I would have struck out the pleading of loss as an abuse of process. Again, for the reasons already given, I would not have considered that it was appropriate to make any kind of "unless" order.

Conclusion

88. In the result, I strike out the counterclaim as a whole. I should be grateful to receive a draft minute of order for my approval, reflecting the terms of this judgment.