Neutral Citation Number: [2022] EWHC 1942 (Ch)

Case No: CP-2021-000024

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

7 Rolls Buildings
Fetter lane, London
EC4A 1NL

Date: 22 July 2022

Before :

MR SIMON GLEESON
Sitting as a Deputy High Court Judge

- -

Between :

MACKIE MOTORS (BRECHIN) LTD — **Claimant**

- and -

RCI FINANCIAL SERVICES LIMITED — **Defendant**

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- -

David Cavender QC and **Thomas Pausey** (instructed by **Freeths LLP**) for the **Claimant**
David Peters (instructed by **Stephenson Harwood LLP**) for the **Defendant**

Hearing date: 12 July 2022

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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.

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 22 July 2022 at 10.30am.

Mr Simon Gleeson:

1. The claimant ("Mackie") was for many years the authorised distributor for Renault, Nissan and (later) Dacia cars for the North East of Scotland. The overall position was relatively straightforward – Renault, Nissan, Dacia and Mackie had a common interest in selling as many cars as possible in the region, and co-operated closely in order to achieve that aim. A key player in this regard was the Defendant, RCI Financial Services Limited ("RCI"). RCI was a wholly-owned subsidiary of Renault, established for the purpose of providing finance in respect of the sale of cars manufactured by Renault, Nissan and Dacia. This finance took two forms. One was the provision of finance to customers wishing to buy cars. The other was finance provided to dealers such as Mackie to finance their operations.

2. These arrangements were documented by a patchwork of contracts. The foundational documents were the Dealership Agreements entered into by Mackie with Renault, Nissan and Dacia. There were also six separate contracts with RCI governing the provision of different types of financing to Mackie (the "RCI contracts"). There were also a number of other services provided to Mackie which do not seem to have been the subject of any documentation at all. Finally, by the various Dealership Agreements, Mackie was obliged to offer RCI financing agreements to its customers. However, the provision of these customer facilities was through bilateral agreements between the customer and RCI, and did not form part of the RCI contracts.

3. In their capacity as providers of finance to Mackie, RCI routinely scrutinised Mackie's accounts, and discovered a particular transaction which Mackie had

entered into. This was a transaction which had no obvious connection with Mackie's business of operating a franchised motor dealership and service centre, and in which Mackie intermediated the provision of finance by a Panamanian entity to a Ukrainian entity. The question of the legitimacy or otherwise of this transaction is not before me. However, the consequence of RCI's discovery of this transaction was that RCI formed a suspicion that Mackie had engaged in money laundering. RCI therefore made a suspicious activity report to that effect to the National Crime Agency ("NCA") on the 23 November 2021. On the 24 November the provision of spare parts to Mackie ceased, on the 27 November the provision of all other services also ceased. On the 7 December notices terminating the relationship were served (the "Notices"). On that date, RCI sought consent from the NCA under s.335 of the Proceeds of Crime Act 2002 to receive repayment of funds advanced to Mackie upon the termination of its arrangements with it.

The Litigation history

4. On 15 December 2021, Mackie issued, in the Competition List of the Business and Property Courts in Leeds, an urgent claim for interim injunctive relief against RCI. Further to this, on 16 December 2021, Mackie filed its particulars of claim (the "Original Claim"). The case set out in the Original Claim, and in respect of which the urgent interim relief was sought, was that RCI had abused its dominant position in serving the Notices (the "Competition Law Claim"). There was an ancillary argument that the provisions said to entitle RCI to terminate on seven-days' notice were unfair (the "UCTA Argument").

5. Mackie's claim for an urgent interim injunction was rejected by HHJ Saffman at a hearing on 16 December 2021, on the basis that neither the Competition Claim nor the UCTA claim had any real prospect of success. HHJ Saffman also, on his own motion, transferred the proceedings to the Competition List of the Business and Property Courts of England and Wales.

6. In order to resolve the issue of its deadlocked business, Mackie sold its sites to another Renault/Nissan franchised dealership in an urgent sale for what is said by Mackie to be well below market value.

7. In January 2022, Mackie indicated to RCI that it intended to amend its particulars of claim and a procedural timeline was agreed by the parties for the consideration of those amendments. A copy of the draft amended particulars of claim (the "DAPOC") was provided to RCI on 11 March 2022. The proposed amendments withdraw the Competition Law Claim and instead pursue a general contractual law claim for damages arising out of the overall contractual relationship between Mackie, RCI and others. This has resulted in a purely contractual claim appearing in the Competition List.

