Neutral Citation Number: [2023] EWHC 1786 (Ch)

Case No: BL-2022-000651

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

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

Date: 27/7/2023

Before:

MASTER CLARK

- -

Between:

VE VEGAS INVESTORS IV LLC **Claimant**

- and -

(1) EVELYN PARTNERS LLP
(formerly known as SMITH & WILLIAMSON LLP)
(2) HENRY SHINNERS
(3) FINBARR O'CONNELL
(4) COLIN HARDMAN
(5) MARK FORD
(the former joint administrators of VE INTERACTIVE LIMITED) **Defendants**

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Barry Isaacs KC and **Lloyd Tamlyn** (instructed by **Clarion**) for the **Claimant**
David Turner KC and **Tom Shepherd** (instructed by **Clyde & Co LLP**) for the **Defendants**

Hearing date: 4 July 2023

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Approved Judgment

I direct that this approved judgment, sent to the parties by email at 10am on 27 July 2023, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

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Master Clark:

1. This is my judgment on the defendants' application dated 8 March 2023.

Parties and the claim

2. For present purposes, the parties and the claim are sufficiently described in the agreed case summary, as set out below.

3. The claims are professional negligence claims brought by the claimant as assignee against the first defendant (Evelyn Partners LLP, known as Smith & Williamson LLP at the material times – "SW") and the second to fifth defendants (licensed insolvency practitioners and partners/directors of SW – "the Administrators").

4. The claims relate to the pre-packaged sale of the business of a company called VE Interactive Limited ("the Company").

5. SW was retained by the Company under an engagement letter counter-signed on 21 April 2017 to provide the services set out in that letter. The Administrators were appointed as administrators of the Company on 25 April 2017, and procured the Company to sell its business to Rowchester Limited, a company connected to the Company's management, later the same day.

6. The claims against SW are for breach of contract (the term implied in the engagement letter to act with reasonable care and skill in providing the services) or its duty in tort to act with reasonable care and skill.

7. The claims against the Administrators are for breach of their common law/equitable duties to act with reasonable care and skill and/or to obtain the best price for the Company's business that circumstances permitted, also for breach of their fiduciary and statutory duties.

8. The claimant claims that by reason of the alleged breaches, the business of the Company was sold at an undervalue and claims damages or equitable compensation.

9. The defendants deny all claims, for the following reasons (summarised in para 3 of the Defence):
   (1) they committed no breach of duty, but acted reasonably in circumstances of extreme urgency and pressure; alternatively
   (2) any such breach of duty caused no loss; alternatively
   (3) the true value of the Company's business was substantially less than the £126 million or £107 million alleged by the claimant.

10. The Administrators were removed from office by an order made on 23 January 2018, and new administrators appointed in their place. The Company entered voluntary liquidation and entered into a Deed of Assignment of the claims dated 6 June 2019.

Application

11. The defendants' application concerns the allegations of breach of duty made in paragraphs 37 and 40 of the particulars of claim:

> "**D. BREACHES OF DUTY BY SW**
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> 37. In acting as pleaded above between 10 April 2017 and 25 April 2017, SW breached the duties as pleaded above.
>
> Particulars of breach of duty
>
> (1) failing to obtain an independent valuation of the Business;
> (2) failing to require the Company to provide and/or to obtain from the Company accurate and/or up-to-date and/or sufficient information such that adequate marketing of the Business could commence on 13 April 2017 or shortly thereafter;
> (3) failing to require the Company to provide and/or to obtain from the Company or at all sufficient information about the identity of potential purchasers of the Business (including, but not limited to, those who had invested in the Company in March 2017 (including Mr Astrachan, Mr Binion and Mr Ranson), the Clerkenwell Consortium and the larger and more wealthy shareholders, referred to in the "Ve Fund Raising Overview 18 April 2017" pleaded at paragraph 18.1 above), the principals of LLC,
> (4) minority owners of the Company's subsidiaries, the Company's operational partners, participants in the same or similar businesses as the Company's, and investors therein, and private equity and venture capital companies) ("**Potential Purchasers**);
> (5) failing to identify **Potential Purchasers**;
> (6) failing to require the Company to provide copies of proposals (such as the Dial Proposal) which were made for investment in the Company; and of communications between the Company and shareholders relating to potential investment in the Company;
> (7) failing to market and/or to cause the Company to market the Business to **Potential Purchasers**;
> (8) failing to carry out the steps SW had identified in the Timeline in accordance with the Timeline or at all, including failing to prepare, agree or issue a teaser document whereby the Company might have been marketed to **Potential Purchasers**, failing to prepare or cause the Company to prepare a dataroom for **Potential Purchasers**, and failing to test the market;
> (9) failing to access market research so as to identify **Potential Purchasers**;
> (10) failing to instruct a business valuer or other intermediary to identify **Potential Purchasers** and/or to market the Business;
> (11) failing to proceed with and/or to ensure that the Company proceeded with an adequate marketing process for the sale of the Business on 13 April 2017 or at all;
> (12) failing to form an independent view as to the appropriate marketing process for the sale of the Business;

