Neutral Citation Number: [2024] EWHC 969 (Ch)

Case No: BL-2023-000492

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

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

Date: 01/05/2024

Before :

MASTER KAYE

- -

Between :

GARDEN HOUSE SOFTWARE LIMITED	**Claimant**
- and -	
(1) TIMOTHY JOHN MARSH	**Defendants**
(2) TIMOTHY NICHOLAS ROWLAND	
(3) ANDREW PORTER	
(4) MARK HARRISON	
(5) LUCY SUN	
(6) PAMELA BALL	
(7) SERISYS ASSET HOLDINGS LIMITED	

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Jamie Riley KC (direct access) for the **Claimant**
Matthew Weaver KC (instructed by **Trowers & Hamlins LLP**) for the **First, Second, Sixth and Seventh Defendants**
Simon Mills (instructed by **JPP LLP**) for the **Third, Fourth and Fifth Defendants**

Hearing dates: 11 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER KAYE

MASTER KAYE :

1. This is my determination of the claimant's amendment application dated 5 December 2023 ("**the amendment application**") and the First, Second, Sixth, and Seventh Defendants' strike out application dated 16 June 2023 ("**the TH defendants**") and ("**the strike out application**") or ("**the applications**").

2. The claimant ("**GHSL**" or "**the claimant**") is a special purpose vehicle incorporated on 13 October 2021. Its business is the conduct of this claim. It took an assignment of claims against the defendants from the liquidators of Serisys Limited (in liquidation) ("**SL**"), dated 23 December 2021.

3. SL was a software development company and a wholly owned subsidiary of Serisys Group Limited ("**SGL**"), a Hong Kong registered company. SL was part of a larger Serisys Group which included two further subsidiaries of SGL, Serisys Solutions Limited ("**SSL**") and Serisys Asset Holding Limited another Hong Kong registered company ("**SAHL**" or "**D7**").

4. The Serisys Group was engaged in developing software known as ADYPT for use by financial services institutions. Employees of both SL and SSL were working on the development of different aspects of ADYPT. Underlying the issues in dispute is whether the development of software undertaken by employees of SL for SL were capable of being independent and distinguishable from developments undertaken by employees of other group companies such as SSL. The question that arises is whether the SL software developments could be said to have their own intellectual property and value on a free-standing basis and separate from the overall work of the employees of the Serisys Group in the development of ADYPT.

5. In 2017 SL was unable to pay its debts. SAHL was incorporated. On 30 August 2017 SL assigned its rights and interests in its intellectual property related to the development of ADYPT by its employees to SAHL and received in return a one-year licence of the intellectual property ("**the Assignment**"). There was no cash consideration for the Assignment. On the same date an assignment was entered into by SSL in relation to its intellectual property related to the development of ADYPT by its employees also with a one-year licence and on the same basis. SL and SSL's employees thereafter continued to develop ADYPT with financial support from SGL.

6. On 27 March 2019 SL was put into liquidation on the petition of HMRC. On the same day, a charge granted by SAHL over its interest in ADYPT on 1 March 2019 was registered as security for a loan from the sixth defendant to SGL ("**the Charge**").

7. The first and second defendants were directors of SL, SSL and SAHL ("**D1**" and "**D2**"). The third, fourth and fifth defendants were (non-executive) directors of SGL ("**D3**", "**D4**" and "**D5**" or together " **the JPP defendants**"). The sixth defendant is the wife of D1("**D6**").

8. The claimant says that the Assignment was concealed: it was not referred to in SL's financial statements or reported to SL's auditor. They claim that D1 and D2 used the Assignment to put assets out of the reach of SL's creditors. The claimant's case is that the elements of ADYPT developed by SL and SSL were separate and distinguishable and had value in their own right including at the time of the Assignment. They should

not therefore have been assigned for no consideration. They say that the Charge in favour of D6 was also intended to put assets out of reach of SL's creditors.

9. The defendants say that the Assignment was for a proper commercial purpose and was entered into so that licences of the ADYPT product could be granted to third parties from a single asset-holding company (SAHL) thereby monetising ADYPT for the benefit of the Serisys Group as a whole. The defendants say that the intellectual property that had been held by SL alone was worthless without the intellectual property that had been held by SSL.

10. The claimant commenced this claim in the commercial court by a claim form dated 23 December 2022. It did so without legal assistance. Mr Shovell who is a director of GHSL has considerable experience in the business of development of software such as ADYPT and has been an expert in the area of developing and valuing intellectual property for many years, however, being an expert on the underlying subject matter does not translate into an ability to frame a complex legal claim.

11. The original particulars of claim ("**POC**") sought to articulate a number of claims against the defendants in relation to SL. The claims included (i) claims that the Assignment was (a) a transaction at an undervalue under s238 Insolvency Act 1986 ("**IA 1986**") and (b) a transaction defrauding creditors under s423 IA 1986; (ii) claims for breaches of directors duties under s170 to 177 Companies Act 2006 ("**CA 2006**") against D1 to D5 in respect of SL; (iii) wrongful and/or fraudulent trading claims under s213 and s214 IA 1986; (iv) a claim that there was an unlawful means conspiracy in relation to the Assignment; (v) that the Charge was a transaction defrauding creditors; (vi) claims that certain payments were preferences or illegal/unlawful loans; and, (vii) a claim for exemplary damages.

12. The strike out application raised a number of objections to the POC, many of those objections were pleading points. In response the claimant issued an application to amend the POC dated 7 September 2023 and provided draft amended particulars of claim ("**DAPOC**"). The DAPOC had been drafted by Mr Shovell and although he had made considerable progress in addressing the points raised by the TH defendants there remained some outstanding issues to be resolved. Both applications were listed on 25 October 2023.

13. The TH defendants accepted many of Mr Shovell's proposed amendments but had continuing concerns in relation to the manner in which the claim was advanced in respect of (i) the value of ADYPT; (ii) the claim under section 423 IA 1986 in respect of the Charge (as defined in the POC); (iii) the breach of duty claim which they said did not plead which duties were relied on and were said to have been breached; (iv) the unlawful means conspiracy claim; (v) the fraudulent trading claim; and (vi) the exemplary damages claim.

14. The outstanding issues were matters of pleading, all likely to be capable of remedy. Consequently, I directed that the claimant serve a further draft amended POC ("**the APOC**") and that the defendants, both the TH defendants and the JPP defendants, confirm which amendments were agreed and which were opposed, if any, after which the claimant was to issue any further application to amend with the form of the proposed amended APOC to be provided with the application.

15. The claimant provided the defendants with the APOC, drafted by Mr Riley, on 24 November 2023. On 1 December 2023, the TH Defendants responded indicating that:

> "While the [TH defendants] make no admissions as to the merits of the claims and allegations now pleaded against them, they are in principle willing to agree to the proposed amendments to the Particulars of Claim. However, such agreement is subject to:
>
> 1.3.1 further clarification from the Claimant regarding the unlawful loans claim; and
>
> 1.3.2 confirmation that the Claimant shall pay the Defendants' costs of and occasioned by the amendments to the Particulars of Claim, along with our clients' costs of their strike-out / summary judgment application."

16. None of the matters which had been raised in the strike out application remained in issue and the in-principle nature of the agreement related to only the resolution of the costs issues and the unlawful loans claim which they considered to be a new claim, the email continued as follows:

> Unlawful Loans
>
> "…
>
> 2.2 It is unclear on what basis you allege that the payments the First Defendant received totalling £105,790 from Serisys Limited (SL) were loans and nor has this been raised before or pleaded.
>
> 2.3 …In the absence of a proper explanation as to how the payments the First Defendant received from SL constituted unlawful loans from SL to the First Defendant, it does not appear that there is any real prospect of success for alleging that the payments totalling £105,790 were unlawful loans.
>
> 2.4 In order for our clients to consider whether or not to accept the proposed amendments at paragraphs 69 to 71 of the draft amended Particulars of Claim, an explanation is required as to the basis upon which the Claimant asserts that the payments totalling £105,790 were unlawful loans."

17. Despite some further clarification from the claimant the TH defendants continued to maintain their objections to the unlawful loans claim as set out below:

> You state in paragraph 3 of our [sic] email that paragraph 51 of the (original) Particulars of Claim already includes an unlawful loan claim, and the proposed amendments "merely provided clarification". However, that is not at all apparent from paragraph 51 of that pleading, which does not refer to the Companies Act 2006 at all.

> 2.3 You also assert that "no objection was made to this illegal loans pleading" in our clients' strike out / summary judgment application. To be clear, our clients' application did seek a strike out of paragraphs 47 to 53 of the Particulars of Claim (including paragraph 51)…Although no express reference was made to striking out an unlawful loans claim brought under s197 Companies Act 2006 (or reverse summary judgment in respect of the same), this was simply because you made no refence to s197 in paragraph 51. Therefore a cause of action based upon s197 Companies Act 2006 is not disclosed in, or otherwise apparent from, the Claimant's current statement of case.

18. The scope of the TH defendants' objections to the APOC was therefore limited to the unlawful loans claim and costs.

19. On 1 December 2023, the JPP defendants confirmed that they were also prepared to consent to the majority of the APOC subject to an appropriate costs order but explained that their objections included paragraphs 5, 16, 40, 42, 49, 69, 71, 76-79.