8. RCI argues that the amendments proposed in the DAPOC do not properly plead claims with a real prospect of success. It therefore argues that the DAPOC does not meet the tests for strike out or reverse summary judgement. RCI also applies to the original pleading to be struck out or, in the alternative, summary judgement.

9. The DAPOC alleges an implied agreement between the parties to the Original Claim and also Renault and Nissan. It therefore applies for the joinder of Renault and Nissan in this action. However, that application only becomes

relevant if the arguments for that implied agreement survive the strike-out application.

10. The relevant test of intelligibility and apparent credibility was summarised by the Court of Appeal in Elite Property Holdings v Barclays Bank [2019] EWCA Civ 204 at [41]-[42]:

> "41. For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: Three Rivers District Council v Bank of England (No3) [2003] 2 AC 1.
>
> 42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon..."

11. Other important points of principle have also been recognised in the authorities. In particular, in assessing the factual basis of the claim, the Court should (i) not conduct a "mini-trial", (ii) be conscious of the concern that live issues of fact may only be properly determined following the hearing of oral evidence and (iii) take into account the evidence that can reasonably be expected to be available at trial as well as the evidence actually placed before it.

12. It is not normally appropriate in a summary procedure to decide a controversial question of law in a developing area, as it is desirable that development of the law is based on actual rather than hypothetical facts: Altimo Holdings and

Investment Ltd v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804 at [84]. This is particularly so where there are complicated issues involving mixed questions of fact and law.

13. Ultimately, regardless of how it is precisely stated, the test of arguability is a relatively "low threshold" for the applicant to overcome.

Mackie's position

14. It is not, I think, disputed that the apparent effect of the express terms of the written agreements in place between RCI and Mackie permit RCI to do exactly what it has done. Mackie's challenge is based on one or more of five propositions. First, that the entire arrangement between the parties was subject to an implied "umbrella agreement", whose terms constrain RCI from terminating the agreements. Second, that there are terms implied into the express agreements which have that effect. Third, that the true construction of the express terms of the written agreements gives them a different meaning from their apparent meaning, so that they do not have the effect that they appear to have. Fourth, that RCI is estopped from exercising its contractual rights by reason of representations made to Mackie. Fifth, that the terms of the agreements by which RCI seeks to act contravene the Unfair Contract Terms Act. The first four of these are new claims, which are raised for the first time in the DAPOC. The position as regards the fifth is more complex – an UCTA claim was made (and dismissed) in the previous proceedings, but the UCTA claim made in the DAPOC is advanced on a different basis from that advanced in the injunction proceedings.

1. Umbrella Agreement

15. The case which the claimant seeks to plead is, in summary, that the entire arrangement between all of these parties should be viewed as being subject to an implied "umbrella" contract. This implied contract should be taken as covering all of the services provided by all of the parties, both those covered by the existing agreements and those provided outside those agreements. This implied contract should be regarded as a "relational" contract, importing a good faith obligation, and the effect of that obligation ought to be that the relationship as a whole should only be terminable on two years notice. What is argued is that the termination of the RCI contracts has the effect of – in practice - immediately terminating the distribution agreements, since in practice a distributor cannot operate without finance, and finance obtained from other sources would be prohibitively expensive. This must therefore be a breach of the implied good faith obligation and/or a term of the implied contract. The position of Mackie is that this is a sufficiently arguable case that it should be allowed to go to a full trial.

16. Mackie also argue that this umbrella agreement exists not only between the parties hereto, but also embraces Renault, Nissan and Dacia. They therefore seek to join those entities as parties in this litigation.

17. RCI's position on this point is that the draft pleading put forward does not set out a clear case for the existence of any such contract. RCI further argue that, even if the umbrella contract were to be held to exist, it predates subsequent written agreements between Mackie and RCI which restate the provisions which Mackie argue the umbrella contract effectively varies. These later agreements

contain conventional entire agreement and no variation provisions. Consequently RCI's position is that even if the umbrella contract exists, it is subject to the (later) express contracts which exclude it, and not the other way around.

