Neutral Citation Number: **[2024] EWHC 3102 (Ch)**

Claim No: BL-2021-002200

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

DEPUTY MASTER HENDERSON
16th January 2025

B E T W E E N :

HASSAN KADHIM ALI

Claimant

-and-

(1) AMAR HUSSAIN
(2) AUTOTRADE LONDON LIMITED
(3) AFH PROPERTIES LIMITED
(4) 185 PARK AVENUE LIMITED
(5) AMAL REDA
(6) ANWAR GHALEB (also called ANOR GALB AHMED ALMOSOY)
~~(7) MR FALAH ABDULHUSSEIN RADHI ALHILFI~~

Defendants

Counsel and solicitors:

The Claimant represented by Mr Benjamin Fowler, instructed by Eldwick Law.
The 1st to 6th Defendants represented by Mr Gideon Roseman, instructed by Allied Goodwin.

Hearing Date: 16th September 2024.
Judgment handed down by email to the parties' solicitors and by release to the National Archives: 16th January 2025.

JUDGMENT

1. This is my judgment on an application by the Claimant dated 13th March 2024 for permission to Re-Re-Amend his Particulars of Claim.

2. There is a witness statement dated 13 March 2024 in support of the application made by Ms Jenna Kruger who is a solicitor and partner in the solicitors' firm which is acting for the Claimant.

3. There is a witness statement in response dated 9 September 2024 made by the 1st Defendant.

4. The Part 7 Claim Form was issued on 6th December 2021. There has yet to be a Case Management or a Costs and Case Management hearing. There have been no orders for disclosure, exchange of witness statements or trial dates.

5. The essence of the Claimant's claim is that he is the sole beneficial owner of 6 properties and the beneficial co-owner with Mr Husham Kadhim of one property. The properties are registered in the names of one or other of the 2nd, 3rd and 4th Defendant companies, as follows:
   5.1. 187, Brent Crescent. The freehold is registered in the name of the 2nd Defendant ("Autotrade"). The Claimant claims that this property is held by Autotrade on trust for himself and Mr Husham Kadhim as its sole beneficial owners.
   5.2. Flat 77 Queen's Wharf. The relevant interest is a leasehold interest. This interest is registered in the name of the 3rd Defendant ("AFH Properties"). The Claimant claims that this property is held by the 3rd Defendant on trust for the Claimant as its sole beneficial owner.
   5.3. Unit 2, Cosgrove House. The relevant interest is a leasehold interest. This interest is registered in the name of the 3rd Defendant. The Claimant claims that this property is held by the 3rd Defendant on trust for the Claimant as its sole beneficial owner.
   5.4. Flat 70, Abbotsford Court. The relevant interest is a leasehold interest. This interest is registered in the name of the 3rd Defendant. The Claimant claims that this property is held by the 3rd Defendant on trust for the Claimant as its sole beneficial owner.
   5.5. 50, Park Avenue North. The relevant interest is a freehold interest. This interest is registered in the name of the 3rd Defendant. The Claimant claims that this property is held by the 3rd Defendant on trust for the Claimant as its sole beneficial owner.
   5.6. 185 Park Avenue. The relevant interest is a freehold interest. This interest is registered in the name of the 4th Defendant ("185 Park Avenue Ltd"). The Claimant claims that this property is held by the 4th Defendant on trust for the Claimant as its sole beneficial owner.
   5.7. 172, Brent Crescent. The relevant interest is a leasehold interest. This interest is registered in the name of the 2nd Defendant. The Claimant claims that this property is held by the 4th Defendant on trust for the Claimant as its sole beneficial owner.

6. In the Claim Form the Claimant also claimed an account of all sums received and expended on the properties; an order vesting legal title to the properties in him; compensation for breach of trust; payment of all sums allegedly payable to the Claimant in respect of loans made by the Claimant or money had and received from the Claimant by the Defendants; and interest.

7. Subject to its possible Re-Re-Amendment, the current version of the claim is set out in Re-Amended Particulars of Claim dated 2nd, 4th or 7th September 2022 (the handwritten numeral for the day is unclear). In summary, and focussing on the parts which directly relate to the proposed Re-Re-Amendments which are in issue, the case alleged in the Re-Amended Particulars of Claim is as follows:
   7.1. In 2012 the 1st Defendant conducted a used car business at 172 Brent Crescent through Autotrade under an informal sub-lease from Auto Capital Ltd.

7.2. The Claimant paid the 1st Defendant or Autotrade £55,000 to buy out such rights, if any, as they had to occupy the premises and paid £180,000 to repair and improve the premises on the agreed basis that the Claimant owned the business, that the 1st Defendant would manage the business and that the Claimant and the 1st Defendant would share the profits equally.

7.3. In the event there were no profits and, by the end of 2012, the Claimant and the 1st Defendant agreed to abandon the business. Thereafter the Claimant rented the property out to tenants, taking the rents, but entrusting the 1st Defendant to collect the rents on the Claimant's behalf and account for them to him.

7.4. The purchase of 187 Brent Cresent was agreed by the Claimant, the 1st Defendant and Mr Husham Kadhim (together "the Investors") at a meeting at 67 Praed Street in around November 2015. The terms alleged in paragraph 8(2) of the Amended Particulars of Claim to have been agreed included:

> (ii) The 1st Defendant would, as agent acting on behalf of the Investors, deal with all the business of negotiating and completing the purchase of the property, including the negotiation and completion of suitable mortgage finance;
>
> (iii) The costs of the purchase (so far as not provided by mortgage finance) would be provided one-third each by each of the Investors;
>
> (iv) The purchase and the mortgage would be in the name of Autotrade which would hold 187 Brent Crescent as nominee for the Investors;
>
> (vii) The 1st Defendant as agent acting on behalf of the Investors would manage the property generally including its letting, the collection of rent, all dealings with the mortgagee, and the payment of the costs of holding the investment, and pay the Investors what they were respectively entitled to in respect of the net profits.

7.5. The Claimant later came to understand that the 1st Defendant's contribution was paid by Mr Anwar Ghaleb, the 6th Defendant.

7.6. From August 2015, the Claimant and the 1st Defendant adopted a practice whereby the Claimant paid money to the 1st Defendant or to Autotrade or to AFH Properties (or allowed the 1st Defendant to retain rental money that belonged to the Claimant) at irregular intervals and in varying amounts, on trust to retain and subsequently to apply the same ('the Investment Fund') for the Claimant: (i) in such property investments as the Claimant might direct; (ii) in paying the costs of holding the Claimant's property investments; (iii) otherwise to the Claimant's order.

7.7. Not less than £237,000 of the Investment Fund was applied in the purchase of 187 Brent Crescent.

7.8. On 18 February 2016 Autotrade purchased 187 Brent Crescent at a total cost of £1,314,781.40 net of VAT, of which £659,435 was provided by Lloyds Bank and secured by a mortgage.

7.9. On completion of the purchase, 187 Brent Crescent was held on constructive trust for the Investors, save that, if the 6th Defendant provided the 1st Defendant's share of the purchase monies, the 1st Defendant would have held his interest on resulting sub-trust for the 6th Defendant.

7.10. On or about 12 March 2016 a deed dealing with the Investors' interests in 187 Brent Crescent ("the 187 Brent Crescent Deed") was signed by the 1st

Defendant for Autotrade, the Claimant and the 6th Defendant. The Claimant does not know who else, if anyone, has signed the 187 Brent Crescent Deed.

7.11. By the 187 Brent Crescent Deed:

(1) Autotrade declared itself to be the trustee of 187 Brent Crescent, holding the same and its income [the Defendants point out that the deed does not refer to income] on trust as to:
33% for the Claimant;
33% for Mr Husham Khadim;
24% for the 6th Defendant;
9% for the 5th Defendant;
1% for the 1st Defendant.

(2) Mortgage payments and all other outgoings were to be met by the beneficiaries in equal shares.

(3) In the event that the property was sold, the 1st Defendant was to have the first right of refusal.

7.12. By assuming responsibility for letting and managing 187 Brent Crescent and/or pursuant to an implied contractual agency, the 1st Defendant (at all times since February 2016) as agent owed the Claimant a contractual and/or a common law duty to manage 187 Brent Crescent with the skill and care to be expected of a reasonably competent and prudent managing agent (paragraph 18 of the Re-Amended Particulars of Claim).

7.13. The 1st Defendant, as agent and/or Autotrade (at all times since 12 March 2016) as trustee, have owed fiduciary duties to the Claimant (paragraph 18A of the Re-Amended Particulars of Claim).

7.14. "By reason of those said contractual, common law and/or fiduciary duties," (paragraph 18B of the Re-Amended Particulars of Claim) the1st Defendant and/or Autotrade were bound to do the following:

(1) To let and so far as reasonably practicable keep 187 Brent Crescent let to a suitable tenant paying the best rent reasonably obtainable on the open market;
(2) So far as possible, to collect the rents and all sums payable by the Autotrade Beneficiaries from time to time and to apply the same, as and when received, in (i) paying the sums due under the Lloyds Bank mortgage and/or any other mortgage debt charged on 187 Brent Crescent, as and when payable or so soon thereafter as reasonably practicable (ii) paying all other outgoings payable by Autotrade in respect of 187 Brent Crescent as and when payable or so soon thereafter as reasonably practicable;
(3) To manage 187 Brent Crescent as an investment with reasonable skill and care and in the best interests of the Claimant and each of the other Autotrade Beneficiaries (so long as having or retaining a beneficial interest);
(4) To keep the Claimant regularly and promptly informed as to (i) the gross rents received out of 187 Brent Crescent (ii) how those gross rents have been applied (iii) the amounts of the sums payable in respect any mortgage debt charged on 187 Brent Crescent (iv) the amounts of all other outgoings (v) the amounts payable, and paid, by each of the Autotrade Beneficiaries respectively under clause 3A of the 187 Brent Crescent Deed (vi) how the amounts paid by each of the Autotrade Beneficiaries have been applied;

(5) Promptly to warn the Claimant and each of the other Autotrade Beneficiaries (so long as having or retaining a beneficial interest) if the rental income or other money available to the 1st Defendant and/or Autotrade for the purpose was or was likely to be insufficient to pay as and when payable the sums due under the Lloyds Bank mortgage and/or any other mortgage debt charged on 187 Brent Crescent, so as to afford them a proper opportunity to make appropriate arrangements for the management of the mortgage debt;
(6) To distribute to the Claimant or otherwise to account to him at least annually for his share of the net profits attributable to 187 Brent Crescent;
(7) To provide on demand copies of all relevant vouchers and other documentary proofs of payment or liability affecting 187 Brent Crescent;
(8) To provide on demand copies of all tenancy agreements affecting 187 Brent Crescent; and
(9) To provide on demand copies of all mortgage deeds, mortgage statements and correspondence with any mortgagee, in respect of any mortgage of 187 Brent Crescent.

7.15. The 1st Defendant represented that he was selling and intended to sell to the Claimant his and the 6th and 7th Defendants' beneficial interests in 187 Brent Crescent. Between March 2018 and July 2018 the Claimant paid £227,467.12 to the 6th Defendant which included £153,467.13 of £248,949. The Claimant paid the £248,949 to the 1st Defendant (or Autotrade) on trust to pay £153,467.13 to the 6th Defendant and the balance to KSEYE Group Limited ("KSEYE"), then a mortgagee of 187 Brent Crescent, in reduction of mortgage arrears and/or otherwise due (according to the 1st Defendant) in respect of property expenses. The consequences were:

7.15.1. On or about 1st May 2018, the 6th, 1st and 7th Defendants sold their combined interest in 187 Brent Crescent to the Claimant so that the Claimant became entitled to a 67% beneficial share and Mr Husham Kadhim remained entitled to 33%.

7.15.2. Alternatively, the parties' beneficial interests under the alleged constructive or resulting trusts were varied as that Autotrade held 187 Brent Crescent on trust for the Claimant as to 67% and Mr Husham Kadhim as to 33%.

7.15.3. Alternatively, the Claimant had financial claims against the 6th and 1st Defendants and, possibly, Autotrade.

7.16. In January 2018 AFH Properties bought 77, Queen's Wharf as the Claimant's nominee using money provided directly or indirectly by the Claimant together with a mortgage of £424,600 provided by Kent Reliance (a trading name of OneSavings Bank Plc).

7.17. In March 2018 AFH Properties bought Unit 2, Cosgrove as the Claimant's nominee using money provided directly or indirectly by the Claimant together with a mortgage of £290,880 provided by KSEYE.

7.18. As a consequence and as a consequence of the 1st Defendant's involvement with the purchases:

7.18.1. AFH Properties acquired 77, Queens Wharf and Unit 2, Cosgrove as nominee and/or constructive trustee for the Claimant "in accordance with [the Claimant's and the 1st Defendant's shared intention (such

intention also to be attributed or imputed to [AFH Properties] or of which [AFH Properties] had knowledge)."

7.18.2. Alternatively, AFH Properties acquired 77, Queens Wharf and Unit 2, Cosgrove as resulting trustee for the Claimant "or in such other proportions as the Court may determine."

7.18.3. In either event, and since their respective dates of acquisition, the 1st Defendant and AFH Properties have owed to the Claimant in relation to 77, Queens Wharf and Unit 2, Cosgrove "the same duties (mutatis mutandis) as owed by" the 1st Defendant and Autotrade in relation to 187 Brent Crescent.

7.19. In or about April 2018 the Claimant agreed with the 1st Defendant that the Claimant would buy 70 Abbotsford Court on the same basis as that applicable to his purchase of 77 Queens Wharf and Unit 2 Cosgrove. The total cost was £535,098.99, of which £374,975 was provided by a mortgage loan from Kent Reliance. 70 Abbotsford Court was purchased in the name of AFH Properties.