20. On 6 December that list was refined and reduced. The JPP defendants' explanation for their continuing objections to the amendments to paragraphs 4,5,40.1,40.4, 42 and 44, 76 to 79 and the unlawful loans claim was:

> "**§§4-5 (de facto directors)**. The existing pleading is that "SL did not have separate board meetings, instead, all of its business and legal decisions were taken by the First to Fifth Defendants as part of SGL board meetings" (so they were shadow directors for which a remedy was sought). The new plea adds the alternative text "…all of its business and legal decisions were taken by the First to Fifth Defendants as part of SGL board meetings and/or as part of SL board meetings held simultaneously with SGL board meetings". This plea of de facto directorship is a new cause of action and shall be opposed as the proposed amendments have no real prospect of success. "
>
> **Acts and omissions of JPP Defendants (§40.1) & (§40.4).** The present plea is that the JPP Defendants approved the Assignment (§16) and agreed to it (§39.1). The proposed amendments are that they caused the Assignment (§40.1) and completed the Assignment (§40.4). The proposed amendments will be opposed on the grounds that the (i) JPP Defendants have a limitation defence and (ii) the proposed amendments have no real prospect of success.
>
> **Dishonest assistance (§42, 44).** These proposed amendments will be opposed on the grounds that (i) the JPP Defendants have a limitation defence and (ii) the amendments have no real prospect of success.
>
> **Exemplary damages (§§76-79).** The JPP Defendants will oppose these amendments on the grounds that the amendments

> have no real prospect of success. It is fanciful to contend that the JPP Defendants calculated to make a profit which "may exceed any compensation that would be payable" to SL. An application for strike out or reverse summary judgment shall be made in respect of the existing pleading.

21. They no longer opposed the amendments to any other part of the APOC and specifically confirmed that they no longer objected to paragraphs they had objected to on 1 December 2023 as follows:

> **The Free Services (§40.2).** The present plea is that the JPP Defendants arranged for SL to provide free services (§36) and agreed that it should do so (§39.2). The proposed amendments are that they caused or allowed SL to provide the free services (§40.2). We have reviewed this further, and we shall not be opposing this amendment.
>
> **The JPP Defendants owed a duty to act with reasonable care, skill and diligence (§39.2), which was breached (§40.5).** Although this is a new plea, upon further review, the JPP Defendants shall not be opposing this amendment.

22. The JPP defendants' position in relation to the unlawful loans claim was reserved as follows:

> In respect of the newly pleaded Unlawful loans (§71), we also require an explanation of the basis upon which you assert the payments made to the First Defendants were unlawful loans, for our clients' further consideration. We reserve our position in this regard.

23. The JPP defendants' objections were not ones which could be advanced by the TH defendants. They were focussed on the characterisation of the role of the JPP defendants. The JPP defendants had not and have not made any application to strike out any part of the claim against them.

24. Having seen the JPP defendants' objections, the TH defendants sought to retreat from their 1 December 2023 position. By the time of the hearing the TH defendants' objections were focussed on the unlawful loans claim at APOC [69] to [71] with a reservation of their position in relation to the exemplary damages claim at APOC [76] to [79]. This later reservation relied on the JPP defendants' submissions, and no separate submissions were made by Mr Weaver. The exemplary damages claim had always been part of the claim and the TH defendants' strike out application was focussed on pleading points not the merits of the underlying claim.

25. Mr Mills had sought to expand his objections to the APOC to include those which had been conceded on 6 December 2023. Mr Riley objected to the attempt to resile from the position adopted on 6 December 2023 at such a late stage. He said he had, not unreasonably, prepared for the hearing on the basis of the position as at 6 December.

26. The TH defendants had accepted that if the amendments were allowed, or agreed then the strike out application would fall away.

27. The evidence relied on by the parties in relation to the applications was as follows:

    i) Mr Shovell's second and third witness statements dated 7 September 2023 and 9 January 2024 and Mr Smith's second witness statement dated 8 January 2024 for the claimant;

    ii) Mr Butler's second, fourth and fifth witness statements on behalf of the TH defendants dated respectively 16 June 2023, 19 October 2023 and 20 December 2023;

    iii) D3, D4 and D5's first witness statements all dated 29 December 2023 and D3's second witness statement dated 10 January 2024.

28. I had the benefit of written and oral submissions from counsel for all parties, which together with the evidence relied on, I have considered carefully and taken into account even if I do not set out each and every point or argument advanced at the hearing.

Applicable Principles

29. There was broad agreement as to the applicable principles when considering an amendment application including the approach to take when considering an amendment that might be said to be advancing a new cause of action in existing proceedings after the expiry of the relevant limitation period. It is accepted by Mr Riley that at least one of the contested amendments seeks to advance a new cause of action. Given when the underlying events occurred the existence of any limitation defence may be a relevant factor to consider.

30. There was a difference of approach between Mr Mills and Mr Riley as to the position to be adopted where the APOC was said to be advancing further particulars in support of an existing plea.

31. Whether to permit an amendment is ultimately an exercise of discretion. The guiding principle is the overriding objective which requires the court to strike a balance between the injustice to the applicant if the amendment is not permitted and the injustice to the respondent if the amendment is permitted. The court must therefore have regard to all the circumstances before granting permission.

32. However, the applicant has to be able to demonstrate that the proposed amendment has a real prospect of success. *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18] emphasises the need for any proposed amendment to be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence which establishes a factual basis for the allegation thereby drawing on the same test applicable to applications for summary judgment (see *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. I was referred to *Pearce v East and North Hertfordshire NHS Trust* [2020] EWHC 1504 (QB) per Lambert J at [10] for a more recent statement of the factors to consider.

33. When considering the proposed amendments, the relevant test imposes a comparatively low bar, and the question is whether it is clear that the proposed amendment has no prospect of success. Amendments can be weak and even improbable but still not fanciful. A party is not barred from pursuing a claim that may appear weak or improbable if it is not fanciful. That is particularly the case where contested factual evidence might be necessary to test the claim. Where any issue turns on contested factual evidence or where a factual enquiry is necessary or determination of the issue involves mixed questions of fact and law the court will often be unable to say with confidence that the proposed amendments are fanciful or without substance, even if apparently weak, without conducting a mini trial. In such a case the low bar for amendment will have been met. Of course, the court may impose conditions where a claim or part of a claim is particularly weak or improbable but not fanciful.

34. Where an amendment is said to advance further particulars in support of an existing plea Mr Riley submits that the court does not need to assess whether the further particulars have a real prospect of success. The assessment of those further particulars is a matter for trial; see *Scott v Singh* [2020] EWHC 1714 (Comm) at [19].

> "The requirement that the claim or defence proposed by way of amendment has a real prospect of success arises from the need to avoid the futility of allowing a claim or defence to be made by way amendment which is liable to be struck out or to be defeated by a summary judgment application. The same consideration does not apply if the line of claim or defence is in the original pleading and will remain in issue even if the amendment is not allowed. "

35. Those principles were subsequently approved by the MR in *CNM Estates (Tolworth Tower) Ltd v Simon Peter Carvill-Biggs Freddy Khalastchi* [2023] EWCA Civ 480 at [77].

36. In *Phones 4U Ltd (in administration) v EE Ltd* [2021] EWHC 2816 (Ch) at [11] Roth J said:

> "That is why a contested amendment which seeks to introduce a new basis of claim or ground of defence into proceedings, for example a new allegation that there was an implied term in a contract, will not be allowed if the party seeking to amend has no real prospect of success upon it. It would be pointless to allow the amendment if the other party could then obtain summary judgment against that head of claim or that ground of defence or that issue. All that is very different from an application to amend by giving further particulars based on factual material in support of an existing plea. In my judgment the court should not on such an application conduct an assessment of whether each of the various particulars which it is sought to introduce have a real prospect of supporting that plea. Those are matters for trial."

37. An amendment that can properly be characterised as providing further particulars, must still have some relevance or connection to the plea. If it is irrelevant or otherwise inappropriate it should not be allowed. Once the claim is arguable the question of

whether all the facts relied on support the claim becomes a trial matter if there is no successful application to strike out or for summary judgment. But again, the court should not be conducting a mini trial. As Roth J said in *Phones 4U* at [8] and as seems particularly apposite in relation to some of the amendments and the arguments advanced by the JPP defendants in this case:

> "8…An application to amend by giving further particulars should not be turned by a side wind into a strike out or reverse summary judgment application…"

38. Mr Mills submits that even where there is an existing claim the court should carefully assess the new particulars. Where they are contradicted by or not supported by the contemporaneous factual documents the court should not permit them. He argues that in reality there was little difference between the approach to new claims and further particulars. However, the no real prospect of success test or merits test is about the cause of action itself and not about the supporting factual detail alone. On amendment there is a difference of approach where the contested amendments relate to further or better particulars of an existing plea as is clear from *Scott*, *CNM Estates* and *Phones 4U*.

39. Indeed, the court should accept factual averments unless they are demonstrably untrue or unsupportable: see *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3; [2021] 1 WLR 1294 at [107]; *JFC Plastics Limited v Motan Colortronic Limited, Herbold Mecksheim Gmbh* [2019] EWHC 3959 (Comm) at [14].