18. There is no need, for this purpose, to say anything substantial about what is meant by the term "relational" contract. I think it is clear that if the agreement between the various parties here were subject to a single express written agreement, that contract would be classed as "relational". That issue only arises if the pleaded umbrella contract exists.

19. The umbrella contract, if it exists, is necessarily an implied contract – Mr Cavender Q.C., for Mackie, accepted this during the hearing. Thus, although it is not cited to me, I think the starting point must be the relevant section of Chitty as regards implied contracts, and in particular para 1-047. This identifies as the leading authority Modahl v British Athletic Federation [2001] EWCA Civ 1447, and cites the following passage from it:-

> "One distinction exists … in relation to the ease with which an express or implied contract may be established. Where there is an express agreement on essentials of sufficient certainty to be enforceable, an intention to create legal relations may commonly be assumed. It is otherwise when the case is that a contract should be implied from the parties' conduct. It is then for the party asserting a contract to show the necessity for implying it."

20. In my judgement, the draft pleading before me simply does not address this issue. The parties have documented their relationship in a number of complementary express agreements. Mr Cavender argues that there are other services which are also provided which fall outside the framework of the existing express agreements, and that the provision of these services necessarily

implies the existence of some legal arrangement in respect of them. I think there are two responses to this. One is that it is simply not the case that where one party to a contract does something for another, it necessarily follows that he intends the provision of that service to be (or to become) a legal requirement. In a situation such as this, it is clearly the common objective of the manufacturer and the distributor to sell more cars, and it is entirely to be expected that the manufacturer will do everything in his power to assist the distributor, including by providing him with services. But it simply does not follow that the manufacturer, when providing those services, necessarily intends to become legally obliged to provide those services. If we accept – as we must – that a manufacturer may choose to go beyond his legal obligations, to do things of benefit to the distributor for no reason beyond his own self-interest, and to do so without having the slightest intention of creating legal relations with the distributor in respect of those services, then it must necessarily be true that the mere existence of such services does not necessarily call into being an intention to create legal relations in respect of them, and without such an intention, the idea of the implied contract must fall away.

21. It is true that there are some types of services whose nature is such that their provision necessarily implies a contract in respect of its provision – Heis v MF (Global) Services Ltd [2016] EWCA Civ 569 provides an example of such services. However, the services which are relied on in the pleading are:

    a. Customer financing services, by which RCI provided financing to customers purchasing cars.

b. Platform services, being the provision of communication facilities with which Mackie could interface with RCI, Nissan and Renault to purchase spare parts and incept customer finance.

c. The provision of access to an online database of existing finance arrangements.

d. The provision of a clearing account by RCI, for the purposes of netting transactions between Mackie on the one hand and RCI, Renault and Nissan on the other.

22. It is clearly not the case that any of these services, or all of them taken together, are such that their provision necessarily implies an intention to create legal relations. Equally, in none of the ten grounds put forward in paragraph 32 of the DAPOC is there anything that suggests any intention on the part of Renault, Nissan or RCI to create legal relations above or beyond the contracts which were already in place.

23. There is therefore nothing in the DAPOC which properly particularises this claim.

24. I should note for the sake of completeness that it was RCI’s case that even if such an umbrella contract did exist, it was effectively displaced by the entire agreement and no oral modification clauses contained in the RCI contracts, which it was conceded were entered into after the umbrella agreement came into being. This may or may not be correct - it is well-established that the presence of an entire agreement clause will not prevent the admission of extrinsic evidence for the purposes of interpreting the written terms of the agreement and

the way in which the parties are entitled to exercise the rights thereby given to them: NHS Commissioning Board v Vasant [2019] EWCA Civ 1245 at [46]-[47]. Since the case for the existence of the implied umbrella agreement fails, I do not have to consider it.

2. Implied Terms

25. This takes us to the next point. In his submissions, Mr Cavender argued that Mackie's case was that even if there was no umbrella agreement, the necessary provisions should be implied into the individual express contracts which do exist. It is by no means clear to me that this case is in fact set out in the DAPOC, but I will deal with the point as if it were.

26. I accept that the entire agreement and no oral modification clauses do not prevent the implication of terms in an appropriate case - see NHS Commissioning Board v Vasant [2019] EWCA Civ 1245 at [51]. Consequently, it is entirely possible that terms can be implied into these agreements – the question is as to the plausibility of the argument that they are indeed implied.