(13) failing to require the Company to provide and/or to obtain from the Company in a timely fashion or at all accurate and/or up-to-date and/or sufficient information (including the reviews, plans and forecasts referred to in the 4 April Update and at paragraphs 18.1 and 27.2 above) to enable **Potential Purchasers** to bid for the Business at a level which reflected its true value and/or to assist SW in considering, investigating and pursuing whether steps could be taken to enable the Company to trade for a short period;

(14) failing to identify and/or consider adequately or at all Mr Barrowman's and/or Mr Pearson's interests in and connections with Rowchester and/or the conflicts between the duties they owed to the Company and their interests in purchasing the Business;

(15) allowing Rowchester to be in and/or failing to ensure that Rowchester was not in a preferential position (in relation to, among other things, its access to information about the Company and the Business, and the process relating to the pre-packaged sale of the Business) vis-à-vis other **Potential Purchasers**;

(16) failing to consider, investigate or pursue whether steps could be taken (including but not limited to negotiating with suppliers of essential services to the Company) to enable the Company to continue to trade for a short period and to allow a sale of the Business for its true value."

"**F. BREACHES OF DUTY BY THE ADMINISTRATORS**

40. In acting as pleaded above the Administrators breached the duties as pleaded above.

Particulars of breach of duty

(1) failing to obtain an independent valuation of the Business;

(2) failing to obtain sufficient information such that adequate marketing of the Business could be carried out;

(3) failing to identify **Potential Purchasers** and/or to market the Business to **Potential Purchasers**;

(4) failing to require the Company to provide copies of proposals (such as the Dial Proposal) which were made for investment; and of communications between the Company and shareholders relating to potential investment in the Company;

(5) failing to carry out the steps SW had identified in the Timeline in accordance with the Timeline or at all, including failing to prepare or issue a teaser document whereby the Company might have been marketed to **Potential Purchasers**, failing to prepare a dataroom for interested parties and failing to test the market;

(6) failing to access market research so as to identify **Potential Purchasers**;

(7) failing to instruct a business valuer or other intermediary to identify **Potential Purchasers** and/or to market the Business;

(8) failing to pursue the offer of third-party funding of £3,000,000 to enable the Company to continue to trade for a short period and to allow a sale of the Business for its true value;

(9) failing to consider, investigate or pursue whether other **Potential Purchasers** would provide funding and/or whether other steps could be taken (including but not limited to negotiating with suppliers of essential services to the Company) to enable the Company to continue to trade for a short period and to allow a sale of the Business for its true value;
(10) failing to obtain sufficient information about the identity of **Potential Purchasers**;
(11) failing to carry out an adequate marketing process for the sale of the Business;
(12) failing to form an independent view as to the appropriate marketing process for the sale of the Business;
(13) failing to obtain in a timely fashion or at all accurate and/or up-to-date and/or sufficient information (including the reviews, plans and forecasts referred to in the 4 April Update and at paragraphs 18.1 and 27.2 above) to enable **Potential Purchasers** to bid for the Business at a level which reflected its true value and/or to assist the Administrators in considering, investigating and pursuing whether the Company might continue to trade for a short period;
(14) failing to cause the Company to sell its right, title and interest in the Representative Agreement;
(15) failing to identify and/or consider adequately or at all Mr Barrowman's and/or Mr Pearson's interests in and connections with Rowchester and/or the conflicts between the duties they owed to the Company and their interests in purchasing the Business;
(16) allowing Rowchester to be in and/or failing to ensure that Rowchester was not in in a preferential position (in relation to, among other things, its access to information about the Company and the Business, and the process relating to the pre-packaged sale of the Business) vis-à-vis other **Potential Purchasers**;
(17) selling the Business at an undervalue;
(18) in the premises, failing to market and/or and sell the Business to the standard expected of a reasonable insolvency practitioner."