40. As a general rule a claim may not be advanced if the relevant limitation period for bringing that claim has expired. In this case many of the key events giving rise to the claims took place in 2017. Here there may be some debate about the nature of the claims and which limitation periods may apply and from when, but the JPP defendants say that they have a potential limitation defence to what they say are new claims.

41. Mr Riley accepts that the proposed dishonest assistance claim added at APOC [42] and [44] is a new cause of action against the JPP defendants. Since the claim arises out of the Assignment which took place on 30 August 2017, the addition of that new claim if permitted would be likely to give rise to a limitation defence.

42. However, even if an amendment amounts to a new cause of action after the relevant limitation period has expired the amendment may still be allowed under CPR 17.4 and s35 of the Limitation Act 1980. These provide that the court may allow such an amendment if the new claim arises out of the same or substantially the same facts as are already in issue in an existing claim.

43. When considering whether a party should be allowed to advance such a claim the court has to consider whether (i) the proposed amendment in fact seeks to add or substitute a new cause of action and (ii) seeks to do so where it is reasonably arguable that the amendments are being sought outside the applicable limitation period and there is an arguable limitation defence available.

44. In determining whether the amendments introduce a new cause of action, the court is concerned with the comparison of the essential factual elements in the cause of action already pleaded with those of the proposed cause of action. Mr Riley submits that this

approach supports his more general argument that seeking to add further instances of breach or better particulars of existing claims does not amount to a distinct cause of action relying on the discussion of the relevant authorities in *Mulalley & Co v Martlett Homes Ltd* [2022] EWCA Civ 32 at [40]-[46] ("*Mulalley*") and in particular at [44] to [46] where Coulson LJ quoted passages from Tomlinson LJ's summary of the law at [20] to [22] in *Co-Operative Group Limited v Birse Developments Limited & Anr*. [2013] EWCA Civ 474 in which Tomlinson LJ considered what constitutes a new cause of action Coulson LJ noting at [45]:

> "that the courts sometimes had difficulty in deciding whether a new cause of action had arisen in circumstances where different facts were alleged to constitute a breach of an already pleaded duty…"

45. And quoting from a passage in *Co-Operative Group Limited* in which Tomlinson LJ said at [22]

> "The question to be resolved is therefore one of fact and degree. For my part, I am not convinced that one needs to look further than for a change in the essential features of the factual basis relied upon, bearing in mind that the factual basis will include the facts out of which the duty is to be spelled as well as those which allegedly give rise to breach and damages."

46. In *Mulalley* at [47]-[54] Coulson LJ then reviewed the authorities and the approach to determining whether a new claim arises out of the same or substantially the same facts for the purpose of CPR r.17.4 setting out Tomlinson LJ's discussion in *Ballinger v Mercer Limited & Anor* [2014] EWCA Civ 996 at [34] to [37].

47. Ultimately, it is a question of balance, and of fact and degree. If the judge is satisfied that the same or substantially the same facts (rather than similar facts) are going to be investigated for the purposes of an existing claim that would tend to weigh in favour of permitting the amendment. There does not need to be a complete overlap, but the court will need to consider if there is a sufficient overlap with the existing claims such that it can be fairly said that they arise out of the same or substantially the same facts. This was explained by Tomlinson LJ in *Ballinger* at [54]:

> "The substance and purpose of the exception in subsection (5) is thus based on the assumption that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the pre-existing matters [in] issue, already have had to investigate the same or substantially the same facts."

48. A further relevant consideration on an application to amend and directly relevant to the question of prejudice and the exercise of the court's broad discretion is the stage at which the amendment is sought. Whether an amendment is late must always be considered in context. In this case the consequence of the applications is that procedurally the claim is at a very early stage. The statements of case are yet to be finalised and the CCMC will not take place before autumn 2024. In a very practical sense much of the detailed investigation is still to be undertaken by all parties leaving

aside the overlapping nature of the claims being advanced. That is a significant factor to consider when considering the balance of prejudice.

49. A final point for general consideration on the approach to the APOC in this case arises from the position of the claimant. Here the POC and DAPOC were drafted by the claimant when unrepresented. An unrepresented party must comply with the rules and practice directions including those relating to statements of case to the same extent as a represented party. However, there may be some flexibility at the margins which is more likely where an unrepresented party is seeking to advance a technically complex claim and their POC may need some refinement to enable the other party to understand the case they have to meet. Indeed it is that flexibility at the margins that was recognised by the TH defendants when identifying the pleading difficulties with the POC and their sensible approach to the strike out application. It was that same flexibility at the margins that resulted in the order providing the claimant with an opportunity to try to resolve those pleading issues.

50. The POC set out the underlying facts relied on but included evidence and expert analysis. Although it had headings and sections setting out each claim not all the elements of each claim where clearly articulated in the relevant sections or at all. It had led to some understandable complaints and confusion on the part of the defendants. Indeed a fair complaint about the POC might have been that it contained too many facts, narrative and expert evidence, and not enough focus on setting out the elements of each cause of action and the facts and matters said to support each of those causes of action. Nonetheless, not every part of the POC was the subject of the strike out application and many of the amendments in the DAPOC had adequately addressed some of the shortcomings in the POC. However, in redrafting the APOC, Mr Riley has taken the opportunity to formulate more clearly each of the claims such that the case the defendants have to meet is now much clearer as demonstrated by the very limited objections to the APOC.

51. Where a claim was advanced in the POC but is now better expressed the court will be slow to treat those amendments as new claims (to which the test of reasonable prospect of success applies) and slow to refuse to allow those amendments or further particularisation in the absence of an application to strike out the original plea in the POC. Where the amendments simply better express an existing claim the benefits of clarity, the overriding objective and good case management will often weigh in favour of allowing such amendments. Where those amendments are supplemented by particulars that do not seek to expand the claim but only provide relevant further particulars, again the benefits of clarity, the overriding objective and good case management will weigh in favour of allowing such amendments.

Conclusion

52. Although it appears to me that two of the claims are new claims, and part of another claim is arguably a new claim against some of the defendants and that there may be limitation defences available for some of the new claims, I have nonetheless determined that the amendments should be permitted subject to a very minor tweak.

53. Where it appears there may be any limitation defence issues the amendments that I have permitted are the natural alternatives or corollary of existing claims. Indeed they substantially overlap with the existing claims and do not appear to require any

additional investigation of facts and matters beyond that which will be required for the existing and continuing claims. Given the early stage of the proceedings procedurally there is no obvious risk of out of sequence investigation having to take place that would not have to take place in any event for the continuing claims. The new claims plainly arise out of the same or substantially the same facts as the existing and continuing claims.

54. There is nothing unusual or surprising about the group of claims that are being advanced together other than perhaps the exemplary damages claim. They are the types of claims that are often advanced together and/or as alternatives based on the same facts and matters.

55. I have considered the amendments against the broad principles set out in this judgment taking into account the submissions and the evidence. The arguments raised by all parties have merit but because of the mixed questions of law and fact and the fact sensitive nature of some of the claims, including the need for the court to undertake an objective assessment of the facts as found, who is right will be a matter for trial.

56. Many of the amendments relate to existing claims and are in reality only further particulars or part of the overall reorganisation and clarification of the claims. I consider that on the basis of the material available some of the existing claims to which the amendments relate are weaker than others or even improbable, but they are all fact sensitive and not unarguable or subject to any relevant strike out application. The claimants have already provided a first tranche of staged security for costs and the question of further security will be considered on the handing down of this judgment.

57. All the additional facts and matters included as part of the amendments even for those claims which I consider are new causes of action are already in issue and factually overlap with the claims which will continue in any event, even if some of the claims they overlap with appear weaker than others.

58. I am satisfied that the amendments overcome the low bar on an amendment application and that the court should exercise its discretion to allow the amendments having regard to the overriding objective and good case management.

The APOC

59. The APOC sets out the background to the claim at paragraphs 1-28. Mr Riley has made substantial amendments to this section. Many of those amendments are ones that provide more clarity and/or are by way of reorganisation. The TH defendants do not oppose them. The JPP defendants only challenge the amendments to APOC [4] and [5] (previously POC [14] and [15]) in so far as they are said to seek to advance/support what Mr Mills submits is a new claim of de facto directorship of SL in relation to the JPP defendants. The APOC then sets out ten claims in section C, at paragraphs 29 – 79.

60. The first two claims at APOC [29] to [38] are to set aside the Assignment as a transaction at an undervalue under s238 IA 1986 or as a transaction defrauding creditors under s423 IA 1986. The remedies sought include payment of a sum equivalent to the value of ADYPT. The amendments are substantial seeking to properly formulate and particularise the existing claims. The amendments are not opposed.

61. The third set of claims are those against the individual defendants, D1 to D5, in relation to breaches of duty by them as directors or shadow directors of SL at APOC [39] to [41]. The amendments are substantial but again primarily focus on restructuring and reorganising the claim. They are not opposed by the TH defendants. These claims had previously been contained in two short paragraphs at POC [30] and [31]. The TH defendants had criticised the lack of particularity. The amendments now set out the duties relied on at APOC [39] by reference to ss172, 174, 175 and 177 CA 2006. APOC [40] sets out the breaches of duty relied on and now provides some particulars. APOC [41] sets out the remedies sought by the claimant which include the loss of market value of ADYPT, and loss of profit from future licence income and for development services.