7.20. In or after June 2018 the Claimant agreed with the 1st Defendant that the Claimant would buy 50 Park Avenue. The total cost was £837,341.12, of which £587,883.01 was provided by a mortgage loan from Kent Reliance. 50 Park Avenue was purchased in the name of AFH Properties.

7.21. On 1 November 2018 AFH Properties, acting by the 1st Defendant, executed 3 deeds declaring itself to be holding Unit 2 Cosgrove, 70 Abbotsford Court and 50 Park Avenue on trust for the Claimant.

7.22. On 10 September 2019 185 Park Avenue Ltd purchased 185 Park Avenue at a total cost of £2,161,678.20 of which £1,122,070 was provided by a mortgage from KSEYE. The Claimant provided the cash balance of £982,430 by instructing the 1st Defendant to pay that sum out of the Investment Fund.

7.23. On 31 May 2019, Autotrade took a lease of 172 Brent Crescent. The costs of acquiring the lease were £17,851.58. These were paid by the Claimant by his directing the 1st Defendant to pay that amount out of the Investment Fund, on the footing, agreed by the 1st Defendant on behalf of himself and [with] the Claimant, and Autotrade, that:

7.23.1. Autotrade took its lease of 172 Brent Crescent as nominee and trustee for the Claimant.

7.23.2. The rents arising from the sub-tenancies of 172 Brent Crescent continued to belong to the Claimant.

7.23.3. The 1st Defendant as the Claimant's agent, would continue to manage the premises, including their letting to sub-tenants, and would continue to collect the rents on the Claimant's behalf and account for them to him.

7.24. As part of an agreement in writing reached between the Claimant and the 1st Defendant on 28 May 2020, the 1st Defendant agreed to provide the Claimant with full accounts and to hand over the management of Autotrade, AFH Properties and 185 Park Avenue Ltd to the Claimant.

7.25. On or about 6 June 2020 the 1st Defendant agreed that the Claimant should be given the Companies House authorisation codes for the companies and the

Claimant was able to cause his directorship of all three companies to be recorded there.

7.26. In June – August 2020 the Claimant discovered that the companies were in default of their mortgage obligations to KSEYE; that AFH Properties was in default of its obligations to OneSavings Bank; and that the mortgagees were threatening to appoint LPA receivers.

7.27. On 4 August 2020 KSEYE appointed LPA receivers in respect of 187 Brent Crescent, Unit 2 Cosgrove and 185 Park Avenue. On 26 August 2020 OneSavings Bank appointed LPA receivers in respect of 77 Queens Wharf.

7.28. The failures to comply with the mortgage obligations were caused or permitted by the 1st Defendant.

7.29. As a result of the defaults the rates of interest payable were increased; default fees were incurred and the risk arose that LPA receivers would be appointed.

7.30. The 1st Defendant caused or permitted the companies to be in default of their obligations to GN Sons with consequent adverse effects on the rate of interest payable and the appointment of LPA receivers on 3 March 2022. [The Re-Amended Particulars of Claim do not explain how GN Sons came to be mortgagees].

7.31. The defaults and their consequences would not have occurred if the 1st Defendant had kept the Claimant informed of the amounts due to the mortgagees from time to time.

7.32. The Claimant claims damages against the 1st Defendant "for breach of contract and/or negligence".

7.33. In spite of repeated requests the 1st Defendant and the companies have failed to provide accounts or to keep the 1st Defendant informed about the financial terms of the facility agreement from GN Sons Limited.

7.34. On 24 May 2021 the 1st Defendant unlawfully removed the Claimant as director of the companies.

7.35. The Claimant claims repayment from the 1st Defendant of various sums lent to him by the Claimant.

8. In broad terms the Defence is to the following effect:

8.1. As regards 187 Brent Crescent, the Claimant, Mr Husham Kadhim and Autotrade (acting by the 1st Defendant) entered into an agreement to acquire the property in Autotrade's name, with each of the parties contributing 1/3 of the costs of the same.

8.2. Notwithstanding the said agreement, subsequent to Autotrade completing its purchase, the Claimant stated he could not afford to pay his 1/3 share, which led to the 1st Defendant agreeing to lend the Claimant the relevant sum for his share.

8.3. The parties' rights in relation to 187 Brent Crescent are limited to those set out in the 187 Brent Crescent Deed and at no time has the 1st Defendant personally assumed any responsibility for that property.

8.4. The Defendants deny that there was an agreement made on 28 May 2020.

8.5. Save for £13,000 which was paid to the 1st Defendant prior to Autotrade's completion of the purchase of 187 Brent Crescent, the Defendants deny having received any monies whatsoever from the Claimant otherwise than by way of repayment of loans made by them to him.

8.6. As regards the alleged loans made by the Claimant to the 1st Defendant, the 1st Defendant denies having received any monies from the Claimant.

9. By a counterclaim the three companies:
   9.1. Make claims in respect of the Claimant's allegedly unlawful removal of the 1st Defendant as director; in respect of the Claimant excluding the 1st Defendant from control of the companies; and in respect of the Claimant having assumed control of the companies.
   9.2. Seek damages by reason of the Claimant's conduct having prevented the companies from being able to refinance various loan agreements and an account as regards the Claimant's dealings with the rental income from the various properties.

10. The issue of the Claim Form was preceded by the hearing of an application dated 1st July 2021. The application of 1st July was an application by the Claimant for:
    10.1. An interim injunction preventing the 1st Defendant from selling or dealing with or disposing of the shareholdings in and ownership of Autotrade, AFH Properties and 185 Park Avenue Ltd, and from dealing with or disposing of the directorships of those companies.
    10.2. Interim injunctions preventing the 1st Defendant, his servants or agents, from selling or disposing of 185, Park Avenue, Unit 2, Cosgrove House and 187 Brent Crescent.

11. The application dated 1st July 2021 was heard by Joanna Smith J on 12th July 2021. At that stage the Claim Form had not been issued and the only two parties named as such in the documents were the Claimant as intended Claimant and the 1st Defendant as the intended sole Defendant.

12. A copy of Joanna Smith J's approved judgment of 12th July 2021 is in the Hearing Bundle.

13. In her judgment Joanna Smith J said that it appeared to be common ground between the parties that the 1st Defendant had acted as the Claimant's manager and representative in respect of investments in property through the three companies. She said it also appeared to be common ground that when the three companies were first established, the 1st Defendant was the sole director and shareholder of the companies.

14. There was no draft Claim Form or draft Particulars of Claim before Joanna Smith J on 12th July 2021, despite the fact that the application had been issued 11 days earlier on 1st July. In her judgment Joanna Smith J said that Mr Rifat's (the Claimant's then counsel) only real explanation for the delay in issuing a claim form appeared to be that he had only been instructed within the last 9 days and that it had been unclear what the precise nature of the claim was going to be. She said that Mr Rifat suggested in submissions that further disclosure would be required in order to establish the claim, albeit that when she pointed out that he would be required to issue a claim form almost immediately if he obtained an injunction, he backtracked from that, saying that the case involved serious allegations of

fraud and that his instructions were in his view, sufficient to enable him to plead that fraud.

15. Joanna Smith J held that on the evidence before her there was a serious question to be tried in respect of what she described as the "key complaint". That was a proprietary claim to be brought by the Claimant against the 1st Defendant in respect of the ownership of the companies and the properties. However, Joanna Smith held that "on the face of things" damages would be an adequate remedy if she did not grant an interim injunction and that the cross-undertaking in damages offered by the Claimant was wholly unsatisfactory. She refused the application for the interim injunction on those grounds.

16. By her order dated 12th July 2021 Joanna Smith J ordered that the application be dismissed and that the Claimant pay the 1st Defendant's costs of the application summarily assessed at £15,000 inclusive of VAT, to be paid within 14 days.

17. The Claim Form was issued 5 months later.

18. The Particulars of Claim are dated 21st December 2021. The Particulars of Claim added, additionally to the relief sought in the Claim Form, claims for a declaration that the Claimant is the sole lawful director of the three companies; the appointment of a receiver in respect of each of the properties; various enquiries and accounts; damages in negligence against the 1st Defendant; an order for provision of copies of tenancy agreements and other documents; payment by the 1st Defendant of £44,662.98 in debt; as an alternative to the declaration sought in respect of 187 Brent Crescent, repayment by the 6th Defendant of £69,000 together with part of £195,000; repayment by the 1st Defendant of so much of the £195,000 as he did not pay to the 6th Defendant and an enquiry and account as to what is due to the Claimant from the 1st, 5th and 6th Defendants in respect of their obligations under clause 3A of a deed called the 187 Brent Crescent Deed and payment of the amount found due. The claim for compensation for breach of trust which appears in the Claim Form was not included in the Particulars of Claim.

19. On 10th March 2022 Deputy Master Glover made an order in this claim and in a claim brought by Mr Falah Alhilfi and Omniat Al Mostaqbal Trading FZCO (Claim No. BL-2021-001241 – "the Alhilfi Action") which also concerned the properties. The Deputy Master ordered, amongst other things that:
    19.1. The two cases be case managed and tried together.
    19.2. Mr Falah Alhilfi be joined as a 7th Defendant to this claim.
    19.3. By 12 noon on 16th March 2022, "the Claimants on each of the Alhilfi Action and the Hassan Ali Action shall file and serve Particulars of Claim, or draft Amended Particulars of Claim, naming the additional defendant."

20. On 15th March 2022 the Claimant purported partly to respond to a lengthy Part 18 Request by the 1st – 6th Defendants dated 16 February 2022. I say "purported partly to respond" because, despite Deputy Master Glover having, on 10 March 2022, ordered the Claimant to serve his responses to the Part 18 Request by 12 noon on 15 March 2022,

many of the responses given in the 15 March 2022 document were "not entitled" or "this is not a proper request" or words to similar effect.

21. On 19th March 2022 Deputy Master Smith, amongst other things:
    21.1. Recited in his order of that date that the Defendants by their counsel stated their intention by 4pm on 29 March 2022 to make an application under CPR Part 18 ("the Part 18 Application") in relation to their Part 18 Request dated 16 February 2022 ("the Part 18 Request").
    21.2. An application by the Defendants be adjourned and be heard together with the Part 18 Application; and that the Claimant should be entitled at that hearing and without the need for any new application notice to apply for an unless order in respect of the Defendants' Defence.
    21.3. The Defendants do file their Defence by 4.00 pm on 29 March 2022 unless they filed and served the Part 18 Application before then.

22. On 1st July 2022 the Claimant made a further response to the Part 18 Request.

23. The Amended Particulars of Claim are dated 4th July 2022. They are headed "Amended Particulars of Claim pursuant to the order of Deputy Master Glover dated 10 March 2022 and by consent under CPR 17.1(2)(a)". So far as the relief claimed is concerned, these Amended Particulars of Claim:
    23.1. Refined the claim in respect of 187 Brent Crescent by specifying the beneficial shares in which it was alleged to be held by Autotrade as 67% for the Claimant and 33% for the 1st Defendant.
    23.2. Added a claim for an order that the 1st Defendant, Autotrade, AFH Properties and/or 185 Park Avenue Ltd do all reasonably necessary to permit the 1st Defendant's directorships to be recorded at Companies House.
    23.3. Removing the claim for the appointment of a receiver in respect of the properties.
    23.4. Adding an alternative claim, at the Claimant's election, for tracing in respect of the "Investment Fund" monies.
    23.5. Adding a claim that in the alternative that Mr Alhilfi is also beneficially interested in any of the properties, an order requiring Autotrade, AFH Properties and 185 Park Avenue Ltd to reimburse the Claimant as surety for any payments made by him as surety under a specified guarantee.
    23.6. An order requiring Mr Alhilfi to account in equity to the Claimant for a proportion of various sums alleged by the Claimant to have been paid by him to discharge or manage borrowing secured on the properties.

24. The Part 18 Application came on for hearing before Deputy Master Marsh on 22 July 2022. Deputy Master Marsh ordered, amongst other things, that:
    24.1. By 4.00pm on 29 July 2022, the Claimant do serve on the Defendants a response fully complying with paragraphs 2.1 to 2.4 of the Practice Direction to CPR 18 to all the questions set out in the Schedule to the order, save that, in respect of paragraph 2 of the Schedule, the Claimant might serve by 29 July

2022, a Re-Amended Particulars of Claim instead of providing further information in respect of that paragraph.

24.2. By 4.00pm on 16 September 2022, the Defendants do file and serve a Defence.

24.3. The Claimant do pay 50% of the Defendants' costs of the Part 18 Application, summarily assessed at £15,000 plus VAT and the £275 court fee, making net sums due and ordered to be paid by 4 pm on 12 August 2022 of £7,500 plus VAT and £137.50.

25. The Requests set out in the schedule to Deputy Master Marsh's order of 22nd July 2022 were:

    1. In relation to paragraph 8(2) of the Particulars of Claim which alleged an agreement between the Claimant, the 1st Defendant and Mr Husham Kadhim to invest in 187 Brent Crescent:

        Whether the agreement was made orally, what were the contractual words used, who stated them, to whom were they stated and when and where they were spoken.

    2. In relation to paragraph (9) of the prayer for relief in the Particulars of Claim, which claimed damages against the 1st Defendant in negligence, to be assessed, that the Claimant "clarify and provide full particulars" as to:

        (i) What duty of care the 1st Defendant is said to have owed the Claimant;

        (ii) How the 1st Defendant is said to have breached the said duty, including the date of any breach; and

        (iii) What heads of loss, regardless of quantum, the 1st Defendant's alleged breach of duty has caused the Claimant.