(emphasis added)

12. As can be seen, para 37(3) introduces "Potential Purchasers" as a defined term. Having done so, the particulars of claim then makes further allegations of breach of duty against SW in respect of Potential Purchasers in para 37(4), (5), (7), (8), (9), (10, (13); and allegations against the Administrators in 40(3), (5), (6), (7) , (9), (10), (13), (16).

13. The Defence alleges that the allegations made in respect of Potential Purchasers are embarrassing for want of particularity.

14. On 29 July 2022 (the date of the Defence), the defendants also made a Request for Further Information ("RFI") which included the following Request (4) for information in respect of paras 37(3) and (4) of the particulars of claim:

"4. Please identify by name which specific individual(s) or entity(ies):

(1) Would have purchased the Business for the alleged "true value" of £107 million or £126 million; alternatively
(2) In respect of whom it is alleged there was a substantial chance of them making such a purchase.

5. Of the specific individual(s) or entity(ies) identified in response to Request 4 above, please state:
(1) When SW should have identified that individual or entity as a potential purchaser;
(2) What specific steps SW should have taken which would have led to that individual or entity being identified;
(3) When that individual or entity would have purchased the Business; and
(4) How that individual or entity would have funded the purchase of the Business."

15. The Claimant's initial response to Request 4 on 2 November 2022 was:

> "The Claimant's claim does not require it to identify such specific individuals or entities. By reason of the Defendants' breaches of duty, the Business was not properly marketed and as a result the Claimant does not know who would have purchased the Business for its true value (or in respect of whom there was a substantial chance they would have purchased the Business for its true value). The Claimant need only prove (i) the existence of a market for the Company's business (in which case the true or market value of the Business would have been paid, had the Business been properly marketed); or (ii) that there was a substantial chance that a purchaser would have paid true value (had the Business been properly marketed). In proving these matters, the Claimant does not need to identify any specific individual(s) or entity(ies) which would have paid true value, nor that there was a substantial chance of them paying true value."

16. In their letter dated 14 December 2022, the defendants' solicitors made the following complaint about that response:

> "it is necessary for your client to identify the specific identities of the alleged Potential Purchasers, so that your client's case can be tested. If your clients cannot, in 2022, identify who the Potential Purchasers were, they would have no business complaining that our clients were negligent in failing to identify them in 2017; further, your clients would have no basis for the claim that any one or more of the Potential Purchasers would have paid £126m (or any other sum) for the Business or that there was a real chance of them doing so. Further, unless and until each of the Potential Purchasers is adequately identified, it is not possible to evaluate how (and whether) our clients should have identified that individual in 2017."

17. On 13 February 2023, the claimant served an amended expanded response to Request 4. It is unnecessary to set it out in full. It begins:

> "This is a request for expert evidence and/or is a request for information which is not reasonably necessary or proportionate to enable the Defendants to understand

the Claimant's case. The Defendants are not therefore entitled to the information sought."

18. A similarly worded response was given in relation to Request 5.

19. The amended responses identify many more persons and business entities as Potential Purchasers, so that the total now identified is 48.

20. In a further letter dated 23 February 2023, the defendants' solicitors complained that:

> "vague categories and descriptors continue to be referred to both in the original definition at paragraph 37(3) and in Amended Reply 4"
>
> and that
>
> "the current position regarding the identity of the "Potential Purchasers" is unsustainable. It renders impossible the task of ascertaining, on a comprehensive basis, who the Potential Purchasers are alleged to have been. It would also enable your client to continually add to the definition as the case progresses, given that the names provided to date are stated to be on an inclusive, not an exclusive basis."