62. The TH defendants do not object to these amendments. The JPP defendants' objections had been limited to APOC [40.1] and [40.4], but Mr Mills sought to expand the JPP defendants' objections in submissions.

63. The fourth claim is at APOC [42] to [44]. It is a new alternative claim of dishonest assistance against the JPP defendants and D7. As against the JPP defendants it is pleaded as an alternative to the breach of duty claims against them as shadow or de facto directors set out at APOC [39] to [41]. The remedies sought are for equitable compensation and an account of profits. It is opposed by the JPP defendants. D7 does not oppose the addition of the dishonest assistance claim against it.

64. The fifth claim is an unlawful means conspiracy advanced against D1 to D5 and D7 in APOC [45] to [50]. APOC [50] now sets out the remedies sought which broadly mirror the losses/remedies sought under other heads of claim including a claim for the lost value of ADYPT at the date of the Assignment, loss of profits for licence income and development services. The amendments are not opposed by the defendants.

65. The sixth claim at APOC [51] to [59] sets out a wrongful trading claim under s214 IA 1986. The remedy sought is a contribution from D1 to D5 by reference to the estimated deterioration of the financial position of SL. The amendments which include further particulars of the alleged actions or inaction of D1 to D5 are not opposed.

66. The seventh claim at APOC [60] to [68] sets out a preference claim under s239 IA 1986 against D1. The remedy sought is repayment of the sums said to represent the preference payment. The preference claim against D6 has been amended out. The amendments are not opposed.

67. APOC [69] to [71] sets out an unlawful loans claim as an alternative to the preference claim. The remedies sought are avoidance of the loan and restitution as against D1 and an indemnity from D1 to D5. The claim is opposed by both the TH defendants and the JPP defendants for different reasons but on the basis that it is a new claim. The claimants say it always formed part of the claim and POC.

68. The ninth claim at APOC [72] to[75] is the corollary of the second claim being a claim that the Charge was a transaction defrauding creditors under s423 IA 1986. The remedy sought is to set aside the Charge. The TH defendants do not oppose the amendments.

69. Finally the tenth claim is for exemplary damages against the defendants at APOC [76] to [79]. This is not a new claim but has been substantially amended to address the pleading points raised in the strike out application. The JPP defendants oppose the

amendments. The TH defendants had initially agreed the amendments in principle but have since sought to reserve their position.

70. It will be apparent that whatever the outcome of the applications substantive claims will continue against all the defendants which will involve a detailed consideration of the facts and circumstances surrounding the Assignment and the Charge, the decision making processes within SL and the role of each of the defendants. This will include, as set out above, consideration of the breach of duty claims against D1 to D5 as directors or shadow directors, the unlawful means conspiracy and the wrongful trading claims. It is important to keep in mind the extensive nature of the factual inquiry that will be undertaken in relation to those overlapping claims when considering the approach to the JPP defendants' objections to some of the amendments.

71. Mr Mills made the submissions in relation to the amendments which only the JPP defendants objected to and in relation to the exemplary damages' amendments. Mr Weaver made submissions in relation to the unlawful loans claim.

72. I will address the unlawful loans claim and exemplary damages claims first as those affect both the JPP defendants and the TH defendants. I will then consider the de facto director issue before dealing with the other outstanding amendments.

Unlawful Loans

73. Mr Weaver submits that the unlawful loans claim is a new claim. Mr Riley says it always formed part of the claim and all he has done is separate it out from the preference claim for clarity.

74. The original claim form included:

> "In September and October 2018 the First and Sixth Defendants received funds from SL totalling £105,790 and £20,000 respectively as an unlawful loan or preferential payments."

75. The POC [51] included:

> "Either the Second Defendant's above £105,590 payments from SL to the First Defendant were illegal loans to him which the Claimant asks the Court to void and require the First and Second Defendant to repay or they were payments in preference and the Claimants seek repayment."

76. It seemed to me tolerably clear that POC [51] and the claim form in combination identify an unlawful loans claim and the appropriate remedy for such a claim as distinct from the remedy for a preference payment. POC [51] specifically seeks to avoid the illegal loan as well as repayment. This claim and remedy did not feature in the POC prayer. In the POC [51] falls within a section headed preferential payments at [46] to [53].

77. The claim advanced against D6 was not developed in the POC and would not have been sustainable. In fact in response to the defence the claimant confirmed in its reply that it would amend the POC to exclude the claim against D6.

78. The strike out application sought to strike out the claim at POC [46] to [53] which included [51] raising pleading points about the way in which the claim was advanced. The TH defendants did not raise any substantive merits issues in relation to the claim against D1. The TH defendants say they had not appreciated that a separate unlawful loans claim was advanced.

79. The draft amended claim form removed reference to D6 and the £20,000 but no amendments were proposed to paragraph [51]. Both Mr Butler's fourth witness statement at [47] to [48] and Mr Weaver's skeleton argument for the October hearing whilst maintaining there had been no preference payment confirmed that the strike out of paragraphs [46] to [53] was not being pursued and the amendments were accepted. This left the plea in relation to the illegal loan in POC [51] in place.

80. In the APOC Mr Riley made further amendments to the preference claim, none of which are opposed, and separated out the unlawful loans claim setting out the legal basis for the claim and the legal consequences at APOC [69] to [71].

81. APOC [69] now pleads the relevant statutory provisions, s197 CA 2006, and the remedies at [70] by reference to s 213 CA 2006. As paragraph [51] POC had pleaded that there was an illegal loan and the relevant remedy this does not appear to me to be new. Mr Riley has added some particulars setting out the basis of the claim which are either the same as those relied on for the preference claim or a corollary of them. The unopposed amendments to the preference claim at APOC [60] to [68] take the same approach of clarifying and setting out the legal basis and consequences of the preference claims.

82. It seems clear to me that the unlawful loans claim was not a new claim despite the absence of the remedy from the prayer. Mr Weaver argued that the TH defendants had not sought to strike out the illegal loans/unlawful loans claim (as opposed to the preference claim) because they had not appreciated that [51] was making a claim under s197 CA 2006. But I was unclear what difference the reference to s 197 CA 2006 made given the clear allegation of unlawful or illegal loans in both the claim form and POC. Indeed whilst it is preferable to have the statutory reference in the APOC for clarity it was not essential to perfect the claim.

83. There is no obvious reason why the TH defendants should be objecting to the unlawful loans claim as against D1. Not appreciating that it formed part of the POC does not appear to me to be a proper basis for refusing the amendments. It was clearly pleaded even if the remedy had not made it into the prayer.

84. Mr Weaver argued that there was no evidence or contemporaneous documents to support the existence of the loan. The TH defendants plead that the payments were repayments of a loan made by D1 to SGL. However, the very argument that the POC did not set out the legal basis for the illegal loans, why they should be voided and from whom they were made recognises that the claim was already in the claim form and POC even if not fully particularised or included in the prayer. Mr Weaver sought to argue that if the amendment is not allowed there would be nothing to fall back on but again this did not seem to acknowledge the existence of the illegal loans claim in the claim form and the POC [51] even if the remedy was not included in the prayer to the POC.

85. The JPP defendants object to the unlawful loans claim as against them on the basis that APOC [71] introduces a new cause of action against them to which they would have a limitation defence. As the unlawful loans were all paid between September and October 2018, and the loan agreement on which at least D1 relies is dated 9 October 2018, it was not obvious that there would in fact be a limitation defence.

86. Mr Riley submits that even if it were arguable that the unlawful loans claim was a new claim that it has merit and is arguable. The determination of this amendment does not require the claimant to prove the unlawful loans claim only to overcome the low bar for amendment if that is required at all and the amendments are not just a reorganisation of an existing claim as it appears to me.

87. The TH defendants defence at [68] pleads that SGL, SL and SSL did not have separate bank accounts and shared SL's UK bank account. Further that the payments which the claimant relies on as being either preference payments or unlawful loans were payments of sums held by SL for SGL which SGL owed to D1 pursuant to a loan agreement dated 9 October 2018.

88. Mr Riley says there was no dispute between the parties that there was no resolution approving the loan and it is common ground that SL made payments to D1 so the claim cannot be said to be unsustainable. There is no resolution that might have clarified the position and provided a basis for saying even if the monies came from SL's bank account, they were repayment of sums owed by SGL to D1. D1 to D5 were all directors of SGL when any resolution to approve the arrangements or loan agreement would have been entered into.

89. The claimant has joined issue on whether the money used to pay D1 was money belonging to SL or SGL. The liquidator of SL had sought repayment from D1. The loan agreement relied on post-dates all but two of the payments which are relied on in APOC [63] and which had been made from SL's UK bank account to D1.

90. Further the POC pleads that the JPP defendants were shadow directors of SL, and that claim is not subject to any application to strike out. Other claims beyond the preferential payment claim, claims such as the wrongful trading claims to which the JPP defendants are already party will involve investigating overlapping facts and matters.