    3. In relation to paragraph (13) of the prayer for relief in the Particulars of Claim, which claimed interest, that the Claimant:

        Clarify and provide full particulars as to the jurisdictional basis for the claim to interest.

26. The Claimant's response to those requests was served on 29 July 2022.

27. On 29 July 2022 Deputy Master Marsh made an order which appears to relate to the Alhilfi Action.

28. The Claimant's response to request 1 was to state, amongst other things, that:

    28.1. The agreement was made orally in around August 2015 at 67 Praed Street.

    28.2. At the meeting were the Claimant, the 1st Defendant and Mr Husham Khadim.

    28.3. Contrary to what was stated in paragraph 8(2) of the Particulars of Claim, the 6th Defendant was not present at the meeting and the Claimant was not aware at that time that the 6th Defendant was to have or did have an interest in 187 Brent Crescent.

29. The Claimant's response to request 2 was to refer the Defendants to the draft Re-Amended Particulars of Claim served with the response.

30. The Claimant's response to request 3 was to refer to s.35A Senior Courts Act 1981 and to the Court's equitable jurisdiction.

31. On or after 2nd, 4th or 7th September 2022 the Re-Amended Particulars of Claim were served.

32. On or after 31 October 2022 a Defence and Counterclaim was served on behalf of the 1st to 6th Defendants. I was not taken to any Defence of Mr Alhilfi.

33. On or after 9 January 2023 a Reply and Defence to Counterclaim was served.

34. On 8 November 2023 Deputy Master Linwood made a consent order in the Alhilfi Action and in these proceedings. He ordered by consent that:
    34.1. The Alhilfi Action and these proceedings be forthwith case managed and tried separately.
    34.2. The name of the 7th Defendant in these proceedings (Mr Alhilfi) be removed from these proceedings.
    34.3. The costs of the application for the consent order be costs in the case in these proceedings.

35. I interpret the second of those orders as an order that Mr Alhilfi be removed as a party to these proceedings.

36. Despite the claim having been started as long ago as 2021 there has still not been a Costs and Case Management Conference; the claim has not been listed for trial. There has been no order for extended disclosure. There has been no order for witness statements. These considerations cut both ways, though in my view overall they mitigate in favour of allowing amendments at this stage of the litigation.

37. On the one hand there has been serious delay in the prosecution of the claim. A substantial part, though not all of that delay can be laid at the door of the Claimant. That is illustrated by the fact that of the many outstanding requests for further information on 22 July 2022, Deputy Master Marsh only ordered responses to three of them and only awarded the Defendants 50% of their costs of the Part 18 Application. On the other hand, allowing the proposed Re-Re-Amendments to the Particulars of Claim should not, subject to the possible exception mentioned below, prejudice the future case management of the proceedings or a trial date greatly or at all. Subject to that possible exception, any such prejudice should be limited to what, in the context of the existing delay, should be the insignificant delay, if any, to any procedural timetable which may result from having to wait for service of amended pleadings before further procedural steps can be taken. This last should be insignificant and may not occur because a CCMC has yet to be fixed and, by the time of the CCMC, any Re-Re-Amendments which I might allow and any consequential amendments to subsequent pleadings are likely to have been made.

38. The possible exception to the allowing of the proposed Re-Re-Amendments not prejudicing the future case management of the proceedings or a trial date greatly or at all,

would arise if, by reason of my allowing certain of the proposed Re-Re-Amendments, it became necessary for Mr Husham Kadhim to be added as a party or if I was only to permit those Re-Re-Amendments on terms that Mr Husham Kadhim was added as a party. The addition of Mr Husham Kadhim as a party would be likely to delay the time table to trial while he is joined and any relevant pleadings by him or in response to his pleadings are served. Having an additional party is also likely generally to add to the complications and costs of the case.

39. In his statement dated 9 September 2024 the 1st Defendant refers to costs orders made against the Claimant, none of which he complied with until after the threat was made to have the claim struck out. Specifically:
    - 39.1. On 12 July 2021 Joanna Smith J ordered the Claimant to pay £15,000 costs to the 1st Defendant within 14 days.
    - 39.2. On 22 July 2022 Deputy Master Marsh ordered the Claimant to pay £9,165 costs.
    - 39.3. On 12 September 2022 the Defendants applied for an order that unless the Claimant complied with the costs orders of 12 July 2021 and 22 July 2022 within 14 days of the determination of the application, the claim be struck out with costs.
    - 39.4. On 27 January 2023 Adam Johnson J ordered the Claimant to pay the 1st Defendant £7,080 costs in respect of an application for an interim injunction.
    - 39.5. On 9 March 2023 HH Judge Klein ordered the Claimant to pay the 1st Defendant £6,024 costs + £33,774 costs, a total of £39,798 by 4 pm on 25 March 2023.
    - 39.6. On 17 July 2023 the Defendants applied for an order that unless the Claimant complied with the costs orders of 9 March 2023 within 14 days of the determination of the application, the claim be struck out with costs.

40. I was not taken to the evidence of the dates of payment, but the immediately foregoing paragraph shows that there were 4 costs orders which were not complied with for several months and not until after the Defendants had applied for unless orders in respect of their payment. I refer to these collectively as "the Claimant's Late Payments of Costs".

41. In his statement dated 9 September 2024 the 1st Defendant says that he incurred costs in defending the Re-Amended Particulars of Claim "in the region of" £30,000 and that the Defendants will most likely incur those costs again, if not more, in filing and serving an Amended Defence.

42. There was no real dispute between the parties on the law and practice as to amendment of pleadings.

43. CPR 17.1(2)(b) provides that a party may amend a statement of case with permission of the court.

44. In a case such as this where the proposed amendments are not "late" in the sense that they are made before any steps subsequent to pleadings have been taken or ordered and no trial

date has been fixed, the guidance given by O'Farrell J in *The Front Door (UK) Limited v The Lower Mill Estate Limited* [2021] EWHC 2324 at paragraph 29 is apposite:

> "On an application by a party to amend its pleading, where there is no issue of lateness or adverse impact on the trial date, the principles can be summarised as follows (see the White Book notes at paragraphs 17.3.5 and 17.3.6):
>
> i) When deciding whether to grant permission to amend, the court must exercise its discretion having regard to the overriding objective.
>
> ii) Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.
>
> iii) Although the court will have regard to the desirability of determining the real dispute between the parties, it must also deal with the case justly and at proportionate cost, which includes (amongst other things) saving expense, ensuring that the case is dealt with expeditiously and fairly, and allocating to it no more than a fair share of the court's limited resources.
>
> iv) An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success: *SPR North Ltd v Swiss Post International (UK) Ltd* [2019] EWHC 2004 (Ch). 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. 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. In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*."

45. Extracts from note 17.3.6 of the White Book which are particularly relevant to the present application are as follows (my grammatical amendments to the note are in square brackets):

> "A proposed amendment must be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence that establishes a factual basis for the allegation: see *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18]. However, for the amendment to be allowed it must be shown to have "a real prospect of success"[~~, as~~] [This] draws upon the test for summary judgment. Distinction is sometimes drawn between whether the amendment: (i) introduces a new claim or alternatively (ii) provides further particulars, based on factual material, in support of an existing pleaded point. It is clear that the former will not be permitted if the new allegation carries no reasonable prospect of success. There is support for the proposition that the latter should not invite an assessment whether the particulars have a real prospect of success, these being matters for trial. See *Phones 4U Ltd (In Administration) v EE Ltd* [2021] EWHC 2816 (Ch) at [11], as followed HH Judge Eyre QC (as he then was), sitting as a judge of the High Court, in *Scott v Singh* [2020] EWHC 1714 (Comm) at [19] (the summarised principles in which were approved by the Court of Appeal in *CNM Estates (Tolworth Tower) Ltd v Simon Peter Carvill-Biggs Freddy Khalastchi* [2023] EWCA Civ 480) and *JFC Plastics Ltd v Motan Colortronic Ltd* [2019] EWHC 3959 (Comm) at [14] and [34]. However, in *Gerko v Seal* [2023] EWHC 63 (KB) the court expressed "slight scepticism" (at [190]) as to the existence of a "rule" that additional particulars do not have to meet a real prospect of

success, giving reasons why such rule, if it exists, must have very limited scope. Even if an amendment does not present a new cause of action or defence, it should still properly be subject to considerations of the overriding objective and case management powers and so irrespective of any "rule" displacing a test of prospect of success.

Real prospect must focus [~~must be~~] on the pleaded case rather than supporting evidence and conclusions that might be drawn based on that evidence. The court should avoid conducting a mini-trial and factual averments should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable: *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3; [2021] 1 W.L.R. 1294 at [107]. Once an amendment clears the hurdle of prospects of success, it is generally not appropriate to still consider the strength or weakness of the claim as a factor relevant to the residual exercise of discretion: see *CNM Estates (Tolworth Tower) Ltd v Simon Peter Carvill-Biggs Freddy Khalastchi* [2023] EWCA Civ 480 at [49] and [69] to [77].

The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation. See *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329; [2008] 1 W.L.R. 643 (a set aside case), *Carey Group Plc v AIB Group* (UK) Plc [2011] EWHC 594 (Ch) and *Shah v HSBC Private Bank (UK) Ltd* [2011] EWCA Civ 1669; [2012] Lloyd's Rep. F.C. 337.

46. In *Carey Group Plc v AIB Group* (UK) Plc [2011] EWHC 594 (Ch):

46.1. The Claimant applied for permission to amend its claim after judgment had been handed down striking it out.

46.2. In the judgment which he had handed down Briggs J had concluded that an overdraft facility provided to the second claimant by a Facility Agreement was not a term facility which could not be brought to an end before 31st July 2011, as had been submitted on the claimants' behalf. Rather, it could be terminated either by review at any earlier date, or by a demand for repayment of the amount outstanding under that overdraft facility at any time, following which, no further utilisation of the overdraft could be made.

46.3. The Claimant sought to amend by deleting an allegation in paragraph 9.3 of their Particulars of Claim that monies advanced on overdraft were repayable on demand and by asserting a case that the Defendant had assured the Claimant that the facilities, including the overdraft, would not be called in before 31 July 2011.

46.4. In paragraphs 12 and 13 of his judgment Briggs J said:

> "12. It is not in the abstract wholly implausible that a bank might orally promise a customer to keep an overdraft facility then under negotiation open for a fixed term. It is at least very improbable that the parties would then conclude a detailed written agreement providing for an overdraft reviewable and repayable on demand without something in writing, such as a side letter, if the promise of a term overdraft still formed part of their bargain. But for the court to treat as otherwise than inherently implausible an assertion made for the first time after the conclusion of the recent hearing that the real bargain between the claimants and AIB UK with regard to the overdraft facility had been

made purely orally, and both outwith and inconsistent with the terms of the Facility Agreement, it might be thought that some evidence would be necessary to explain why the claimants had, on this critical aspect of the matter, been pursuing a different and inconsistent positive case, to the effect that their understanding was that the whole bargain in relation to the overdraft facility was to be found in the Facility Agreement, and that it provided for repayment on demand. An explanation would be necessary if for no other reason than because the requirement to withdraw that admission in paragraph 9.3 of the Particulars of Claim would itself require a satisfactory explanation.

13. All that Mr Purcell offers by way of explanation in his fourth witness statement is the explanation that the first time when he personally heard that AIB UK claimed to be entitled to review the overdraft facility and demand immediate repayment at any stage, was during the hearing on 8th March. Since it was the claimants themselves which first made that assertion, and since its implications had been spelt out in minute detail in AIB UK's defence served on 1st March, that evidence comes nowhere near affording a credible or sufficient explanation for the claimants' volte face."

46.5. In paragraphs 16 and 17 Briggs J said:

"16 There may well be instances where glaring inconsistencies between a new case and the case previously advanced and verified by evidence and statements of truth may be satisfactorily explained, so as to give rise to a conclusion that the new case has a real prospect of success. But the court is not obliged to treat the mere assertion of such a new case in a witness statement as other than fanciful if the only explanation provided for its inconsistency with the case advanced to date is, on its face, inherently incredible, or manifestly inadequate. In the present case, Mr Purcell's explanation suffers from both those defects.

17. Mr Page sought to address those difficulties by submitting that these proceedings had come on very quickly, that they were still at an early stage, and that mistakes of the kind now said to be constituted by the way in which the case was originally presented were typical of the rough and tumble of fast moving developments arising out of an emergency. My review of the development of this litigation suggests that it has throughout been addressed with intense concentration and attention to detail on the part of the claimants and their advisers. On any view, the claimants have had the whole of the period since 14th February, when the point was specifically raised by Peter Smith J during the first hearing, to consider whether the Facility Agreement constituted the true and complete bargain between the parties in relation to the overdraft facility."

46.6. In the final paragraph, paragraph 22, of his judgment Briggs J said:

> "22. Nonetheless, it is primarily because I consider that the case now advanced is, in the circumstances which I have described, inherently implausible, that I declined to grant permission to amend."

47. By a letter dated 28 February 2024 from the Defendants' solicitors to the Claimant's solicitors, the Defendants gave their conditional consent to all except for certain of the proposed Re-Re-Amendments to the Particulars of Claim. The letter added a condition to the consent given in it. That condition was that the Claimant agree to pay the Defendants' costs of and occasioned by the proposed amendments; those costs either as agreed or as summarily assessed at the next hearing in the proceedings. The condition was not accepted, but nevertheless at the hearing before me only proposed Re-Re-Amendments within the categories excepted from the conditional consent were objected to. In those circumstances I treat the other proposed Re-Re-Amendments as having not been objected to.