21. The defendants' application falls into two parts, seeking
    (1) orders that
        (i) the claimant identify by name any natural person or entity which it will contend at trial was a Potential Purchaser; and
        (ii) the claimant be barred, without the court's permission, from contending at trial that any other person was a Potential Purchaser.
    (2) an order striking out:
        (i) all of the initial response to Request 4 other than the sentence "By reason of the Defendants' breaches of duty, the Business was not properly marketed";
        (ii) the additions by amendment to that response (set out in para 17 above);
        (iii) the similar passage added by amendment in the response to Request 5;
        (iv) the sentence in the amended response to Request 5 "As regards other Potential Purchasers, this will be the subject of expert evidence."

    Orders in respect of (i) to (iii) are sought on the basis that those passages advance a case not to be found in the particulars of claim, namely one based on the existence of a market (as distinct from naming Potential Purchasers). For that reason, the defendants contended, it should be contained in the particulars of claim itself and not in responses to the RFI. The order in respect of (iv) reflects the first part of the application.

22. The application is supported by the witness statement dated 8 March 2023 of the defendants' solicitor, Penrose Foss, in which she criticises the claimant's use of "broad open-ended categories from which it is not possible to compile a clear list of individuals or entities". Similarly, the defendants' skeleton argument (at para 26) explains that the defendant was seeking an order requiring the claimant to provide a closed list of "Potential Purchasers", because

> "[t]he descriptors which follow the opening wording of paragraph 37(3) (as supplemented by response 4 to the C's Amended Part 18 Response) have been drafted on a sliding scale of specificity. The further along that scale one goes, the harder it is for the defendants to understand the case they have to meet (and the more open the definition of "Potential Purchasers" becomes)"

23. Thus, as the defendants' counsel accepted, a key premise of the application as issued was that the claimant was not entitled to identify Potential Purchasers by the use of a descriptive category of purchasers.

Identifying Potential Purchasers

24. The application was therefore opened on the basis the claimant should be ordered to provide a closed list of Potential Purchasers i.e. all those individuals or corporations the claimant says
    (1) the defendants should have identified; and
    (2) who would have bid for and bought the business at the prices asserted by the claimant.

25. The underlying basis of the application is the defendants' position that the market for the Company was what they refer to a "special market", as opposed to a "general market". This is reflected in their (unagreed) list of issues for trial:

> "11. If SW and/or the Administrators had not acted in breach of duty (as alleged), would (a) Potential Purchaser(s) have bid for, and paid, the alleged true value of the Business [POC 37(12), 40(13), 41]? If yes, which Potential Purchaser(s)?
>
> 12. If SW and/or the Administrators had not acted in breach of duty (as alleged), was there a substantial chance that (a) Potential Purchaser(s) would have bid for, and paid, the alleged true value [POC 37(12), 40(13), 42]? If yes, in respect of which Potential Purchaser(s) was there a substantial chance?"

26. It is inherent in this formulation that to succeed the claimant must identify specific purchasers and show that they would have bid for and paid the price alleged to be the true value of the business or that there is a substantial chance that they would have done so.

27. This may be contrasted with C's formulation of the corresponding issues:

> "9. If SW and/or the Administrators had complied with their duties, would the Business have been sold for its true value [POC 41]?
>
> 10. Did the Company by reason of any breaches of duty by SW and/or the Administrators lose the chance of a sale of the Business at true value [POC 42]?"

28. The defendants' counsel relied upon 3 Scottish decisions: *Dick v Clydesdale Bank* (1991) SLT 678, *Wilson v Dunbar Bank plc* (2006) SLT 775 (Outer House); *Wilson v Dunbar Bank plc* [2008] CSIH 27 in support of the following propositions:

(1) The claimant must plead and prove that a higher price should have been achieved for the business by the Administrators than the price which was achieved;
(2) A claimant could, in such circumstances, plead and seek to prove the existence of particular purchasers who would have been willing to pay a specified amount for the business;
(3) Alternatively, and particularly with a "standard security" (and a normal sale process), a claimant might seek to assert the existence of a general market. If it pleaded such a case, it would then have to make it good.

29. The claimant rejects this distinction and this analysis, as being unsupported by case law (of England and Wales - Scottish decisions being of merely persuasive authority), expert evidence or common sense. Its position is set out in its response to Request 4 of the RFI; and is that it is not required to identify any particular purchaser. Furthermore, it would, it says, be impossible for it to do so, because the defendants' breaches of duties meant that the Potential Purchasers were not identified at the time.