91. Here the claimant can point to payments to D1 by SL that are not properly explained or evidenced. The evidence underpinning the unlawful loan claim will be considered at trial when the court considers the preference payment and will also overlap with the evidence considered for some of the other claims to which the JPP defendants are already party. It cannot be said that the alternative claim that the payments in issue were unlawful loans is obviously unsupportable. It is based on the same factual matrix and indeed it will be investigated as against D1 in any event for the reasons set out above.

92. It seems to me that (i) it is clearly arguable on the basis of the evidence presently available that the payments to D1 were either preferences which claim is continuing in any event or that in the alternative that (ii) it is not at all fanciful to argue on the basis of the same evidence that an inference can be drawn on the evidence presently available that the payments amounted to unlawful loans to D1.

93. The overlapping nature of the evidence, the lack of clarity and formality in the corporate governance such as the absence of any resolution and the shared bank account feeds into some of the other aspects of the amendments such as the de facto director claim.

94. I am satisfied that as against D1 the amendments to [69] and [70] should be allowed. As Mr Riley submits the amendments clarify the existing claim and put it in its proper legal framework. He does not need to meet the merits test as it is not a new claim and there is no application to strike it out. But if it were a new claim, it easily overcomes the merits test for the reasons set out and for those same reasons would be allowed in any event.

95. I am satisfied that it would be a triumph of form over substance in those circumstances not to permit the amendments relating to the unlawful loans claim as against D1 as set out in APOC [69] and [70] and the amendment to the prayer to perfect the claim.

96. APOC [71] needs to be considered separately. It seeks an indemnity for SL/the claimant under s213(3) and (4) CA 2006 from D1 to D5 in respect of any loss it suffers from being unable to recover the repayment of the unlawful loan from D1. This is certainly a new and/or expanded remedy that brings in a remedy against D2 to D5 for the first time. D2 to D5 have not yet had the opportunity to plead to the unlawful loans claim at all given the way in which the claim was advanced in the POC. It is therefore arguably a new claim against them even if Mr Riley is right to argue that in fact the APOC simply advances an additional remedy that arises from the same claim as against D1. In substance he argues that the claim under s213 simply sets out the consequences of the unlawful loans claim as a matter of statute so there is no need to consider the prospects of success.

97. All the same facts and matters will have to be investigated in relation to the unlawful loans claim as the preference claim and both will be fully investigated at trial in any event as both claims will proceed against D1. The unlawful loans claim is simply an alternative way of characterising the payments made to D1 and an alternative remedy arising out of the same or substantially the same facts. There will be an almost complete overlap in relation to the facts and matters the court will have to consider for both claims.

98. In so far as the argument is reduced to a narrow argument as to whether the addition of a remedy changes the nature of the existing claim such that it amounts to a new claim for the purposes of s35(5) it is necessary to recognise the distinction between the factual elements on which the claimant relies and the cause of action they seek to advance and the remedy they seek.

99. Mr Riley referred me to the passage in the White Book 2023 ed. at 8-110:

> "In *Revenue and Customs Commissioners v Begum* [2010] EWHC 1799 (Ch); [2011] B.P.I.R. 59 (David Richards J) the judge noted that, whilst this distinction is clear, it might be thought to lead to some tautology when applying the test in s.35(5)(a) as to whether "the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action". The judge explained that the answer lies in treating "cause of action"

> as those facts relied on in the statement of case as giving rise to a particular legal result and remedy (para.30). A change in the remedy may change the claim, but not the cause of action. A change in the essential features of the factual basis (rather than, say, giving further particulars of existing allegations) will introduce a new cause of action, but it may be permitted under s.35(5)(a) and r.17.4(2) if the facts are the same or substantially the same as those already in issue. "

100. And continuing:

> "As the Court of Appeal emphasised in Lloyds Bank Plc v Rogers (No.2) [1999] 3 E.G.L.R. 83, per Auld LJ at p.85: "
>
> "It is important to note that what makes a new claim as defined in s.35(2) is not the newness of the claim according to the type or quantum of remedy sought, but the newness of the cause of action which it involves. The formula employed in s.35(2)(a) and (5) is 'a claim involving … the addition or substitution of a new cause of action'."

101. As against D1 it seems to me that [71] is simply an additional remedy and not a new claim at all and should be allowed. It seems to me that the unlawful loans claim is arguably a new claim as against D2 to D5 and one which they have not had to engage with before. However, even if the unlawful loans claim is a new claim for these purposes against D2 to D5 I am satisfied that the unlawful loans claim is arguable and overcomes the merits test for these purposes, will have to be determined by the court in any event as against D1 and the amendments at APOC [71] which bring in a remedy against D2 to D5 should also be allowed.

Exemplary Damages

102. The claim for exemplary damages was in the original POC at [53] to [55] and was included in the prayer. It is not a new claim. However, as articulated in the POC it would have been susceptible to the strike out application. It did not set out the legal requirements for a claim for exemplary damages or specify the grounds on which the claimant relied.

103. Mr Riley submits that the APOC now sufficiently sets out the grounds relied on and the legal basis of the claim. Indeed the TH defendants had agreed to the amendments on 1 December 2023 and do not seek to advance the strike out application which had taken pleading points not merits points in relation to this claim. The TH defendants did not make any submissions in relation to the exemplary damages claim despite having retreated from their 1 December 2023 position such that they now reserved their position. This appeared to support Mr Riley's submissions that this existing claim was now adequately pleaded.

104. Mr Mills' objections to the amendments were that they lacked any prospect of success. This was a difficult submission to sustain in the absence of any application to strike out. The JPP defendants had recognised the need for such an application on 6 December 2023. As noted above (i) a party is not prevented from making or pursuing weak or

even unusual claims and (ii) where there is an existing claim one cannot use an objection to an amendment to achieve a strike out by the backdoor.

105. The exemplary damages claim has been substantially amended. The POC had set out the claim by reference to an academic paper on deterrence theory and provided some narrative explanation and quantification of the possible measure of damages. The clarification of its legal basis and the additional particulars in the APOC provide a more helpful framework for the claim. The TH defendants, whatever they think of the ultimate merits of such a claim, were prepared to agree to the amendments.

106. APOC [77] and [78] now sets out the basis of the claim in a more conventional way. The defendants "discreditable and outrageous" conduct is pleaded in [77] which refers back to and relies on matters pleaded earlier in the APOC. The APOC then pleads an inference that the conduct complained of was calculated to make a profit which may exceed any compensation payable to SL setting out the matters relied on in support of that inference at [78]. APOC [79] pleads the damages sought which includes a claim to "*a proportion of the profits or other benefits that the defendants or each of them calculated would accrue to them and/or SGL*."

107. A claim for exemplary damages can only arise if the claimants are successful in establishing liability on one of the other claims such as the unlawful means conspiracy. There is no suggestion that the unlawful means conspiracy or wrongful trading claims against D1 to D5 should be struck out or are unarguable, there will therefore be relevant claims on which to found the exemplary damages claim. In addition, the breach of duty claims and the concealment claims will also be proceeding to trial. Mr Riley says these are indicia of bad conduct and sufficient to support the claim. It seems to me that these claims and the facts and matters on which they rely provide a basis for the inferences relied on to support the exemplary damages claim, even if other contested amendments are not permitted. This does appear to present some additional difficulties with any argument that the claim is unarguable, entirely fanciful and does not overcome the low bar for amendment.

108. In addition it is of course a damages claim arising from liability being made out in relation to the claims in respect of which the amendments are not opposed. The real nub of the JPP defendants' objection to the claim is that based on their modest shareholdings, their interest was so minor that there can be no credible basis for arguing that they were calculated to make a profit that might exceed any compensation payable. They do not agree with the conclusions the claimant seeks to draw from the facts relied on and say other factors would substantially change how the court might view the claim but this seemed to me to be inviting me to conduct a mini trial based on what the JPP defendants said the relevant factors or facts were.

109. Although Mr Mills argues there is simply no basis for arguing that a claim for exemplary damages has any prospect of success against the JPP defendants, his arguments appeared to me not only to fail to focus on the fact that the exemplary damages claim had always been pleaded but also to focus on the wrong end of the telescope. The question of value in an exemplary damages claim will only be considered if the primary liability has been established and the question of value is both an art and a science. It is in any event far from easy to assess the value of the intellectual property particularly when looking at the future value of a software application.

110. However, the contemporaneous evidence and valuations suggests that the defendants and Serisys Group as a whole had placed a considerable potential value on ADYPT from 2017. Evidence of this expectation of value was included in for example board minutes and business plans seen by the JPP defendants.

111. Mr Riley argues that whether any of the defendants made any gain will require an assessment of whether the defendants gained overall. The defendants all admit that SGL's shares would have been worthless without ADYPT and that the purpose of the Serisys Group was to develop, market and monetise ADYPT for the benefit of SGL. This appears to support an argument that ADYPT has a value. One of the issues that will have to be considered as part of the unlawful means conspiracy is whether there was an actual or potential value of those parts of ADYPT that had been developed by SL at the time of the Assignment. The court will need to consider what knowledge the defendants, and each of them, had at the time of the Assignment.