27. This takes us to a point which requires some elucidation. Mackie says, and I accept, that if the umbrella contract existed, it could be a relational contract. However, in its case on implied terms, Mackie seem to go further than this, and to argue that the essence of a relational contract – the implied obligation of good faith in dealings – should be implied not only into a relational contract, but also into any arrangement between parties where, *if* that arrangement were incorporated into a single contract, that contract *would* be a relational contract. Another way of putting this might be to say that the relational good faith obligation arises not out of a contract, but out of a relationship, and that where

a relationship of this kind exists, a duty of good faith should be implied between the parties, whatever the legal nature of their existing relationship may be.

28. An application of this kind is not an appropriate place to decide new issues of developing law, and I accept that the whole issue of relational contracts is very much an area of developing law. I will therefore simply assume the validity of this proposition for this purpose, although I have the gravest doubts about its correctness as a matter of law.

29. The terms which Mr Cavender argues should be implied are set out in paragraph 44 of the DAPOC. The material one, for this purpose, is 44 (5)(c), where he argues that a term should be implied into all of the contracts between the parties to the effect that the parties agreed "not to withhold the Services, or terminate the umbrella contracts, in the absence of good cause, without reasonable notice, which was a period of at least 24 months". This in effect constitutes the incorporation of the termination provision set out in the dealer agreements into all the contracts between Mackie and RCI.

30. Mr Cavender's argument is that the real issue to be decided here is as to whether RCI's termination of its agreements is in good faith or not. He argues that the "relational" nature of the relationship should import such a duty of good faith, and that the investigation of whether such a duty was in fact breached could only be established at trial. Hence, he argues, once such a case has been made, the pleading should not be struck out.

31. The position between the parties would, if contractual, clearly fall within the definition of a relational contract – indeed, in Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB), Leggatt LJ included "long term

distributor agreements" in his illustrative list of types of relational contracts. However, it is not the case that all such arrangements necessarily have this characteristic. As Mr Justice Fancourt said in UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch), "It is self-evidently not all long-term contracts that involve an enduring but undefined, cooperative relationship between the parties that will, as a matter of law, involve an obligation of good faith.". Rather than seeking "to identify and weigh likely indicia of a 'relational contract' in the narrower sense" he considered it preferable to consider directly whether the term should be implied in fact under the test of necessity explained by the Supreme Court in Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72.

32. The question is therefore one as to, whether or not the arrangement is relational, such a term satisfies the test of necessity for inclusion in the RCI contracts.

33. Mr Cavender says that it does. His argument is that the withdrawal of the RCI services effectively terminates Mackie's ability to perform the functions of distributor under the distribution agreement, and that as a result it is necessary that the RCI contracts continue in force for as long as the distribution agreement remains on foot.

34. Mr Peters, for RCI, points out that the mere implication of this term which Mr Cavender seeks to imply would, of itself, achieve nothing. The RCI contracts are in fact framework agreements, under which finance may be advanced in future on a case-by-case basis. Mr Cavender accepts this, and argued in his oral submissions that if RCI was indeed subject to the implied term for which he contends, it would therefore be under an implied obligation to continue to

provide finance under that agreement for as long as the agreement remained in place. I think that that is a necessary part of his case – if he accepts that RCI could simply cease to provide finance whilst leaving the agreements in place, then the clause which he seeks to imply into the agreements would be of no practical effect.

35. The reason that this argument must fail is that it has no regard for the nature of the RCI contracts themselves – indeed an implication of a term of this kind would almost completely undermine their intended legal effect.

36. RCI is a finance company, and the RCI contracts relate to the provision of finance by it to Mackie. Now for any finance company, a very significant distinction is always drawn between a legally binding commitment to lend and a non-binding indication of preparedness to lend. It is very common in the finance industry to come across framework agreements which say "as and when asked, we will decide whether to advance finance to you, and, if we do, these are the terms on which we will advance it", and examples can be found everywhere from the ISDA master agreement to high street banks including overdraft provisions in their standard banking terms. The whole essence of such an agreement is that it is not a commitment. The borrower may ask for finance from time to time, and at the time when it is requested the finance provider may take an independent decision as to whether or not to provide it. The existence of the framework agreement quite deliberately does not constrain the finance provider in its taking of that decision. The finance provider may well give an indication of the level of finance beyond which it is not prepared to go, but such

an indication deliberately does not constitute any sort of undertaking that such finance will be provided when it is requested.