48. Mr Roseman submitted that as regards the Re-Re-Amendments, any order granting the Claimant permission to Re-Re-Amend should not only include the usual order that the costs of and occasioned by the Re-Re-Amendment be paid by the Claimant, but also an order that those costs be assessed at the next hearing and that unless they are paid promptly in accordance with the order, the claim be struck out. Mr Roseman submitted that such an order was justified by reason of: (a) the Claimant's Late Payments of Costs; (b) the ways in which the Claimant's case has changed and his failure to comply with the Part 18 Request or order to provide further information and (c) the delay in his seeking to Re-Re-Amend the Particulars of Claim.

49. There is jurisdiction to make such an order under CPR 3.1(3)(b). I agree that all the things just mentioned by me as relied on by Mr Roseman as justification for making an unless order mitigate in favour of my doing so. However, I consider that at this stage making an unless order with the sanction of the striking out of the claim by reference to the non-payment of an order for costs would not be just and proportionate, when the claim appears to be worth several million pounds, the amount of the costs is uncertain and the Claimant's evidence and allegations as to his contributions to the cost of the properties has not been tested in cross-examination.

50. Mr Fowler submitted that it would be out of the norm for the costs of a pleading in response to the grant of permission to amend to be assessed by a Master. I agree that it would be out of the norm, but I consider that another Master or I would have jurisdiction summarily to assess those costs under CPR 44.6(1)(a) after they had been incurred.

51. The general effect of an order to pay "costs of and caused by" an amendment is that the party in whose favour the costs order is made is entitled to the costs of preparing for and attending the application and the costs of any consequential amendment of his own statement of case (CPR 44PD 4.2).

52. There is no reason in this case why I should not at least make the usual order that the costs caused by the Re-Re-Amendments be paid by the Claimant, on the footing that

those costs will have been caused by the Claimant's not having pleaded his case as he would now wish to at an earlier stage. I will make such an order.

53. Having regard to the fact that, as will appear, I have not refused all of the contested aspects of the application for permission to Re-Re-Amend, it would be premature for me to make an order as to the costs of the application or the hearing of the application before I have read or heard the parties' submissions on the subject. Having done so I will consider what order to make as to those costs. I will also not cut out the possibility that at the Consequentials Hearing which I have directed ("the Consequentials Hearing") I might make orders under any or all of CPR 3.1(3)(a) (conditional order; for example an order that the permission to Re-Re-Amend be conditional on paying a specified sum into court calculated broadly by reference to the estimated costs of and caused by the Re-Re-Amendments); CPR 3.1(3)(b) (unless order); and CPR 44.2(8) (order for payment of a reasonable sum on account of costs).

54. It does not follow that because a proposed Re-Re-Amendment is not objected to that the allegation made in it has a real prospect of success. The Defendants' non-objection might have been on the purely pragmatic basis that the allegation added little or could easily be dealt with and that it was not worth arguing about whether or not it should be permitted. Nevertheless, where an allegation in a proposed Re-Re-Amendment which is not objected to is the same as or is inherent in or in part of a proposed Re-Re-Amendment which is objected to, I consider that I should take that into account in deciding whether in my discretion to permit the proposed Re-Re-Amendment which is objected to. That is because in my view justice generally requires that an allegation made in one place in a pleading for one purpose should be able to be relied upon at another place in the pleading for the same or a different purpose.

55. There are eight categories of the proposed Re-Re-Amendments which the Defendants objected to. I deal with each category in turn. In doing so I bear in mind that this is at least the sixth attempt by the Claimant accurately to formulate his case. The first attempt was before Joanna Smith J. The second attempt was in the Claim Form. The third attempt was in the Particulars of Claim. I count that separately from the Claim Form because of the additional claims which were made in it as mentioned above. The fourth attempt was in the Amended Particulars of Claim. The fifth attempt was in the Re-Amended Particulars of Claim. Additionally there were the three sets of responses to the Defendants' Part 18 Request.

First group of proposed Re-Re-Amendments which are objected to by the Defendants

56. The first group of proposed Re-Re-Amendments which are objected to by the Defendants are those which are proposed to be made in paragraphs 3A, 5, 69 and in paragraph (3) of the prayer of the draft Re-Re-Amended Particulars of Claim.

57. The Defendants' objection to draft paragraph 3A is the allegation that in respect of Autotrade it refers to the Claimant having become sole shareholder of Autotrade in 2012 "as pleaded more fully in paragraph 5 below."

58. The Re-Re-Amendments sought to be made to paragraph 5 of the Re-Amended Particulars of Claim are:
    58.1. To change the allegation that the agreed basis of whatever the agreement was in 2012 from an allegation that the agreed basis of the agreement was that the Claimant "owned the business" to an allegation that the agreed basis was that the Claimant "would own 100% of the shares in Autotrade".
    58.2. To add an allegation that the Claimant's interest in Autotrade was reflected in registrations on Companies House noting that he owned more than 75% of the shares in Autotrade.

59. Paragraph 5 of the Re-Amended Particulars of Claim, which was in the same terms in the unamended Particulars of Claim, alleges that in 2012 (the date is apparent when paragraph 5 is read together with paragraph 6), the Claimant paid the 1st Defendant or Autotrade £55,000 to buy the 1st Defendant or Autotrade "out of such rights as he or it had to occupy the premises, and paid £180,000 to repair and improve the premises, on the basis (agreed between [the Claimant] and [the 1st Defendant]/Autotrade) that [the Claimant] owned the business, that [the 1st Defendant] would manage the business, and [the Claimant] and [the 1st Defendant] would share the profits equally."

60. That must be read against the background of paragraph 3 of the Re-Amended Particulars of Claim, which was in the same terms in the unamended Particulars of Claim, which alleges that all of the three companies "have at all material times had [the 1st Defendant] as their sole director (subject to paragraph 69 below) and shareholder."

61. The "at all material times" part of the allegation in paragraph 3 of the Re-Amended Particulars of Claim is inconsistent with paragraphs 56 and 57 of the Re-Amended Particulars of Claim, which were in the same terms in the unamended Particulars of Claim. Paragraph 56 of the Re-Amended Particulars of Claim alleges, amongst other things, that as part of an agreement in writing made between the Claimant and the 1st Defendant on 28 May 2020, the 1st Defendant agreed to provide the Claimant with full accounts and to hand over the management of the three companies to the Claimant. Paragraph 57 alleges that on the true construction of the agreement of 28 May 2020:
    (i) The Claimant was appointed by the 1st Defendant to be a director of each of the three companies.
    (ii) The 1st Defendant resigned his directorship of all three companies.
    (iii) The Claimant thereby became the sole director of all three companies.

62. The inconsistency would go if, in paragraph 3, "at all material times" is read as "at all material times until 28 May 2020".

63. The Defendants refer to answers in the Claimant's response dated 15 March 2022 to the requests numbered 2 in the Defendants' Part 18 Request dated 16 February 2022. The requests and responses were made and given in respect of paragraph 5 of the Particulars of Claim. Particularly relevant in the present context are requests 2(iv), 2(vii), 2(viii) and

2(ix), and the Claimant's responses to those requests which were given over a statement of truth.

64. Request 2(iv) was "whether, if the alleged agreement was based upon an oral agreement, what were the contractual words used, state by whom, to whom, when and where they were spoken".

65. It is unclear to me from the terms of the existing paragraph 5 of the Particulars of Claim whether the Claimant was there alleging:
    65.1. Two separate agreements: first, an agreement to buy the 1st Defendant or Autotrade out of such rights as he or it had to occupy the premises for £55,000 and a second agreement that the Claimant would pay £180,000 to repair and improve the premises on the basis that he owned or would own the business, that the 1st Defendant would manage the business and that the Claimant and the 1st Defendant would share the profits equally. Or
    65.2. A single composite agreement comprising the first and second possible agreements just mentioned.

66. Similarly, it is unclear to me whether, in the request in respect of paragraph 5 of the Particulars of Claim, "the alleged agreement" referred to the first only of the agreements hypothesised by me above, or to a single composite agreement. I do not criticise the Defendants for that because exactly what was alleged in paragraph 5 of the Particulars of Claim was unclear and fuller answers than those which were given to the requests in respect of paragraph 5 of the Particulars of Claim should have clarified the position.

67. The Claimant's response to request 2(iv) was an unhelpful "sufficiently pleaded".

68. Request 2(vii) was: "Whether the full extent of the agreement between the Claimant and the First Defendant and/or Second Defendant was that the Claimant would be buying the said Defendants or either of them "*out of such rights as [they] had to occupy the premises"*. The Claimant's response to that question was "Yes". That response appears to me only to deal with what I have referred to above as the first possible agreement. It does not deal at all with the positive averment in brackets in paragraph 5 as to the "agreed" basis on which the £55,000 and/or the £180,000 were paid.

69. Request 2(viii) was whether, "if the extent of the agreement was not limited to the Claimant purchasing the 1st Defendant and/or Autotrade out of its sub-lease, what were the full terms of the alleged agreement." The Claimant's response to that question was: "not applicable". By stating that the request was not applicable, the Claimant was stating that the hypothesis on which the request was made did not exist; which, putting it positively confirms the answer to request (iv), that the extent of the agreement was limited to the Claimant purchasing the 1st Defendant and/or Autotrade out of its sub-lease.

70. Request 2(ix) was, in relation to the Claimant's 'owning' the business: (a) what is the name of the business [he is] said to have owned, including by reference to any incorporated and/or unincorporated body; and (b) was this ownership in terms of him

acquiring a shareholding in any incorporated entity and, if so, what was the identity of the entity in question. The Claimant's response to (a) was: "Name of the used car business conducted through Autotrade at the time". His response to (b) was: "No".

71. Putting the Claimant's response to request 2(ix)(b) into the context of paragraph 5 of the Particulars of Claim, that meant that at the time of that response (15 March 2022), the Claimant was not putting forward the 2012 agreement as entitling him to the shares in Autotrade. What it was alleged that the Claimant was buying was Autotrade's or the 1st Defendant's used car business. That is consistent with paragraphs 56, 57, 58 and 69 of the Particulars of Claim and Re-Amended Particulars of Claim.

72. Neither the Claim Form nor any version of the Particulars of Claim down to the proposed Re-Re-Amended version contains any allegations or claim as to the shareholding in Autotrade or either of the other companies being transferred or agreed to be transferred to the Claimant.

73. The Defendants object to the proposed Re-Re-Amendments adding the first sentence of paragraph 3A (allegation that the Claimant became sole shareholder of Autotrade in 2012) and adding in paragraph 5 the allegations that the "agreed basis" of whatever was agreed in 2021 was that Claimant would own 100% of the shares in Autotrade and that the Claimant's interest in Autotrade was reflected in registrations at Companies House noting that the Claimant owned more than 75% of the shares in Autotrade.

74. The first step in the Defendants' argument in objecting to those Re-Re-Amendments is that by them the Claimant is seeking to rely on self-contradictory factual positions. My above analysis shows that to be the case. Without these proposed Re-Re-Amendments, not only is there no allegation that the Claimant acquired any rights in respect of the Autotrade shares in 2012, there are the positive statements in the Responses to the Part 18 Request that he did not. I therefore reject what was, except for a general reference to the overriding objective, the only argument put forward on behalf of the Claimant in respect of these Re-Re-Amendments, which argument was that they did no more than clarify the Claimant's existing case. They did not clarify it, they contradicted it.

75. The Defendants argue that as a result the proposal to make these proposed Re-Re-Amendments is abusive and that:
    75.1. The inconsistencies which would result from these Re-Re-Amendments would make it impossible for the Defendants properly to prepare for trial because they are unable to understand the case they have to meet.
    75.2. An internally inconsistent case "obviously" does not have a real prospect of success.

76. I was not referred to any authority to support the proposition that the mere fact that the Claimant is attempting to change the factual basis of his case so as to contradict allegations of fact which he has not sought to amend, is an abuse of process. In my judgment it probably is. It is possible and not abusive to plead different sets of facts in the alternative. The Claimant has not attempted to pleaded in the alternative. The

practical difficulty with his doing so is apparent from a comparison of the two versions of fact which the Claimant is now attempting to put forward simultaneously: (i) there was no agreement in 2012 that the Claimant would acquire shares in Autotrade; (ii) there was such an agreement. I think that this practical difficulty and the absence of an attempt to plead in the alternative or to amend the relevant responses to the Part 18 Request does make the attempt to make these proposed Re-Re-Amendments abusive. In my view it would not be a proper use of the court process to put forward the two contradictory factual cases, both supported by statements of truth made by the same individual, without at least pleading them in the alternative and attempting to explain the inconsistency. As the proposed Re-Re-Amendments stand I would disallow them on that basis. I also disallow them on the basis that, as I explain below, I consider that they do not have a real prospect of success.

77. I do not accept the Defendants' argument that the inconsistencies would make it impossible for the Defendants properly to prepare for trial because they are unable to understand the case they have to meet. The Defendants would simply have to prepare on the basis of the two alternatives, albeit that they have not been pleaded as alternatives.

78. On the other hand, in respect of these Re-Re-Amendments, I consider that the Defendants' "no real prospect of success" argument is made good.

79. These Re-Re-Amendments (i.e. adding the first sentence of paragraph 3A (allegation that the Claimant became sole shareholder of Autotrade in 2012) and adding in paragraph 5 the allegations that the "agreed basis" of whatever was agreed in 2021 was that Claimant would own 100% of the shares in Autotrade) contradict what the Claimant has said in his responses to the Part 18 Request over a statement of truth. The Claimant has made no attempt to explain why he now wishes to change his factual case in that regard.