112. Mr Riley argues that the court will have to consider at trial whether the defendants' conduct in relation to the Assignment was intended or calculated to make a gain which will be bound up in the findings in relation to the existing unlawful means conspiracy claim. It seems to me that Mr Mills argument about the potential value of the claim was too narrowly focussed for the broad analysis that the court will undertake to determine whether a defendant gained overall. As Mr Riley put it, it is not a maths equation that looks simply at the value of the asset as against a liability.

113. Although one might consider the claim for exemplary damages to be unusual, it has long been established that exemplary damages may be justified where a defendant "with cynical disregard for a plaintiff's rights has calculated that the money to be made out of their wrongdoing will probably exceed the damages at risk" (*Rookes v Barnard* [1964] 1All ER 367). It is essentially simply a tort claim.

114. The scope of such damages is broad in the sense that the court assesses exemplary damages so that they give effect to the compensatory principle of seeking to put the claimant in the same financial position as if the wrong had not occurred so that even the date from which the damages may be assessed is not fixed at say the date of any breach.

115. It seems to me that the contested amendments have addressed the concerns raised by the TH Defendants in their strike out application. They had accepted this on 1 December 2023.

116. Mr Mills argument that the APOC including the further particulars enable him to argue that the claim has no merit against them does not seem to me to advance his position, whatever its unusual nature, improbability or weaknesses it has always formed part of the claim. Its success or failure will rely on facts that will be determined in relation to other claims such as the unlawful conspiracy claim in any event and in pleading terms the amendments now set out the claim in a proper framework.

117. I am satisfied that the amendments should be permitted against all the defendants. In reality they are clarificatory and/or provide further or better particulars of an existing claim. Even if the prospect of the claimant being able to successfully support a claim for exemplary damages against any of the defendants, but particularly the JPP

defendants, seems weak or improbable on the evidence currently available it is fact sensitive and the facts it relies on will form part of the claim in any event.

De Facto or Shadow Directors APOC [4] and [5]

118. Mr Mills submits that the amendments to APOC [4] and [5] and all subsequent references to claims against the JPP defendants as de facto directors of SL are a new claim. It is a claim which he says has no merit and there is a limitation defence.

119. Mr Riley's primary position is that the amendments do not give rise to a new claim but clarify an existing claim of de facto directorship which can be found in POC [30], [14] and [15] where he submits that the references to directors generically can be read across to mean de facto directorship. His alternative argument is that if it is a new claim, it has merit and arises out of the same or substantially the same facts and matters which the court will have to determine in relation to the existing claims.

120. At POC [3.3] and APOC [3.3] when defining and describing the parties for the purposes of the claim the JPP defendants were described as follows:

> "3.3. the Third to Fifth Defendants were non-executive directors of SGL … The Third to Fifth Defendants were also shadow directors of SL; "

121. At APOC [4] and [5] the claimant seeks to amend POC [14] and [15] as follows:

> 4. ~~14.~~ SL did not have separate board meetings, instead, all of its business and legal decisions were taken by the First to Fifth Defendants as part of SGL board meetings and/or as part of SL board meetings held simultaneously with SGL board meetings. The Second Defendant's 23 September 2019 email to SL's Liquidator confirmed that:
>
> "SGL board meetings were held for SGL and also acted as a decision making forum also for its subsidiaries ".
>
> 5. ~~15.~~ Accordingly, in making decisions in relation to the business and affairs of SL at board level, the Third to Fifth Defendants were acting as de facto directors of SL. Further or alternatively, insofar as they gave instructions or made decisions on which the First and Second Defendants acted, the Third to Fifth Defendants were ~~also~~ acting as shadow directors of SL. ~~, along with the First and Second Defendants as directors.~~

122. At APOC [40] the claimant seeks to amend POC [30], to which there is no objection, as follows:

> "40. ~~30. Further or alternatively, in approving and entering into the Assignment for £0 on behalf SL, not for any legitimate purpose but for the purpose of putting AdyptUK beyond the reach of SL's creditors so that it could continue to be developed and exploited for the benefit of the First to Sixth Defendants as~~

> ~~shareholders in SGL, t~~ The First to Fifth Defendants acted in breach of each of the~~ir following~~ duties ~~owed by them~~ to SL as its directors or shadow directors as follows:"

123. APOC [40.1] to [40.5] provide particulars setting out the ways in which it is said that D1 to D5 acted in breach of duty. Those paragraphs do not differentiate between the defendants. Mr Mills objections to [40.1] and [40.4] are focussed on what is said to be a lack of particularity as against the JPP Defendants and the addition of the words causing in [40.1] and completing in [40.4].

124. At APOC [41] the claimant seeks to amend POC [31] as follows:

> "41. ~~31.~~ By reason of the First and Second Defendants' breaches of duty as directors and the Third to Fifth Defendants' as directors or shadow directors, SL suffered loss and damage comprising: (i) the loss of the market value of AdyptUK at 30 August 2017; (ii) the loss of profits from future licence income that AdyptUK would have generated for SL but for the Assignment; and (iii) and the loss of ~~market value~~ profits from fees that ought to have been charged for development services provided to the Seventh Defendant without payment (see paragraphs 27 above ~~35 to 37 below~~)."

125. Having set out the relevant paragraphs of the POC and APOC it is clear that the POC differentiated between D1 and D2 as directors of SL and the JPP defendants as shadow directors. Mr Riley's amendments sought to lose the distinction that had been clearly made in the POC. His submission that the reference to directors in POC [30] was a reference to both D1, D2 and the JPP defendants as directors and thus the claim of de facto directorship was already pleaded ignored the earlier clear definitions and descriptions in POC [3] and the distinction clearly made in POC [15] and [31].

126. On the plain reading of the POC, I am satisfied that there was no claim of de facto directorship of SL pleaded against the JPP defendants in the POC and it is therefore a new claim.

127. However, whatever its merits the shadow director claim against the JPP defendants was always pleaded. It is not a new claim. Whilst the JPP defendants consider it a weak claim no application has been made to strike it out. Mr Mills accepted that it was such a fact sensitive claim and that it would need to await disclosure and/or witness evidence. That is telling given the overlap between the shadow director claim and the new de facto director claim. It might be said to identify the difficulties for the JPP defendants in opposing the introduction of the de facto director claim on the merits and/or seeking to argue that it does not arise out of the same or substantially the same facts as claims which the court will have to determine at trial and which will have to be investigated by the parties in any event.

128. The shadow director and de facto director claims are breach of duty claims. It is the claimant's case that the JPP directors owed duties as de facto or shadow directors of SL and breached those duties giving rise to claims for loss of value and loss of profit.

129. A de facto director is someone who has assumed responsibility to act as a director despite never having been actually appointed as such. There is no single definitive test for identifying a de facto director. It requires an objective analysis of the facts. This would require the court to consider the extent to which if at all that a person was undertaking a role within the relevant company more consistent objectively with being a director.

130. In *Re Hydrodam (Corby) Ltd* [1994] 2 B.C.L.C. 180, Millet J identified the differences between the two roles at pages182 – 183:

> "I would interpose at this point by observing that in my judgment an allegation that a defendant acted as de facto or shadow director, without distinguishing between the two, is embarrassing. It suggests—and counsel's submissions to me support the inference—that the liquidator takes the view that de facto or shadow directors are very similar, that their roles overlap, and that it may not be possible to determine in any given case whether a particular person was a de facto or a shadow director. I do not accept that at all. The terms do not overlap. They are alternatives, and in most and perhaps all cases are mutually exclusive. A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level. A de facto director, I repeat, is one who claims to act and purports to act as director, although not validly appointed as such. A shadow director, by contrast, does not claim or purport to act as director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company."

131. Millet J continued at page 184:

> "The liquidator submitted that where a body corporate is a director of a company, whether it be a de jure, de facto or shadow director, its own directors must ipso facto be shadow directors of the company. In my judgment that simply does not follow. Attendance at board meetings and voting, with others, may in certain limited circumstances expose a director to personal liability to the company of which he is a director or its creditors. But it does not, without more, constitute him a director of any company of which his company is a director."

132. In *Revenue and Customs Commissioners v Holland, Re Paycheck Services 3 Ltd* [2010] 1 W.L.R. 2793 Lord Hope (in the majority) having considered the passage in *Hydrodam* at 182 – 184 noted at [29]:

> "The words "without more" are important. They indicate that the mere fact of acting as a director of a corporate director will not be enough for that individual to become a de facto director of the subject company."

133. In *Smithton Limited v Naggar* [2015] 1 W.L.R. 189, at [31] to [44], Arden J provided practical points for consideration when determining whether someone was a de facto director:

> "31. … Provisionally it seems to me that that term is to be tested against the usual split of powers between shareholders and directors under Table A i.e.. on the basis that the powers of management of the company's business are delegated to the directors and the shareholders cannot intervene except by special resolution. On that basis it means a person who either alone or with others has ultimate control of the management of any part of the company's business. In the usual case, in my judgment, it would not include a purely negative role of giving or receiving permission for some business activity.
>
> 32. The role of a de facto or shadow director need not extend over the whole range of a company's activities (…). A person may be both a shadow director and a de facto director at the same time (...)
>
> Practical points: what makes a person a de facto director?
>
> 33. Lord Collins sensibly held that there was no one definitive test for a de facto director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. However, a number of points arise out of Holland and the previous cases which are of general practical importance in determining who is a de facto director. I note these points in the following paragraphs.
>
> 34. The concepts of shadow director and de facto are different but there is some overlap.
>
> 35. A person may be de facto director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.
>
> 36. To answer that question, the court may have to determine in what capacity the director was acting (as in Holland).
>
> 37. The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the

company's business whether the defendant's acts were directorial in nature.