30. Whether a principled and coherent distinction between a special market and a general market can properly be drawn, and, if so, whether the market for the Company's business was special or general are, in my judgment, issues for the trial judge, not issues for me today. The defendants' counsel realistically accepted this in the course of his submissions.

31. The consequence was that the defendants do not pursue that part of the application that restricts the claimant to a closed list of individual persons or entities.

32. The application proceeded on a narrower basis, namely, whether insofar as the claimant relies upon individual Potential Purchasers (as opposed to a category) it should be required to identify those individuals. The defendants do not therefore seek to prevent the claimant from relying upon categories of persons who are Potential Purchasers, provided that all specific individuals or entities intended to be relied upon are identified.

Principles

33. The principles applicable to this part of the application are not contentious, and are set out at paras 30 and 31 of the defendants' skeleton argument.

34. As explained at paragraph 4.7 of the Chancery Guide, citing the judgment of Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) (at [145]-[148]), a statement of case should serve three purposes:
(1) Allowing the opposing party to know what case it has to meet;
(2) Ensuring the parties can prepare properly for trial and that unnecessary costs are not expended chasing points which are not in issue or lead nowhere; and
(3) Operating as a critical audit for the serving party that it has a complete cause of action or defence.

35. In *Towler v Wills* [2010] EWHC 1209 (Comm), Teare J confirmed at [18]-[19] that:
(1) The purpose of a statement of case is to inform the other party of the case against it, so that it may plead to it in response, disclose those of its documents which are relevant to that case and prepare witness statements which support its defence. It is also necessary for the Court to understand the case which is brought so that it

may fairly and expeditiously decide the case and in a manner which saves unnecessary expense.

(2) It is neither fair nor just that a D cannot be sure of the case it has to meet.

Discussion and conclusion

36. The claimant's counsel submitted that since it had pleaded the essential elements of its cause of action, there was no requirement for it to identify Potential Purchasers. However, it has in fact, as noted, identified specific Potential Purchasers; and 7 of the 8 witnesses in its directions questionnaire are described as being a Potential Purchaser. In addition, as noted, in its amended response to Request 5 the claimant states that other Potential Purchasers may be the subject of expert evidence.

37. In my judgment, if and to the extent, however, that the claimant does rely upon individual Potential Purchasers, then it must identify them in its statement of case. This may not be necessary to set out its cause of action (although on the defendants' case it is), but it is necessary to enable the defendants to know the case they have to meet, namely that certain specific individuals or entities were as a matter of fact Potential Purchasers of the Company. As the defendants' counsel submitted, adequate particularisation is more than setting out the essential elements of the cause of action. It is about ensuring that if there is something that might take the defendants by surprise, then it is pleaded, so that they can address it in disclosure and in their evidence.

Striking out

38. As noted, the basis put forward for striking out the relevant passages are that they constitute a new unpleaded "market-based" case, that could and should be in the particulars of claim.

Principles

39. Again, the relevant principles are not contentious: a new claim must be added by amendment to the particulars of claim and cannot be pleaded in a Reply or in a response to a Part 18 Request: *Martlet Homes Ltd v Mulalley & Co Ltd* [2021] EWHC 296; *Costa v Dissociadid Ltd* [2022] EWHC 1934 (IPEC).

Discussion and conclusions

40. The parties' submissions therefore focussed around whether the claimant's case as to the market was unpleaded before its responses to the RFI. As to this, the claimant's counsel relied upon 18 references to "market" or its cognates in para 37 of the particulars of claim. It cannot, in my judgment, be said that reference to and reliance upon the market is only introduced in the claimant's responses.

41. The defendants' position depends on accepting their distinction between a special and a general market, and requiring the claimant to plead which type of market it alleges to be the relevant one. However, the claimant rejects this distinction; and I have held that whether such a distinction can be made is a matter for the trial judge. The claimant cannot in my judgment be compelled to plead its case within a framework which it does not accept. Indeed, it could be said that it is for the defendants to set out the distinction if they wish to rely on it, which they do not currently do in their Defence. I consider therefore that the defendants' criticisms of the passages sought to be struck out are not soundly based and I reject them.