37. The RCI contracts fall exactly into this pattern. The battery master hire agreement sets it out explicitly - "On each occasion that you place an order for an Electric Vehicle … you will be deemed to have requested us to enter into a hire agreement...If we are prepared to enter into a hire agreement, we will send you an updated listing schedule...". In the other agreements, the credit to be supplied is an amount specified to be in the absolute discretion of RCI, such that it may be varied or reduced to zero at any time.

38. Mr Cavender suggested in argument that it could not possibly have been intended by the parties that these terms could have meant what they said. His argument, in brief, was that the common intention of the parties was that facilities should be made available under the agreements – that the agreements were, in effect, firm commitments given by RCI to provide finance.

39. I do not think that that can possibly be right. Mackie may have operated on the assumption RCI would continue to provide finance, but RCI carefully refrained from giving any commitment, written or oral, whose effect was to commit them to do any such thing, in accordance with standard finance industry practice. I am satisfied that that was a deliberate decision on their part, that the terms of the agreements reflected exactly that decision, and that there is no question that they would have agreed, explicitly or implicitly, that the existence of the agreements subjected them to any legal obligation at all to provide or maintain finance.

40. This seems to me to be an instance of a general principle that, where a framework agreement of this kind in relation to the provision of finance has been put in place, entry into such a framework agreement does not, without more, impose any commitment at all on the relevant finance provider to actually advance finance. It is, of course, always possible for a finance provider to give such a commitment, and there are a number of ways in which this could be done. However, in the absence of overwhelmingly clear evidence of a specific agreement to lend, such a commitment should never be implied from the existence of a framework agreement. In particular, the mere fact that (1) a framework agreement is in place, (2) the finance provider has a long track record of providing finance, and (3) the provider has informally indicated its intention to continue to provide finance, should never, without more, be treated as sufficient to imply a legal obligation on him to do so.

41. I should also say that even if I had accepted the existence of Mr Cavender's proposed umbrella contract, and further accepted that it imported a duty of good faith as a relational contract, I would not have accepted that that duty of good faith alone could operate to compel RCI to continue to advance funds. Such an obligation could, in my view, only arise from an explicit and binding legal commitment to do so. There is nothing in the DAPOC which could provide any basis for finding any such commitment.

<u>3. Construction</u>

42. Mackie further argues that, even if there is no implied term, the express terms of the financing agreements, properly interpreted, support their case.

43. The termination provisions are found in clause 13 of each of Contracts 1,3 and 4 (as defined in the DAPOC). The clauses are materially identical, save that there is an extra sub-provision, clause 13.1, in Contracts 3 and 4. The relevant clause reads "Without prejudice to the foregoing provisions of this Clause this Agreement shall continue unless and until determined by seven days written notice by either party" (the "Seven Day Notice Term").

44. The suggested ambiguity arises from the fact that the Seven Day Notice Term does not expressly state that either party has any right or entitlement to terminate for any reason. This is a point of distinction from the immediately preceding provisions in clauses 13.2 and 13.3, which expressly do state that RCI has an entitlement to terminate "forthwith" and "by notice" if particular events of default have occurred.

45. The basis of Mr Cavender's submissions is that the parties could not possibly have intended that these agreements could be terminated without cause simply by giving seven days' notice. This, he argues, would have constituted a giving up of valuable rights by Mackie. It is a general principle of construction (and, as Moore-Bick LJ has noted, common sense) that parties do not give up their valuable rights lightly: Seadrill Management Services Ltd v OAO Gazprom [2010] C.L.C. 934 at [29] (Moore-Bick LJ). He also argues – correctly – that the RCI contracts exist in the context of the Dealership Agreements, and exist exclusively for the purpose of sustaining the arrangements put in place under the Dealership Agreements.

46. He therefore argues that it is realistically arguable that the Seven Day Notice Term should be construed as subject to the terms of the Dealership Agreement which require a two year's notice of termination.