38. The court is required to look at what the director actually did and not any job title actually given to him.

39. A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.

40. The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances "in the round" (per Jonathan Parker J in Secretary of State v Jones).

41. It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.

42. Relevant factors include:

    i) whether the company considered him to be a director and held him out as such;

    ii) whether third parties considered that he was a director;

43. The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.

44. Acts outside the period when he is said to have been a de facto director may throw light on whether he was a de facto director in the relevant period."

134. Mr Mills says that these authorities provide support for his complaint about the lack of clarity between the two roles in the APOC and the lack of any proper basis for the plea of de facto directorship whilst Mr Riley says they are support for the overlapping nature of the roles.

135. It is clear from the witness statements of D3 to D5 that they did not consider themselves to be either de facto or shadow directors of SL, however, it is not a subjective test which considers what the party in question considered their role to be. The court must undertake an objective assessment of all the material facts and circumstances including taking into account where appropriate subsequent/later conduct if it might provide context for earlier conduct and help in the objective assessment of the acts complained of to decide whether a person is a de facto or shadow director or neither. It is clear from Arden J's practical points that the scope and extent of the factual inquiry is extensive and will be case specific.

136. Whilst a person could not be both a shadow and de facto director of the same company at the same time, there is a considerable overlap both between the two concepts and the nature of the factual inquiry that would have to be undertaken to determine objectively which was the more appropriate description of the role taken on by a particular party.

137. It appeared to be common ground that a de facto director came within the definition of director in CA 2006 which also does not distinguish between non-executive directors and executive directors. Any person within that definition of director would owe to the relevant company all the general duties of a director set out in ss. 171 to 177 CA 2006. It is only when referring to the position of shadow directors that any distinction is drawn and even then, at s170(5) the general duties are applied "where and to the extent that they are capable of applying."

138. In broad terms therefore to consider whether a director or a shadow director had breached any duty to the relevant company, here SL, there would need to be a careful and critical examination of the facts and circumstances surrounding their alleged breaches. The same factual examination would be undertaken whether that director were alleged to be a shadow or de facto director. The difference would be that in relation to shadow directors the duties in ss 171 to 177 do not automatically apply. As set out in s170 they only apply to the extent they were capable of applying which requires an extra layer of analysis to the facts, whereas the duties in ss171 to 177 would apply automatically to a de facto director.

139. Mr Mills argues that the APOC fails to state how and when the JPP defendants assumed responsibilities as directors of SL and fails to differentiate between the acts of SGL acting through its directors and what it says the JPP defendants did that meant they had become de facto directors of SL. It would take more than the mere fact of being directors of SGL for them to become de facto directors of the subsidiary SL. He argues that the contemporaneous documents militate against the claim or de facto directorship. Further, he argues the amendments are inadequate as they do not set out how or when each of the JPP defendants directed D1 and D2 to act in relation to SL nor does the APOC plead that D1 and D2 then did so or were accustomed to do so. However, this later complaint appears to be focussed on the lack of particularisation of the existing shadow director claim.

140. The springboard for both the de facto and shadow director claims is an email from D2 to the Liquidator of SL dated 23 September 2019 copied to amongst others D1 in which D2 advised the Liquidator of SL that:

> "SGL board meetings were held for SGL and also acted as a decision making forum also for its subsidiaries. Matters discussed included, inter alia, software development in Hong Kong, UK and Thailand; sales and marketing activities in Hong Kong and Thailand; live production issues of other software in Thailand."

141. The email provides an explanation from D2, a director of SGL, about the nature of the corporate governance in respect of SL and the other subsidiaries and the decision making process for SL and its subsidiaries. The TH defendants admit that SL did not hold separate board meetings but plead that any decisions were taken by the directors of SL and not any third parties (which would include the JPP defendants). They plead that the email referred to above simply confirms that the decisions in relation to the subsidiaries were taken alongside the SGL board meetings and not taken by SGL.

142. The JPP defendants deny that the email of 23 September 2019 represented the way in which business was conducted for SL. They say that in so far as the affairs of SL were

reported to the board of SGL of which they formed part they did not give directions or instructions to the directors of SL.

143. Mr Mills relies on the SGL board minutes for meetings on 22 August 2017 and 17 October 2017 before and after the Assignment. The JPP defendants plead at [22] and [23] of their defence that at no stage prior to or during the 22 August 2017 board meeting did the SGL directors instruct the SL directors to enter into the Assignment. They say they were informed of the Assignment but not involved in the decision and at [29] that the board minutes in October 2017 simply record the fact of the Assignment and that they were not informed of the terms.

144. Mr Riley points to POC [14] and [15] which in their original form plead that SL did not have separate board meetings and that all business and legal decisions were taken as part of the SGL board meetings. He reminds me that none of the defendants have sought to strike out that factual averment. Indeed, although the JPP defendants join issue on the averment, and say they were not involved in the decision making process for SL even though they were at the meetings the facts as advanced for the purposes of the applications seem to me to be sufficient to put those matters in issue. In particular the 23 September 2019 email and the TH defendants' position as to the governance of the companies provide evidence on which to base the claim as pleaded by the claimant. It is accepted that SGL and the subsidiaries held meetings together or at the same time and decisions were taken at those meetings which impacted the subsidiaries.

145. It cannot be said that the plea that the meetings were the decision making forum for SGL and its subsidiaries, including SL, is a hopeless one. Mr Riley submits that given that factual context the claim is sufficiently pleaded and pleadable and that the amendments he proposes cure any perceived shortcomings.

146. Further support for the claimant's position can be found in the evidence relied on by both the claimant and the JPP defendants. Mr Smith was a director of SGL until January 2016. He sets out his recollection of decision making whilst he was a director relating to SL which he says were taken by the SGL directors at SGL meetings and that briefing emails were sent to the non-executive directors on urgent matters in between. He explains that the board briefing papers for all the subsidiaries were circulated to the SGL directors in advance of meetings. He describes what appears to be a collaborative and inclusive form of governance at least whilst he was involved. He has identified emails and documents that would seem to challenge the recollections of D3, D4 and D5 that they were not informed or consulted on matters outside the set piece meetings.

147. D3's evidence both seeks to explain why a claim of de facto directorship of SL against him is fanciful and should not be permitted but also provides evidence that appears to run counter to the position adopted by the JPP defendants in relation to their knowledge and involvement in the decision making process for SL. D3 initially relied on a draft consultancy agreement dated 5 February 2015 but which was superseded by a later consultancy agreement with his company (subsequently dissolved before the events in question) to seek to submit that any claim against him was bound to fail because of the limits set within it. Whilst this appears to have generated much heat between Mr Smith and D3 neither of them has pointed to a fact or piece of evidence that is ultimately conclusive of the position either way in terms of the role of D3 in relation to the governance and decision making of SL.

148. Mr Riley pointed to evidence which portrayed the JPP defendants being presented to third parties as leaders of the business, their presence at the meeting in August 2017 when there was discussion about the Assignment, and the background and experience of each of D3 to D5 as additional evidence that the position of the JPP defendants and their involvement and role in relation to SL was not clear.

149. Mr Mills says there were twenty-two board meetings between 2015 and 2018 of which D3 attended nineteen, D4 six meetings from December 2016 and D5 five meetings from 18 April 2017. However, the presence of absence from a board meeting alone is unlikely to be conclusive and will just be a factor considered in context. It does not directly relate to the functions or role each of the defendants had in relation to SL or whether their conduct amounted to that of a de facto or shadow director. Indeed if they had only attended a single meeting that could be enough depending on their role at that meeting.

150. Mr Mills notes that the board minutes for SGL on 22 August 2017, which was attended by the JPP defendants, merely note that SL was going to assign Adypt to D7. The board minutes for the meeting on 17 October 2017 simply record that the Assignment had taken place.

151. Mr Mills argues that the minutes themselves do not provide any direct evidence of SGL or the JPP defendants undertaking any relevant functions in relation to SL. However, D3's own evidence, perhaps unsurprisingly, highlights that not everything that occurred or was discussed either at or outside the board meetings was recorded in the formal board minutes. This reliance on the content of the formal board minutes did not seem to me to take matters much further in isolation on an application to amend.

152. All that remains at this stage is unsatisfactory and not fully developed evidence about how SGL and SL and the other subsidiaries' governance and decision making worked. D3 is adamant that he was not involved with approving the Assignment or causing it to be entered into. However, he does accept that at a later stage he was informed of the financial difficulties concerning SL and HMRC. He suggests that this was a serious matter that was rightly raised at SGL board level, but that SGL was not the decision making forum. His recognition that important or serious matters relating to SL were raised with the JPP defendants only makes the decision making process more opaque and adds additional support to the claimant's position.

153. Ultimately the process of determining whether a person is a de facto director or indeed a shadow director is an objective assessment undertaken by the court based on the evidence as found. It is not about what D3 thought he was doing or not doing or D4 or D5 or even Mr Smith.