80. I accept in general terms Mr Fowler's broad submission to the effect that in a case where the facts date back to events which took place over 10 years ago, recollections may change from time and that the legal analysis of what took place may also change with changes of emphasis; but in my view that does not remove the force from the fact that there has been no attempt to explain the change which I am here considering.

81. Conceivably I could infer from the final proposed Re-Re-Amendment to paragraph 5 which alleges that there were registrations at Companies House which noted that the Claimant owned more than 75% of the shares in Autotrade that those registrations triggered a change of recollection in the Claimant; but those alleged registrations are not particularised. They are not in the evidence served for the purpose of the application for permission to Re-Re-Amend.

82. Mr Fowler submitted that the lateness of a proposed amendment is judged by reference to when, relative to the progress that a case has made towards trial, it is sought to be made. I agree with that submission as a general proposition, but it is not of universal application. In the circumstances of the present case in respect of the proposed Re-Re-Amendments it is not the fact that the application to Re-Re-Amend is made early rather than late in the

claim's progress which impacts on the "real prospect of success" test, but the fact that they are sought to be made over 3 years after the hearing before Joanna Smith J; in circumstances where they are unsupported by evidence; where they contradict the existing case of the Claimant which has been advanced under a statement of truth; and where not only is there no explanation for the change of case, but no attempt to plead the new case in the alternative. Accordingly I consider that these proposed Re-Re-Amendments have no real prospect of success and I refuse permission to make them. That refusal extends to the final proposed addition to paragraph 5 referring to the alleged Companies House registrations.

83. The Re-Re-Amendments sought to be made to paragraph 69 of the Re-Amended Particulars of Claim are:
    - 83.1. As regards the directorships of the three companies:
        - 83.1.1. To change the allegation that the 1st Defendant unlawfully removed the Claimant as the director of the three companies, to an allegation that the 1st Defendant unlawfully purported to remove the Claimant as the director of the three companies and to add an allegation that the removal was ineffective.
        - 83.1.2. To add an allegation that on 24 May 2021 the 1st Defendant unlawfully purported to amend the Companies House registers to record himself as sole director of each of the three companies.
        - 83.1.3. To add to the allegation that the reason the removal or purported removal of the 1st Defendant as director was unlawful or "ineffective" was because of non-compliance with ss.168 and 169 Companies Act 2006, an allegation that it was for that reason "among other things".
    - 83.2. As regards the shareholding in the three companies:
        - 83.2.1. To add an allegation that on 24 May 2021 the 1st Defendant unlawfully purported to amend the Companies House registers to record himself as sole shareholder of each of the three companies.
        - 83.2.2. Possibly to add an allegation that the removal of the Claimant as the director of the three companies was unlawful and ineffective to remove the Claimant as shareholder, "among other things" because of non-compliance with ss.168 and 169 Companies Act 2006.

84. So far as the directorships are concerned, there is already an allegation in the existing paragraph 69 that the alleged removal on 24 May 2021 was unlawful by reason of non-compliance with sections 168 and 169 Companies Act 2006. The proposed addition to paragraph 69 of allegations that the removal of the Claimant as a director was only "purported" and was "ineffective" because on non-compliance with sections 168 and 169 Companies Act 2006 appears to me merely to clarify the existing pleading of unlawfulness or to raise a simple point of law. No significant costs should be incurred as a result of this amendment. In my judgment justice clearly requires that it should be allowed so that the Claimant's case in law is clear going forwards.

85. The addition of an allegation that on 24 May 2021 the 1st Defendant unlawfully purported to amend the Companies House registers to record himself as sole director of each of the

three companies is consistent so far as the facts are concerned, with paragraph 74 of the Defence, in which the Defendants "admit", in the context of paragraph 69 of the Re-Amended Particulars of Claim, that the 1st Defendant "updated" the records at Companies House in respect of the three companies to substitute himself in place of the Claimant "as the sole director and shareholder". The legality or effect of the change of the registers merely clarifies the existing pleading or raises a simple point of law. No significant costs should be incurred as a result of this amendment. In my judgment justice clearly requires that it should be allowed so that the Claimant's case in law is clear going forwards.

86. The proposed addition of an allegation that the removal or purported removal of the 1st Defendant as director was unlawful or "ineffective" was because of non-compliance with ss.168 and 169 Companies Act 2006, "amongst other things" is hopelessly vague so far as it is an allegation of "among other things". It is neither an allegation of fact, nor does it raise a point of law. I will not allow the allegation of "amongst other things".

87. Turning to proposed Re-Re-Amendments to paragraph 69 which concern shareholdings, the existing Re-Amended Particulars of Claim do not make any allegations as to transfers or agreements to transfer shares in the three companies. The proposed Re-Re-Amendments do so in two places:
    87.1. Firstly, in paragraphs 3A and 5. I have considered and refused these above.
    87.2. Secondly, in paragraph 57 where allegations are sought to be made by way of Re-Re-Amendment as to the Claimant having become the sole shareholder in all three of the companies under the alleged 28 May 2020 agreement.

88. The proposed Re-Re-Amendments to paragraph 57 of the Particulars of Claim are not objected to by the Defendants.

89. In its form with the non-objected to proposed Re-Re-Amendments to it, paragraph 57 would provide that on the true construction of the 28 May 2020 agreement:
    (i) The 1st Defendant agreed to appoint, and/or appointed, the Claimant to be a director of each of the three companies and that he would allow the Claimant to remain in office as sole director.
    (ii) The 1st Defendant agreed to resign, and/or resigned his directorship of all three companies.
    (iia) The 1st Defendant agreed to transfer and/or transferred, whatever shareholding he held in the companies to the Claimant.
    (iii) The Claimant thereby became the sole director of all three companies.

90. Having regard to the Defendants' admission in paragraph 74 of the Defence that the 1st Defendant "updated" the records at Companies House in respect of the three companies to substitute himself in place of the Claimant "as the sole director and shareholder" and to the non-objection to the proposed Re-Re-Amendment to paragraph 57, specifically the addition of the allegation that on the true construction of the 28 May 2020 agreement the 1st Defendant agreed to transfer and/or transferred whatever shareholding he had in the companies to the Claimant, I consider that there can be no real prejudice to the

Defendants as result of the addition in paragraph 69 of an allegation that on 24 May 2021 the purported amendment by the 1st Defendant of the Companies House registers to record himself as sole shareholder of each of the three companies was unlawful. The allegation of unlawfulness is merely an allegation as to the legal consequences of the purported amendment of the registers by the removal of the Claimant as a shareholder in circumstances where there are non-objected to Re-Re-Amendments alleging that the Claimant had become the sole shareholder of the three companies on 28 May 2020. Against the procedural background set out above, and taking into account that some small amount of additional costs will be incurred if I allow this aspect of the proposed Re-Re-Amendments to paragraph 69, I consider that justice at proportionate cost requires me to permit this aspect of the proposed Re-Re-Amendments to paragraph 69.

91. The proposed addition to paragraph 69 of an allegation that the removal of the Claimant as the director of the three companies was unlawful and ineffective to remove the Claimant as shareholder, "among other things" because of non-compliance with ss.168 and 169 Companies Act 2006 is legal nonsense. Firstly, because the removal of the Claimant as a director so clearly cannot have had the effect of removing the Claimant as shareholder as to make it nonsensical to allege it. Secondly because ss. 168 and 169 Companies Act 2006 are concerned with the removal of directors and have nothing to do with the removal of shareholders. Further, in this context and having regard to the numerous attempts that have already been made over the years to plead the Claimant's case accurately, the phrase "among other things" is hopelessly vague. Accordingly I will not permit the proposed addition to paragraph 69 of an allegation that the removal of the Claimant as the director of the three companies was unlawful and ineffective to remove the Claimant as shareholder. Nor will I permit the addition of the phrase "among other things".

92. The Re-Re-Amendments sought to be made to paragraph (3) of the prayer are:
    92.1. To add a claim for a declaration that the Claimant is the sole shareholder of each of the three companies.
    92.2. To add a claim for specific performance of agreement reached on 28 May 2020.

93. Claims for a declaration that the Claimant is the sole shareholder of each of the three companies and for specific performance of the alleged 28 May 2020 agreement are simply claims for appropriate relief in respect of the Re-Re-Amendments to paragraphs 57 and 69 which are not objected to or which I am permitting. As such they should not add significantly to the costs. If the allegations as to the alleged 28 May 2020 agreement and its effects are made good, such a declaration and specific performance are heads of relief which there would be a real prospect of the Claimant obtaining. The inclusion of the claims for a declaration and specific performance should not add significantly to the costs. Having regard to those factors and to the effect of there not yet having been a CCMC and notwithstanding the delay in proceeding with the claim and making the application to Re-Re-Amend; the Claimant's Late Payments of Costs and the fact that, even ignoring the Part 18 Responses, this is the sixth attempt to formulate the Claimant's claim; I consider that the balance of justice at proportionate cost requires the Claimant to be able to add the claims for a

declaration and specific performance as sought in the proposed Re-Re-Amendments to paragraph (3) of the prayer, and I will allow them.

Second group of proposed Re-Re-Amendments which are objected to by the Defendants

94. The second group of proposed Re-Re-Amendments which are objected to by the Defendants are in respect of a single proposed new paragraph 4B of the Particulars of Claim. The proposed new paragraph 4B would provide:

> "4B. As pleaded below, [the 1st Defendant] owed duties to the 2nd to 4th Defendants in their capacity as trustees for beneficiaries including [the Claimant]. [The 1st Defendant] is presently (albeit unlawfully) in *de facto* control of [the three companies] and preventing them from bringing claims against [the 1st Defendant] directly. In those circumstances, [the Claimant] claims in respect of [the 1st Defendant's] duties to the 2nd to 4th Defendants by way of beneficiary's derivative claim, [the companies] being joined to the claim."

95. Paragraph 4B will be of limited, if any, application because the only pleading in the proposed Re-Re-Amended Particulars of Claim which comes after paragraph 4B and which might arguably allege duties owed by the 1st Defendant to any of the companies is proposed paragraph 18AA.

96. In the letter dated 28 February 2024 the Defendants' solicitors consented to the addition of paragraph 4B, subject to the Claimant confirming in writing that he would apply to add Mr Husham Kadhim as a party to the proceedings. No such confirmation has been given. The Defendants have continued to object to the addition of paragraph 4B. They do so on the basis of submissions that:
    - 96.1. Where a claim of the kind contemplated in paragraph 4B is brought, it is imperative that all beneficiaries are joined to the proceedings so that they will be bound by any order of the court.
    - 96.2. If Mr Husham Kadhim was joined as a party that would involve a further step in the proceedings and further costs and delay.

97. I do not accept that it is imperative that all the beneficiaries should be joined to a beneficiary's derivative claim. The legal theory of such a claim is that the claimant beneficiary sues on behalf of the trustee. In any particular case, the question of whether the trustee should sue either in its own name or by one of its beneficiaries is one on which the views of the beneficiaries may differ.

98. The question potentially between multiple beneficiaries of a trust as to whether a beneficiary's derivative action should be brought is a question which arises in the administration of the trust. When read with CPR 64.2(a), CPR 64.4(1) provides that in claims to determine any question arising in the administration of a trust, all trustees must be parties and, in CPR 64.4(1)(c) that the claimant "may make parties to the claim any persons with an interest under the trust" (i.e. any beneficiary) "who it is appropriate to make parties having regard to the order sought". That does not make the joinder of all

beneficiaries mandatory or "imperative" unless it is "appropriate" for them all to be joined.

99. The learned editors of Lewin of Trusts (20th ed) suggest at paragraph 47-014 that where a beneficiary's derivative claim is brought other beneficiaries should be joined as parties where this is necessary to avoid a multiplicity of actions. They make that suggestion by reference to an obiter dictum of Arden LJ in *Roberts v Gill* [2008] EWCA Civ 803 at paragraph 47 of her judgment. In the same paragraph Arden LJ said that if the case before her had been a case in which the court was minded to grant permission to join the personal representative, it would have had to consider whether to give directions to enable the wishes of the Inland Revenue, as the largest creditor of the estate, or of the other beneficiary to be put before the court.

100. It is difficult to envisage the circumstances in which it is necessary to join other beneficiaries to a beneficiary's derivative claim in order to avoid a multiplicity of actions. To my mind because the whole theory of a beneficiary's derivative action is that it is brought on behalf of the trustee and is in substance the trustee's action. If the derivative action failed, the claim belonging to the trust would have failed, thereby giving rise to a cause of action estoppel as between the trustees and their beneficiaries and preventing it from being brought again by another beneficiary acting on behalf of the trustee.

101. Be that as it may, in the present case there is no real risk of a second claim being brought by Mr Husham Kadhim. That is because he is aware of the claims and has stated clearly that he does not wish to be joined. He did so in a witness statement dated 20 December 2022. There he said: "I do not wish to be a party to these proceedings and I [am] entrusting [the Claimant] to retrieve my beneficial rights." I do not express a view as to whether that opens Mr Husham Kadhim to the possibility of an adverse third party costs order. For present purposes it suffices that in my judgment, by reason of that statement it would be an abuse of process for Mr Husham Kadhim to start a second action.