47. This argument fails for the same reason that the implied term argument fails. Even if the true construction of these agreements is that they cannot be terminated within two years, that is only of any assistance to Mr Cavender if it can also be inferred that non-termination of the agreement results in a commitment by RCI to continue to provide finance. The idea that the words of the agreement can be construed to have this effect without the implication of terms is neither set out in the DAPOC nor argued orally, and is (in my view) hopeless in any event. As HHJ Pelling observed in Bratani & Others v Rockrose UKCS8 LLC [2020] EWHC 58 (Comm) (at §47) "the Courts have consistently held that unqualified termination provisions take effect in accordance with their terms").

Estoppel

48. Mackie also pleads estoppel by representation. As a matter of legal principle, there is no difficulty with an estoppel operating to prevent a party from exercising a contractual termination right, and the essence of Mackie's case under this heading is that (a) RCI represented that it would not rely on its strict contractual rights; (b) Mackie relied on that representation to its detriment; and (c) it would be unconscionable to allow RCI to resile from that representation.

49. Mr Peters argues that this means that Mackie is relying on a promissory estoppel. It is well established that a party cannot rely on a promissory estoppel as the basis of a cause of action. This conclusion was clearly stated by the Court

of Appeal in Baird Textile Holdings v Marks & Spencer Plc [2001] EWCA Civ 274.57.

50. Mr Cavender says that he is in fact relying on estoppel by representation. However, the essence of estoppel by representation is that it prevents a party from establishing facts: i.e. from denying that the facts represented by them are true, even where that is actually the case. More importantly, estoppel by representation does not give rise to a cause of action: Low v Bouverie [1891] 3 Ch. 82 at 101, 105. The rule that promissory estoppel does not give rise to a cause of action is based on different grounds (see Chitty para.6-106 for the distinction).

51. In any event, Mackie's case on estoppel does not have a real prospect of success. In order for the estoppel to arise, RCI would have to have made a clear and unequivocal representation that it would not rely on the Seven Day Notice Terms (see Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd [1972] AC 741). The matters alleged to give rise to the relevant representation come nowhere near meeting this requirement. They consist of (a) a loan authorization form from RCI Banque SA (not RCI) stating that it regarded MMBL as a "long term partner"; (b) an email from Renault (not RCI) which stated "we love Mackie to death!" and (c) the facts of the ongoing relationship between Renault, Nissan, Dacia, RCI and Mackie. None of this comes close to identifying a clear and unequivocal renunciation of RCI's clear rights under its contracts with Mackie.

Unfair Contract Terms Act 1977

52. The UCTA Argument begins from a slightly different place from the other amendments to the DAPOC. An UCTA plea was contained in the Original Claim, and Mr. Cavender argues that what is contained in the DAPOC is simply a further particularisation of that claim.

53. It is clear that an application to amend by giving further particulars of factual material supporting an existing claim is treated differently to an application to amend to introduce a new claim. As stated in Phones 4U v EE [2021] EWHC 2816 at [8], "An application to amend by giving further particulars should not be turned by a side wind into a strike out or reverse summary judgment application".

54. The problem here is that the original UCTA point was fully considered in the judgement of HHJ Saffman in the initial strike-out application (see paragraph 5 above). He held that the UCTA argument therein presented did not give rise to a serious issue to be tried. His reasoning was that the termination of the RCI contracts would not, of itself, have any impact on the provision of finance to Mackie, since RCI was not obliged under the terms of the agreements to provide finance to Mackie in any event. There was therefore no unfairness under UCTA. As HHJ Saffman said, in the submissions before him "there appears to be no dispute that the financing tap can be turned off with no realistic notice" (para 57).

55. Mr Cavender now does dispute that proposition – in particular, he argues that if he succeeds on any of his umbrella claim, his implied terms claim, his construction claim or his estoppel claim, he will have demonstrated that the

financing tap could not in fact be turned off at any time without a breach of contract. Pleasingly, that removes the issue for consideration at this point. If I am satisfied that there are grounds for allowing any of these claims to proceed, then the UCTA point must proceed along with it. If, however, there is no arguable case for allowing any of these claims to proceed, then the position on the UCTA claim will be in the same place as it was before HHJ Saffman. In such a case I must simply accept the finding of the learned judge.

Conclusion

56. For the reasons given above, I would therefore strike out the whole of the DAPOC as disclosing no cause of action, on the basis that the facts as pleaded are wholly insufficient to permit the Court to reach the conclusions in law that would be required for the Claimant to succeed.

57. The listing and joinder issues therefore do not arise.