102. Further, the Particulars of Claim in their currently existing form already raise the issue of whether Mr Husham Kadhim should be made a party. For example in paragraph (1)(i) of the prayer, a declaration is sought that Autotrade holds 187 Brent Crescent and its income on trust as to 67% for the Claimant and 33% for Mr Husham Kadhim. Therefore, insofar as the addition of the beneficiary's derivative claim may also give rise to that issue (and for the reasons given above I consider that it does not), it should not add significantly or at all to the time and costs needed to resolve the question of whether Mr Husham Kadhim should be joined or given some formal notice as to the existence of the proceedings.

103. The "special circumstances" needed in order to found a beneficiary's derivative claim are sufficiently alleged. They being that the 1st Defendant is in de facto control of the companies and hence is very unlikely to cause them to bring claims against himself.

104. Having regard to those conclusions to the more general points explained above, I consider that, if I was to permit the proposed addition of paragraph 18AA, the balance of justice at proportionate cost requires the Claimant to be able to add the beneficiary's derivative claim as sought in paragraph 4B of the proposed Re-Re-Amended Particulars of Claim, and I would allow that Re-Re-Amendment.

105. For the reasons I explain below I do not permit the proposed addition of paragraph 18AA. As a consequence the basis on which paragraph 4B is sought to be alleged is non-existent, so as a matter of pleading paragraph 4B can have no real prospect of success and I will not allow the proposed Re-Re-Amendment which would add it.

Third group of proposed Re-Re-Amendments which are objected to by the Defendants

106. The third group of proposed Re-Re-Amendments which are objected to by the Defendants are those sought to be made to paragraph 18 and to be added as paragraph 18AA. These concern the facts and matters relied upon by the Claimant as allegedly imposing various duties on the 1st Defendant.

107. The existing Re-Amended Particulars of Claim allege in paragraphs 18, 18A and 18B as follows:

> "18. By assuming responsibility for letting and managing 187 Brent Crescent and/or pursuant to an implied contractual agency, [the 1st Defendant] (at all times since February 2016) as agent owed [the Claimant] a contractual and/or a common law duty to manage 187 Brent Crescent with the skill and care to be expected of a reasonably competent and prudent managing agent.
>
> 18A Further [the 1st Defendant], as agent and/or Autotrade (at all times since 12 March 2016) as trustee, have owed fiduciary duties to [the Claimant].
>
> 18B By reason of those said contractual, common law and/or fiduciary duties, [the 1st Defendant] and/or Autotrade were bound:"
>
> [to do various things]

108. The various things alleged in nine subparagraphs after the part of paragraph 18B quoted above are generally things which a common law or contractual duty of care might impose, but with a sprinkling of duties which might or might also be fiduciary duties. An example of the latter is paragraph 18B(6) which alleges a duty "to distribute to [the Claimant] or otherwise to account to him at least annually for his share of the net profits attributable to 187 Brent Crescent."

109. Paragraph 18 of the Re-Amended Particulars of Claim as it would, if further amended by the proposed Re-Re-Amendments to it, read as follows, with changes to the Re-Amended Particulars of Claim shown underlined or struck through:

> "18. <u>Pursuant to the agreement reached at the meeting at 67 Praed Street in around November 2015, alternatively by the Brent Crescent Deed, alternatively by the</u>

parties' course of conduct since November 2015, [the 1st Defendant] acted as agent on behalf of the Investors in ~~By assuming responsibility for~~ letting and managing 187 Brent Crescent and/or ~~pursuant to an implied contractual agency,~~ [the 1st Defendant] (at all times since February 2016) as agent owed [the Claimant] a contractual and/or a common law duty to manage 187 Brent Crescent with the skill and care to be expected of a reasonably competent and prudent managing agent."

110. In a letter dated 5 March 2024 from the Claimant's solicitors to the Defendants' solicitors, the Claimant offered to particularise the allegation as to course of conduct by adding to the proposed Re-Re-Amendment to paragraph 18 the italicised words as follows:

"18. Pursuant to the agreement reached at the meeting at 67 Praed Street in around November 2015, alternatively by the Brent Crescent Deed, alternatively by the parties' course of conduct since November 2015 *by which the 1st Defendant acted as though he were the company's agent responsible for, and assumed responsibility for letting and managing 187Brent Crescent*, [the 1st Defendant] acted as agent on behalf of the Investors in ~~By assuming responsibility for~~ letting and managing 187 Brent Crescent and/or ~~pursuant to an implied contractual agency,~~ [the 1st Defendant] (at all times since February 2016) as agent owed [the Claimant] a contractual and/or a common law duty to manage 187 Brent Crescent with the skill and care to be expected of a reasonably competent and prudent managing agent."

111. The original definition of "the Investors" in paragraph 8(2)(i) of the Particulars of Claim defined them as the Claimant, Mr Husham Kadhim and the 6th Defendant. That definition was changed in the Re-Amended Particulars of Claim, by replacing the 6th Defendant with the 1st Defendant. With that change, the addition in paragraph 18 of the allegation that the 1st Defendant acted as agent for the Investors in letting and managing 187 Brent Crescent in itself cannot be objectionable. That is because it merely repeats what (with the change in the definition of the Investors) is already alleged in paragraph 8(2)(vii) of the Amended Particulars of Claim and was already implied in paragraph 18 from the allegation that the 1st Defendant was under a duty to manage 187 Brent Crescent with the skill and care to be expected of a reasonably competent and prudent managing agent.

112. Paragraph 8(2) of the Amended Particulars of Claim alleges that an agreement was made by the Claimant, the 1st Defendant and Mr Husham Khadim at a meeting at 67 Praed Street in around November 2015.

113. The substantial proposed changes to paragraph 18 are:

113.1. To remove the allegation that the 1st Defendant came under a contractual and/or a common law duty as agent for the Claimant to manage 187 Brent Crescent by assuming responsibility for letting and managing 187 Brent Crescent and/or pursuant to an implied contractual agency.

113.2. To replace that allegation with allegations that pursuant to the agreement reached at the meeting at Praed Street in around November 2015, alternatively by the Brent Crescent Deed, alternatively by the parties' course of conduct since November 2015:

113.2.1. The 1st Defendant acted as agent on behalf of the Investors in letting and managing 187 Brent Crescent; and/or

113.2.2. The 1st Defendant owed the Claimant a contractual and/or a common law duty to manage 187 Brent Crescent with the skill and care to be expected of a reasonably competent and prudent managing agent.

114. The allegation that the 1st Defendant acted as agent on behalf of the Investors and came to owe the Claimant the duties expected of a reasonably competent and prudent managing agent pursuant to the agreement reached at the meeting at Praed Street in around November 2015 is in my judgment unobjectionable. In broad terms it repeats what is already alleged in paragraph 8(2)(vii), that is that it was agreed that the 1st Defendant as agent acting on behalf of the Investors would manage the property generally including its letting, the collection of rent, all dealings with the mortgagee, and the payment of the costs of holding the investment, and pay the Investors what they were respectively entitled to in respect of the net profits.

115. The allegation that the 1st Defendant acted as agent on behalf of the Investors and came to owe the Claimant the duties expected of a reasonably competent and prudent managing agent by [reason of] the Brent Crescent Deed is one which has no real prospect of success. That is because there is no provision in the Brent Crescent Deed, express or implied which mentions agency or provides in any way for the 1st Defendant to act as agent for any party. I will not allow the addition of this allegation.

116. Without the italicised words, the allegation that by the parties' course of conduct since November 2015 the 1st Defendant acted as agent on behalf of the Investors in letting and managing 187 Brent Crescent and came to owe the Claimant the duties expected of a reasonably competent and prudent managing agent would be wholly unparticularised as regards what that course of conduct was. Mr Fowler submitted that the relevant course of conduct was the letting and management by the 1st Defendant of 187 Brent Crescent. Without the italicised words, that is not what is proposed to be alleged in relation to course of conduct in paragraph 18. The proposed allegation is that two consequences resulted from the parties' course of conduct since November 2015: (i) the 1st Defendant acted as agent on behalf of the Investors in letting and managing 187 Brent Crescent and (ii) the 1st Defendant owed the Claimant a contractual and/or a common law duty to manage 187 Brent Crescent. The course of action could have been anything.

117. The italicised words particularise the course of conduct as the conduct *by which the 1st Defendant acted as though he were the company's agent responsible for, and assumed responsibility for letting and managing 187Brent Crescent*. The first part of that suggested addition does not support the allegations that by reason of the course of conduct the 1st Defendant acted as agent on behalf of the Investors and owed the Claimant

a contractual and/or a common law duty. It would support an allegation that by the course of conduct the 1st Defendant acted as agent for the company and owed the company a contractual and/or common law duty.

118. If only the second part of the italicised words are added; so that it is alleged that the course of conduct was the assumption by the 1st Defendant of responsibility for letting and managing 187 Brent Crescent, so that the allegation became a free standing allegation that by assuming responsibility for letting and managing the property the 1st Defendant acted as agent for the Investors in letting and managing the property, that would not include an allegation as to why the 1st Defendant's assumption of responsibility for letting and management of the property constituted him as the agent of the Investors' rather than as the agent of Autotrade for that purpose.

119. In the context of the application to Re-Re-Amend the Particulars of Claim I consider that in order to establish that the allegation of a course of conduct has a real prospect of success, an allegation or explanation as to why the 1st Defendant's assumption of responsibility for letting and management of the property constituted him the Investors' agent for that purpose would be needed in order to deal with the fact that the legal estate in the property was alleged to be vested in Autotrade as trustee for certain beneficiaries and to explain why, therefore, his assumption of responsibility for letting and management of the properties constituted him as the agent of one or three of the beneficiaries. At that time (November 2015) the beneficiaries of the trust of 187 Brent Crescent included, under the terms of the Brent Crescent Deed, not only the Investors (as defined), but also the 5th and 6th Defendants. There has been no such allegation or explanation. Accordingly I will not allow this element of the proposed Re-Re-Amendment of paragraph 18.

120. Collecting together my conclusions as to what I have decided to allow and disallow in respect of the proposed Re-Re-Amendments to paragraph 18, paragraph 18 of the Re-Amended Particulars of Claim as further amended by the Re-Re-Amendments to it which I allow will, with changes to the Re-Amended Particulars of Claim shown underlined or struck through, will read as follows:

> "18. Pursuant to the agreement reached at the meeting at 67 Praed Street in around November 2015, Amar acted as agent on behalf of the Investors in ~~By assuming responsibility for~~ letting and managing 187 Brent Crescent and/or ~~pursuant to an implied contractual agency, Amar (at all times since February 2016) as agent~~ owed Hassan ~~the following~~ a contractual and/or a common law duty to manage 187 Brent Crescent with the skill and care to be expected of a reasonably competent and prudent managing agent."

121. The Claimant seeks permission to add a wholly new paragraph 18AA in the following terms:

> "18AA Further, insofar as [the 1st Defendant] acted as agent for Autotrade in relation to the letting and managing of 187 Brent Crescent, [the 1st Defendant] owed Autotrade a duty to exercise reasonable care, skill and diligence and a fiduciary duty. These duties were owed to Autotrade in its capacity as trustee for [the Claimant]."

122. Paragraph 18AA, together with proposed paragraph 4B represent a significant change in the Claimant's approach. Until the Re-Re-Amendments for which permission is sought were proposed, the various versions of the Particulars of Claim have not alleged duties owed by the 1st Defendant to any of the companies, or breaches of any of those duties. Paragraph 18AA and the subsequent allegations which refer back to it, coupled with paragraph 4B introduce for the first time possible claims by the companies against the 1st Defendant for breaches of duties owed by him to them.

123. The introductory wording in proposed paragraph 18AA: "insofar as the 1st Defendant acted as agent for Autotrade in relation to the letting and management of 187 Brent Crescent" is problematic for two related reasons.

124. First, the words "insofar as" do not amount to a positive averment that the 1st Defendant acted as agent for Autotrade in relation to the letting and management of 187 Brent Crescent. Second, the allegations in paragraph 18, both as they currently exist and as they will exist when Re-Re-Amended in accordance with my permission, allege that in managing and letting 187 Brent Crescent the 1st Defendant was the agent for and owed duties to the Investors. There is no allegation in the Re-Amended or in the Re-Re-Amended Particulars of Claim that the 1st Defendant was agent for any of the companies. It follows that proposed paragraph 18AA is meaningless and would be of no effect. For those reasons I will not allow its addition by Re-Re-Amendment.

125. Mr Roseman submitted that paragraph 18AA was misconceived because it alleged that the 1st Defendant owed Autotrade duties which were or might be additional or different from the duties which he owed to Autotrade as Autotrade's director as a matter of company law. I do not accept that submission. In my view an individual who is a director of a company may owe the company an additional or different set of duties from his duties as a director. An example close to the context of the present case would be where there were three trustees, one of which was a company with an individual as a director who was a qualified surveyor. The trustees might decide to engage the surveyor director to survey a property which the trustees were considering purchasing for their trust; such engagement to be on the surveyor's standard professional terms and conditions. In such a case the surveyor director would owe the company of which he was a director both the duties attaching to his position as director and his contractual duties under his professional terms and conditions. There might or might not be difficulties with conflicts of interests and profits from a trust or from a company by a company director, but as matter of legal theory those might be overcome.

Fourth group of proposed Re-Re-Amendments which are objected to by the Defendants

126. The fourth group of proposed Re-Re-Amendments which are objected to by the Defendants are in respect of a proposed new paragraph 23B. The proposed new paragraph 23B would provide:

> "23B Alternatively, by the conduct particularised above [the 1st, 5th and/or 6th Defendants] represented to [the Claimant] that a 67% beneficial interest in 187 Brent

Crescent would be held in trust for him. [The Claimant] relied on those representations to his detriment by advancing the sums particularised in paragraph 22 above. Accordingly a proprietary estoppel arose which prevents [the 1st Defendant and the Fifth Defendant] from denying [the Claimant's] 67% beneficial interest."

127. In correspondence the Claimant's solicitors, stated that subject to the Defendants' consent to the balance of the amendments, they were content to withdraw the allegation as to representations by the 5th and 6th Defendants. In a letter dated 11 March 2024 the Defendants' solicitors wrote that in the light of what they referred to as the Defendants' solicitors' concession that the proposed amendment concerning the 5th and 6th Defendants was misconceived, paragraph 23B would require further amendments beyond the mere removal of the references to the 5th and 6th Defendants. I was not taken to any later correspondence on this subject. In the Claimant's solicitor's witness statement in support of the application for permission to Re-Re-Amend, the relevant space in her list of contested amendments and the Defendant's specific objections to them is marked "not used". In his skeleton argument Mr Roseman said that the Defendants opposed paragraph 23B, but later in the skeleton under the heading "*paragraph 23B: Allegation that D1 acted as D5 and D6's agent*" said that as regards paragraph 23B, the Claimant had conceded that "these amendments in relation to D5 and D6 are misconceived and is no longer relying on the same." Mr Fowler did not argue otherwise. I do not have a note of my own as to what, if anything, was said about paragraph 23B in oral submissions. Although 187 Brent Crescent was mentioned in Mr Fowler's skeleton argument as one of the properties in respect of which a proprietary estoppel was claimed, paragraph 23B did not feature in the oral arguments about the addition of claims to proprietary estoppel. Against that background I therefore assume that no part of paragraph 23B is sought to be added by way of Re-Re-Amendment. If that assumption is wrong, I will consider the point at the Consequentials Hearing which I have directed.

Fifth group of proposed Re-Re-Amendments which are objected to by the Defendants

128. The fifth group of proposed Re-Re-Amendments which are objected to by the Defendants are proprietary estoppel claims which are sought to be added in respect of all the properties except (on the assumption that paragraph 23B is not permitted) in respect of 187 Brent Crescent. The proprietary estoppel claims are sought to be added in a new paragraph 34AA in respect of 77 Queens Wharf and Unit 2 Cosgrove; in a new paragraph 40AA in respect of 70 Abbotsford Court; in a new paragraph 45AA in respect of 50 Park Avenue; in a new paragraph 51AA in respect of 185 Park Avenue; and in a new paragraph 53BA in respect of 172 Brent Crescent. So far as material to the application for permission to Re-Re-Amend is concerned, the proposed allegations and the analysis are the same in respect of each of those proposed Re-Re-Amendments. I take paragraph 40AA and 70 Abbotsford Court as an example.

129. In relation to 70 Abbotsford Court the Claimant alleges that the 1st Defendant arranged its purchase in the name of AFH Properties as the Claimant's nominee at a cost of £535,098.99, of which £374,975 was provided by Kent Reliance (a trading name of

OneSavings Bank) on the security of a 1st legal charge arranged by the 1st Defendant over the property.

130. The Claimant alleges that he provided the necessary cash balance of £160,123.99 for the purchase by instructing the 1st Defendant to apply that amount out of the Investment Fund for that purpose.

131. Paragraphs 40 and 40A of the Re-Amended Particulars of Claim provide:

"40. In the premises [AFH Properties] acquired 70 Abbotsford Court as nominee for [the Claimant] absolutely in accordance with [the Claimant's and the 1st Defendant's] shared intention (such intention also to be attributed or imputed to AFH Properties or of which AFH Properties had knowledge).

40A Alternatively, and on the assumption that [the 1st Defendant] duly applied or caused money from the Investment fund to be applied in accordance with [the Claimant's] instructions as set out above, [AFH Properties] acquired 70 Abbotsford Court as resulting trustee for [the Claimant] absolutely or in such other proportions as the Court may determine."

132. By paragraph 40AA the Claimant wishes to allege:

"40AA. Alternatively, by the conduct particularised above [the 1st Defendant] represented to [the Claimant] that a 100% beneficial interest in 70 Abbotsford Court would be held on trust for him. [The Claimant] relied on those representations to his detriment by advancing the sums particularised above. Accordingly a proprietary estoppel arose which prevents [the 1st Defendant] from denying [the Claimant's] beneficial interest.

133. The Defendants point out that the 1st Defendant is not claiming any form of proprietary interest in the property. Accordingly, argue the Defendants, the proprietary estoppel claim is misconceived.

134. Mr Roseman referred me to Lord Walker's specification of what was required to establish a proprietary estoppel in *Thorner v Major* [2009] UKHL 18 at paragraph 61. This is what Lord Walker said there:

> "61. In my opinion it is a necessary element of proprietary estoppel that the assurances given to the claimant (expressly or impliedly, or, in standing by cases, tacitly) should relate to identified property owned (or, perhaps, about to be owned) by the defendant. That is one of the main distinguishing features between the two varieties of equitable estoppel, that is promissory estoppel and proprietary estoppel. The former must be based on an existing legal relationship (usually a contract, but not necessarily a contract relating to land). The latter need not be based on an existing legal relationship, but it must relate to identified property (usually land) owned (or, perhaps, about to be owned) by the defendant. It is the relation to identified land of the defendant that has enabled proprietary estoppel to develop as a sword, and not merely a shield: see Lord Denning MR in *Crabb v Arun District Council* [1976] Ch 179, 187.

135. In the present case the alleged assurances or representations are sought to be alleged as giving rise to a proprietary estoppel against the 1st Defendant. The 1st Defendant is not claiming any form of proprietary interest in the property; accordingly, so the Defendants argue, the identified property is not one which the 1st Defendant is the owner of or about to be the owner of, with the result that the allegations sought to be made in paragraph 40AA do not bring the claim within the scope of Lord Walker's definition.

136. Lord Walker's statement which is relied upon by the Defendants was made in the context of an issue of whether assurances by a farmer to the effect that his farm would belong to the claimant on the farmer's death sufficiently identified the farm. There was no issue in *Thorner v Major* as to whether or not the farmer owned the farm.

137. Mr Fowler referred me to a statement as to the requirements for a proprietary estoppel set out in *Davies v Davies* [2016] EWCA Civ 463 by Lewison LJ at paragraph 38(ii) with a view to persuading me that ownership or prospective ownership of property was not a necessary ingredient in a claim in proprietary estoppel. Paragraph 38(ii) of Lewison LJ's judgment states:

> "The ingredients necessary to raise an equity are (a) an assurance of sufficient clarity (b) reliance by the claimant on that assurance and (c) detriment to the claimant in consequence of his reasonable reliance: *Thorner v Major* at [29]."

138. Paragraph 29 in *Thorner v Major* is the first paragraph of Lord Walker's judgment. He said:

> "29. My Lords, this appeal is concerned with proprietary estoppel. An academic authority (Simon Gardner, *An Introduction to Land Law* (2007), p 101) has recently commented: "There is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither)". Nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance: see Megarry & Wade, *The Law of Real Property*, 7th ed (2008), para 16-001; Gray & Gray, *Elements of Land Law*, 5th ed (2009), para 9.2.8; *Snell's Equity*, 31st ed (2005), paras 10-16 to 10-19; Gardner, *An Introduction to Land Law* (2007), para 7.1.1."

139. As a matter of legal and contextual analysis, Lord Walker must have intended that both what he said in paragraph 29 and in paragraph 61 identified the elements necessary to establish a proprietary estoppel. The clues are in the absence of any reference to property in the three main elements mentioned in paragraph 29 and in the description of the estoppel as a "proprietary" estoppel. A proprietary estoppel if established and given effect to by the court will give rise to an interest in property. Accordingly, I consider that what Lord Walker said in paragraph 61 in *Thorner v Major* is of general application.

140. In the present case the 1st Defendant has no relevant interest in the property in which or out of which a proprietary interest could be ordered to emerge. Accordingly a claim

against him in proprietary estoppel as sought to be alleged in paragraphs 34AA, 40AA, 45AA, 51AA and 53BA of the draft Re-Re-Amended Particulars of Claim has no real prospect of success and I will not permit the proposed Re-Re-Amendments in those paragraphs in the terms set out in the draft Re-Re-Amended Particulars of Claim.

141. In his skeleton argument Mr Fowler referred me to a part of Ms Kruger's statement in which she said that if the issue was which Defendants were bound by the estoppel, the Claimant was content for the relevant paragraphs to conclude with the phrase: a proprietary estoppel arose which prevents the 1st to 4th Defendants from denying the Claimant's beneficial interest. That addition would resolve the problem about the estoppel not being alleged against any persons with relevant interests in the properties. However, that addition would not complete the allegations needed to be made unless the representations alleged to have been made by the 1st Defendant were also alleged to have been made by him on behalf of the 2nd to 4th Defendants, as appropriate in respect of the various properties. Currently neither the existing Re-Amended Particulars of Claim nor the proposed Re-Re-Amended Particulars of Claim make that allegation. Indeed, his solicitors' statement indicates that it may not be straightforward to do that. After having set out the possible addition of an allegation that the alleged proprietary estoppel bound the 1st to 4th Defendants, Ms Kruger says: "This is because in making the representations, the First Defendant bound not only himself but the companies insofar as he was authorised to act on their behalf." "Insofar as" is not a sufficiently accurate positive averment of fact. If the Claimant wishes to pursue a Re-Re-Amendment along these lines he will need to formulate it accurately, completely and coherently. He has not yet done so. Accordingly I will not allow the proposed Re-Re-Amendments adding paragraphs 34AA, 40AA, 45AA, 51AA and 53BA either with or without the addition of an allegation that the alleged estoppel bound the 1st to 4th Defendants.

142. In his oral reply and in response to an earlier discussion between counsel and me as to whether what was really being alleged was a promissory estoppel, Mr Fowler submitted that the proposed alleged estoppel was only being used as a shield not as a sword. That is broadly one of the distinctions between a promissory and a proprietary estoppel. So far as promissory estoppel is concerned, as per paragraph 61 of Lord Walker's judgment in *Thorner v Major*, the estoppel must be based on an existing legal relationship (usually a contract, but not necessarily a contract relating to land). No relevant existing legal relationship alleged. Accordingly, an allegation of promissory estoppel would not have a real prospect of success. Insofar as Mr Fowler's submission was wider and was to the effect that it would be inconsistent with the representations which the Claimant alleges were made for the 1st Defendant now to say that he did not make them, that would be a plea of evidence, not of fact. and would be something which should not be pleaded.

The sixth group of proposed Re-Re-Amendments which are objected to by the Defendants

143. The sixth group of proposed Re-Re-Amendments which are objected to by the Defendants are those set out in a proposed new paragraph 53C which would provide:

> "53C. In any event, [the 1st Defendant] and Autotrade have owed to [the Claimant] the same duties [in respect of 172 Brent Crescent] (mutadis mutandis) as are owed by [the 1st Defendant, Autotrade and AFH Properties] to [the Claimant] in respect of the

other properties the subject of this claim, as particularised in paragraphs 18 to 18B above."

144. The Defendants submit that in paragraph 53C the Claimant contends that the 1st Defendant owed the Claimant a personal duty in relation to 172 Brent Crescent, being a property owned by Autotrade, by reason of the same factual premises as pleaded in paragraphs 18 to 18B. I do not read proposed paragraph 53C so literally as to mean that the duties were owed because of the agreement and arrangements alleged in paragraphs 18, 18A and 18B in respect of 187 Brent Crescent. I read it as describing the nature of the duties allegedly owed by the 1st Defendant and Autotrade in those paragraphs. It does not purport to set out why those duties are owed.

145. With the Re-Re-Amendments permitted by me, the nature of the duties particularised in paragraphs 18 to 18B in respect of 187 Brent Crescent, and hence those sought to be alleged in paragraph 53C will be the following duties owed by the 1st Defendant and Autotrade to the Claimant: (i) a contractual and/or a common law duty to manage the property with the skill and care to be expected of a reasonably competent and prudent managing agent; (ii) fiduciary duties and (iii) the particular aspects of those duties alleged in paragraph 18B.

146. If paragraph 53C has a weakness from a pleading perspective it is that it does not allege why those duties arose. However, I think that is reasonably clear from the following context that the duties are alleged to arise by reason of an agreement between the 1st Defendant (on behalf of himself and Autotrade) and the Claimant:

146.1. Paragraph 53C is the last proposed paragraph of 6 under the heading "*172 Brent Crescent – Part 2*". The second of those paragraphs is paragraph 53 which has stood unamended since the Particulars of Claim.

146.2. Paragraph 53 alleges, amongst other things, that the costs of acquiring the lease of 172 Brent Crescent were paid by the Claimant on the footing (agreed between (i) the 1st Defendant on behalf of himself and Autotrade and (ii) the Claimant), that:

146.2.1. Autotrade took the lease and its income as nominee and trustee for the Claimant;

146.2.2. the rents arising from the sub-tenancies of 172 Brent Crescent continued to belong to the 1st Defendant;

146.2.3. the 1st Defendant would be the Claimant's agent and as such would manage the premises, including their letting to sub-tenants, and continue to collect the rents on the Claimant's behalf and account for them to him.

147. There are therefore allegations of a contract to manage the property and as to nomineeship or trusteeship. There are nevertheless some missing allegations:

147.1. There is no allegation that it was an express or implied term of the alleged contract or agency that the contractual duties sought to be alleged in paragraph 53C would be owed by the 1st Defendant to the Claimant.

147.2. There is no allegation that fiduciary duties arose out of the trusteeship, nomineeship or agency. It is so plain as a matter of law that a trusteeship, nomineeship or agency imports a fiduciary duty that I consider that such an allegation is unnecessary.

147.3. There is no allegation of facts or matters which would give rise to a common law duty either at all or one giving rise to the specific duties alleged in paragraph 18B.

148. Paragraph 53C would add express allegations in respect of the alleged duties in relation to 172 Brent Crescent in circumstances where currently there are no allegations of duty or breach of duty in respect of 172 Brent Crescent. That is unlike the position in respect of 187 Brent Crescent, 77 Queens Wharf and Unit 2 Cosgrove, 70 Abbotsford Court, 50 Park Avenue and 185 Park Avenue where allegations of the duties in relation to the properties already exist in paragraphs 18, 18A, 18B, 40B, 45B and 51B.

149. The allegations of breach of duty in respect of 172 Brent Crescent are limited to the allegation in paragraph 68(1) of the Re-Amended Particulars of Claim as to a failure to account. There are no specific allegations as to breach of contractual or common law duties by the 1st Defendant or Autotrade in respect of 172 Brent Crescent, except those which might be inherent in the allegation of a failure to account; but those are inherent in the allegations as to trusteeship, nomineeship or agency. There are no allegations that 172 Brent Crescent was subject to a mortgage or charge. Thus:

149.1. The addition of clause 53C would only add a claim of a duty to account in respect of 172 Brent Cresent.

149.2. The addition of a claim for other relief in respect of 172 Brent Crescent on a contractual or common law basis would add nothing because there is no claim for a breach of duty in respect of 172 Brent Crescent other than a failure to account.

150. It is apparent from the pleadings and the evidence that even without that addition there will be a large amount of contested evidence as to who or what paid who or what, when and why and in respect of which property or properties. Further, there will need to be a large accounting exercise which is likely to include cross-accounting between various properties, businesses and projects. It is likely to be unsatisfactory if the element of that accounting which relates to 172 Brent Crescent is not included. As a practical matter it is likely to have to be included, whether or not there is a claim for it. In those circumstances the addition of a formal claim for an account in respect of 172 Brent Cross is unlikely to add significantly to the costs and I consider that the overriding objective requires that, subject to what I say next, I should permit it to be made.

151. It is unsatisfactory that the pleadings should be left in a state where it is necessary to carry out a less than straightforward analysis to work out what duties are alleged and what breaches of those duties are alleged. Accordingly I will permit the proposed Re-Re-Amendment to add paragraph 53C, but only on the footing that an addition is made to it which makes it clear that the duties it alleges are limited to duties to account.

The seventh group of proposed Re-Re-Amendments which are objected to by the Defendants

152. The seventh group of proposed Re-Re-Amendments which are objected to by the Defendants are those contained in proposed paragraphs 67D and paragraph 10A of the prayer.

153. Paragraph 67D and its sub-paragraphs currently allege particulars of damage for breach of contract and/or negligence.

154. The proposed Re-Re-Amendment to paragraph 67D is to add a claim for equitable compensation to be assessed for breach of fiduciary duty in respect of the same damage as is already particularised in paragraph 67D and its sub-paragraphs. I do not permit this proposed Re-Re-Amendment for the simple reason that it has no real prospect of success because the damage particularised in paragraph 67D and its sub-paragraphs is not damage which is recoverable as damage for breach of fiduciary duty.

155. One relevant extract from Millett LJ's judgment in *Bristol and West Building Society v Mothew* [1998] Ch 1 is at p.18E where he said:

> "The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty."

156. The losses alleged in paragraph 67D and its sub-paragraphs are not losses attributable to disloyalty or infidelity. Thus:

156.1. Paragraph 67D.1 claims a sum equivalent to those sums equivalent to those sums incurred by Autotrade, AFH Properties and/or 185 Park Avenue Ltd by way of default charges, interest and/or other costs of refinancing which the Claimant was required to meet on those entities' behalf and which are unlikely to be repaid to him.

156.2. Paragraph 67D.2 claims such further costs, expenses and/or losses arising out of or associated with the appointment of LPA Receivers and any disposals that may subsequently be made by them, the effect of which has and/or will be to reduce the economic value of the Claimant's property investments.

157. Proposed prayer (10A) is for equitable compensation as against the 1st Defendant and the three companies for breach of trust and/or fiduciary duty, to be assessed.

158. Insofar as proposed prayer (10A) is for equitable compensation for the breach of fiduciary duty sought to be alleged in the proposed Re-Re-Amendment to paragraph 67D, it would fall with my refusal to permit that proposed Re-Re-Amendment. However, there are allegations of a failure to account alleged elsewhere in the Re-Re-Amended Particulars of Claim. I consider that there is a real prospect that such failures would be breaches of trust and/or breaches of a fiduciary duty to account; though it is so difficult to see how those breaches could themselves, and as distinct from the losses consequent on a failure to pay what might be found due on the taking of an account, lead to significant, if

any, recoverable losses to the Claimant, that I consider that, at best, a claim for equitable compensation for failure to account barely meets the test of real prospect of success.

159. Equitable compensation is generally calculated on a different basis from common law damages, therefore the addition of a claim for equitable compensation is bound to add significantly to the costs going forwards. Further, the addition of a claim for equitable compensation to the existing claims for accounts and payment of what is found due on the taking of the accounts would result in the Claimant at some stage having to elect between the two remedies, possibly after both have been pursued for some time in tandem; thereby again adding to the costs going forwards.

160. Having regard to the considerations mentioned in the immediately preceding two paragraphs and the general considerations mentioned above, I consider that justice at proportionate cost requires that I should not permit the addition of a claim for equitable compensation for breach of trust or breach of fiduciary duty. I therefore refuse permission to add proposed prayer (10A).

The eighth group of proposed Re-Re-Amendments which are objected to by the Defendants

161. The eighth group of proposed Re-Re-Amendments which are objected to by the Defendants are those proposed to be added by adding a paragraph 68(4). Proposed paragraph 68(4) would provide:

> "(4) In breach of the duties particularised above, each of [the 1st Defendant and the three companies] have failed to co-operate in [the Claimant's] efforts to arrange the re-financing and prevent the sale of the properties."

162. That addition is opposed by the Defendants on the ground that it is embarrassing for lack of particularity, and that given the Claimant's changes to his case (ever-evolving as Mr Roseman described it) and the Claimant's repeated failure to comply with Part 18 requests and the breach of the court's order requiring further information, "inexcusable" (Mr Roseman's word).

163. In his advocate's enthusiasm, Mr Roseman's submission may somewhat over-egg the pudding, but the lack of particularity is unsatisfactory. Particulars of Claim must contain a "concise statement of the facts on which the Claimant relies (CPR 16.4(1)(a). I consider that an allegation that the 1st Defendant and the companies have failed to co-operate with the Claimant's efforts to arrange the re-financing and prevent the sale of the properties without particularising what failures to co-operate are alleged is too concise. After the proceedings have been on foot for over 3 years and at the fourth attempt to plead the claim, it behoves the Claimant to provide adequate particulars of any new claim which he attempts to advance.

164. In the letter dated 28 February 2024 the Defendants' solicitors stated that the proposed allegation in paragraph 68(4) was embarrassing for want of particularity. In the Claimant's solicitors' reply to that complaint, they said in their letter dated 5 March 2024 that the Defendants had failed to co-operate in the Claimant's efforts to arrange the re-

financing and prevent the sale of the properties (i.e. repeating the allegation made in proposed paragraph 68(4)), "including by not engaging with [the Claimant's] efforts to negotiate terms with potential lenders." The Claimant's solicitors averred that that was "plain enough from our draft amendments." I disagree. The allegation in paragraph 68(4) is open-ended as to what the failures to co-operate were alleged to be. The open-ended nature of the allegation is highlighted by the Claimant's solicitors writing that the failures included not engaging with the Claimant's efforts to negotiate terms with potential lenders. At this stage the alleged failures need to be identified so that the Defendants know the case which they have to meet.

165. In their letter of 5 March 2024 the Claimant's solicitors asked the Defendants' solicitors, if the Defendants said that further particulars were required, to identify what further particulars they said were required. The Defendants' solicitors' response in a letter dated 11 March 2024 was to aver that it was not in accordance with the overriding objective for the Claimant to produce "an embarrassingly deficient proposed amended pleading and then seek to resolve the issue in correspondence, particularly correspondence which itself does not properly shed any light on the issue." I do not wholly agree with that way of putting the matter, but, as I have already said in the context of this proposed amendment, I consider that it behove the Claimant to provide adequate particulars of the proposed allegation in paragraph 68(4). He did not do so in the correspondence.

166. In his skeleton argument Mr Fowler submitted that paragraphs 56, 62, 69 and 67 of the original Particulars of Claim particularised the failures to co-operate which were alleged in proposed paragraph 68(4).

167. Paragraph 56 does not do so, or at least not adequately. It alleges that "after considerable prevarication" the 1st Defendant agreed, as part of the alleged agreement of 28 May 2020, to provide the Claimant with full accounts and to hand over the management of the three companies to the Claimant. The allegation of an agreement to provide accounts and hand over management is not an allegation of failure to do those things. The allegation of "after considerable prevarication" might arguably be an allegation of lack of co-operation, but it is wholly unparticularised, so it takes the particularisation of the allegation of lack of co-operation little further.

168. Paragraph 62 does not particularise any lack of co-operation. It is an allegation as to how the Claimant managed to secure the removal of LPA receivers.

169. Paragraph 69 does particularise a lack of co-operation. Paragraph 69, in its Re-Re-Amended form permitted by me alleges unlawful purported amendment of the Companies House registers and purported removal of the Claimant as a director and shareholder of the three companies. It also alleges that since 24 May 2021 the 1st Defendant has refused on behalf of himself and each of the three companies to give the Claimant any information of any kind concerning his investments.

170. Paragraph 67 does particularise a lack of co-operation. For present purposes the relevant allegation in paragraph 67 is the allegation that the 1st Defendant and the companies did not keep the Claimant properly informed as to the amounts required from time to time to discharge the companies' respective mortgage obligations which could not be met out of rental income. That positive allegation is discernible from the two negatives that if they had done as they ought certain costs would and should have been avoided.

171. With the particulars alleged in paraphs 67 and 69, I consider that proposed paragraph 68(4) would be just about adequately particularised for me to give permission for it to be added. Adding it should not significantly increase the costs because it relies on matters which are already alleged. On that basis I consider that doing justice at proportionate cost requires the giving of permission to add proposed paragraph 68(4) as so particularised, in order that the Claimant's factual case as to breach can be further explained. Accordingly, I will give permission to Re-Re-Amend by adding proposed paragraph 68(4) with the addition of the words "by reason of the matters alleged in paragraphs 67 and 69" inserted in proposed paragraph 68(4) after the word "failed".

172. That analysis and permission is without prejudice to any further request which the Defendants might make for further information as to any of paragraphs 67,69 and 68(4).

173. In summary my decision is as follows:

173.1. In respect of proposed paragraph 3A I will not permit the first sentence of that paragraph to be added, but the remainder of that paragraph can be added. I will not permit the proposed Re-Re-Amendment to paragraph 5.

173.2. I will permit the proposed Re-Re-Amendments of paragraph 69 which are concerned with the directorships of the companies, except for the words "amongst other things".

173.3. I will permit the addition in paragraph 69 of the allegation that that on 24 May 2021 the purported amendment by the 1st Defendant of the Companies House registers to record himself as sole shareholder of each of the three companies was unlawful.

173.4. I will not permit the proposed addition to paragraph 69 of an allegation that the removal of the Claimant as the director was ineffective to remove the Claimant as shareholder. Nor will I permit the addition of the phrase "among other things".

173.5. I will permit the proposed Re-Re-Amendments to paragraph (3) of the prayer.

173.6. I will not permit the proposed addition of paragraph 4B.

173.7. I will permit Paragraph 18 to be Re-Re-Amended to the extent only that it will read as follows:

"18. Pursuant to the agreement reached at the meeting at 67 Praed Street in around November 2015, Amar acted as agent on behalf of the Investors in ~~By assuming responsibility for~~ letting and managing 187 Brent Crescent and/or ~~pursuant to an implied contractual agency, Amar (at all times since February 2016) as agent~~ owed Hassan ~~the following~~ a contractual and/or a common law duty to manage 187 Brent Crescent

with the skill and care to be expected of a reasonably competent and prudent managing agent."

173.8. I will not permit the proposed addition of paragraph 18AA.

173.9. I will hear submissions at the Consequentials Hearing as to whether I am correct in my assumption that no part of paragraph 23B was sought to be added and, if and to the extent that that assumption is incorrect, what order I should make in respect of paragraph 23B.

173.10. I will not permit the proposed Re-Re-Amendments adding paragraphs 34AA, 40AA, 45AA , 51AA and 53BA either with or without the additional words mentioned by Ms Kruger.

173.11. I will permit the prosed Re-Re-Amendment to add paragraph 53C, but only on the footing that an addition is made to it which makes it clear that the duties it alleges are duties to account.

173.12. I will not permit the proposed Re-Re-Amendment to paragraph 6D to add a claim for equitable compensation.

173.13. I will not permit the proposed addition of paragraph (10A) of the prayer.

173.14. I will permit the addition of proposed paragraph 68(4), but only with the addition if the words ""by reason of the matters alleged in paragraphs 67 and 69" inserted in proposed paragraph 68(4) after the word "failed".

173.15. I will order the costs caused by the Re-Re-Amendments to be paid by the Claimant.

173.16. I will consider or further consider other possible orders as to costs at the Consequentials Hearing.

Deputy Master Henderson 16/1/25