154. There is a clear factual dispute about the extent of the information and involvement and role the JPP defendants had in the day to day running of SL. In particular the manner of the governance of the Serisys Group as a whole does not provide a clear answer that means that the amendment proposed is entirely fanciful for the reasons set out above.

155. Mr Mills identified many issues which are likely to be factors to be considered by any judge assessing objectively whether it can be said that the JPP defendants were either de facto or shadow directors of SL. If Mr Mills is right, then the facts when fully developed will not make out the claim. However, the shadow director claim will be

proceeding to trial as will the general breach of duty claim against D1 and D2. The court will be examining all the allegations of breach of duty against all the directors in any event and applying its own objective analysis to the issue of directorship. Mr Riley submits that the evidence is sufficient for the court to conclude for the purposes of this application that the allegation that the JPP defendants were involved at board level in SL is not demonstrably untrue and overcomes the low bar for an amendment. I agree.

156. Given when it is said that the breaches of duty arose Mr Riley needed to address the limitation question and whether it could be said that the claim arose out of the same or substantially the same facts that were to be investigated in any event and considered to determine the existing claims. This did not seem to me to be a difficult hurdle for him to overcome. As is clear from the authorities, determining whether a person is either a de facto or shadow director is fact sensitive. Here the shadow director claim is already pleaded. The duties and breaches relied on by the claimant in relation to the existing shadow director claim are the same ones relied on for the de facto director claim. As is apparent from the very limited amendments sought to assert the de facto director claim all the same facts and matters will have to be explored by the court and no different facts or matters or particulars are relied on for the de facto director claim. The same breaches are relied on, and the same remedies are sought. There does not have to be a 100% overlap between the two claims when assessing whether the claim of de facto directorship arises out of the same or substantially the same facts as the shadow director claim for the purposes of CPR 17.4 but in this case, it appears that the overlap at least on the facts presently available is likely to be complete.

157. This weighs heavily in favour of allowing the amendment even if the limitation period has expired. Even if the amendment is not permitted all the same facts and matters will have to be investigated and the trial judge who will have to make findings about them and then consider objectively as a matter of fact and degree whether the JPP defendants were shadow directors. The only difference if the amendment is allowed is that the judge will not have the option of de facto directorship as an alternative. To not allow the amendments in those circumstances would seem to me again to be a triumph of form over substance.

158. It might be said that the claim advanced by the claimant is more akin to a de facto directorship claim rather than a shadow directorship claim but whatever the strength or weakness of the shadow directorship claim there is no application to strike it out with Mr Mills rightly recognising that such a claim is fact sensitive. The same fact sensitivity will apply to the de facto directorship claim.

159. I am persuaded for the reasons set out above that the amendment to plead the de facto directorship claim should be allowed.

Other Amendments

160. There are some additional amendments made to APOC [5] and [40.1] and [40.4] which are also opposed by the JPP defendants but not by the TH defendants. Some of those objections appeared to be tied into the de facto directorship claim for which I have given permission.

APOC [5]

161. APOC [5] sought to add in a specific reference to the JPP defendants making decisions in relation to SL or making decisions on which D1 and D2 acted (so either as de facto or shadow directors) and that those decisions were made at board level.

162. Mr Mills argues that the additional words in [5] were not particulars but simply an assertion and should not be permitted. Mr Riley says these amendments are intended to make it clear that the decisions were being taken by D1 to D5 as directors of SL were being taken at board level and to differentiate the way in which those decisions were made depending on whether the JPP defendants were de facto directors or shadow directors. Consequently, the addition to the second sentence is not "waffle" as Mr Mills suggested but in fact is intended to distinguish between the de facto director plea in the previous sentence and the shadow director plea. Mr Riley says that the amendments are intended to meet the requirements of *Hydrodam*. He submits that the plea about the decision making is supported by the evidence he relies on and should be permitted.]

163. Mr Mills' real objection is in fact that he says that APOC [5] does not go far enough and that the APOC does not go far enough. There are insufficient particulars in that the claimant does not set out how and when each of the JPP defendants directed D1 and D2 to act in relation to SL, or any other particulars that would enable the JPP defendants to understand the shadow director claim. Whether that is right or wrong, it is a question of particularisation of an existing plea which is not the subject matter of any strike out application. It may be appropriate to make a Part 18 request to draw out those particulars, but an allegedly defective or not fully particularised existing plea cannot be struck out by a side wind on an application to amend. In so far as the amendment to APOC [5] adds anything it simply points the way in terms of what the claimant is going to have to prove.

164. It seems to me that the amendment does provide some clarity and having permitted the de facto director claim to be added this amendment should follow and should be permitted. The claimant should however reflect on the question of particularisation of the claims it is making.

Breach of Duty APOC [40]

165. APOC [40.1] to [40.5] are new although the substance of some parts of them can be gleaned from the POC:

> "40.1 By approving and causing SL to enter into the Assignment, they brought about the transfer of AdyptUK, SL's only valuable asset for no or no valuable consideration. This was obviously inimical to the promotion of SL's success and contrary to the interests of SL's creditors at a time when the company was insolvent, bordering on insolvency or probably destined for insolvent liquidation or administration.
>
> 40.2. Having caused the gratuitous transfer of AdyptUK, they then caused or allowed SL to provide services to the Seventh Defendant to further develop it without charge. The free provision of services and the diversion of the developed version of AdyptUK to the Seventh Defendant was also contrary to the

> successful promotion of SL and to its interests generally including those of its creditors.
>
> 40.3 In transferring AdyptUK to the Seventh Defendant, with whom they were connected via SGL, continuing to use the expertise of SL's employees to develop AdyptUK and diverting the developed version of AdyptUK to the Seventh Defendant for the benefit of SGL and, by extension, themselves, they acted in a conflict of interest and preferred the interests of themselves, SGL and/or the Seventh Defendant over those of SL.
>
> 40.4. In approving and/or completing the Assignment, they failed to declare their interest as shareholders of SGL.
>
> 40.5. In doing the above, they acted without reasonable care, skill and diligence."

166. As set out above the structure of the APOC has been improved by Mr Riley. He has unpacked the breach of duty claims from POC [30] and [31] and now sets out the relevant statutory framework in APOC [39] teasing out the duties relied on from s 171 to s177 CA 2006. This includes at APOC [39.2] the duty to exercise reasonable care and skill. By 6 December 2023, and unsurprisingly, none of the defendants opposed those amendments. Although Mr Mills sought to bring back in an objection to APOC [39.2], having permitted the de facto director amendment the re-emerging objection which appeared to relate to the inclusion of the JPP defendants within the description of directors would seem to me to fall away. Whether it is right or wrong is for a different day.

167. APOC [40] sets out the particulars relied on to found the breach of duty claims. The particulars are not as Mr Mills noted directed at any particular one of D1 to D5 but are generic as against those five individual defendants be they directors, de facto directors or shadow directors. Mr Mills objected to parts of the particulars set out in APOC [40] on the basis that he said that the particulars improperly elided allegations made against the TH defendants with those made against the JPP defendants.

168. This objection seems to me to a large extent to fall away now that I have allowed the amendments to include the claim against the JPP defendants as de facto directors. I note however, Mr Mills more general submission that the particulars could be tidied up if the claimant were to set out what each of D1 and D2 and the JPP defendants were said to have done.

169. Mr Mills complaint appeared to be primarily focussed on the shadow director claim. He submitted that the particulars were insufficient additional particularisation in relation to the shadow director claim because of the different approach to be adopted when considering that claim.

170. As set out above the assessment of whether the duties pleaded in APOC [39] will apply in relation to the plea of shadow directorship is fact sensitive and whilst the extent of the duties imposed on a de facto director will be the same as those that apply to a de jure director where one is looking at shadow directorship the emphasis is different and

the court will only apply the duties set out in CA 2006 where and to the extent that they are capable of applying.

171. The claimant will therefore need to address the question of whether SL acted in accordance with any directions or instructions given by the JPP defendants. The complaint is that the particulars relied on by the claimant are inadequate to make out the claim that has been pleaded. However, where the JPP defendants' objections relate to the shadow director claim as set out above Mr Mills cannot use the opposition to the amendment application to achieve a strike out. That is a matter to address either by making a Part 18 request or by an application to strike out the claim. The particularisation issue does not arise in the same way when it comes to the de facto director claim.

172. His primary objection is to the inclusion of the words causing and completing in APOC [40.1] and [40.4]. Mr Mills does not object to the plea of approving which features in APOC [40.1], [40.2] and [40.4] but submits that the inclusion of causing and completing is an expansion of the claims against the JPP defendants for which there was no evidential basis.

173. In addition although not objecting generally to the inclusion of the particulars themselves as is evident from the limited objections taken to these amendments, he maintains that they are not sufficient or sufficiently focussed. However, I note that the JPP defendants had agreed to the amendment including "causing" to APOC [40.2] although Mr Mills sought to retreat from this position. It remained unclear to me why the inclusion of causing in APOC [40.2] was unobjectionable until skeleton arguments were exchanged whilst the addition of causing and completing in APOC [40.1] and [40.4] were opposed.

174. He submits the plea of causing and completing are additional and also inconsistent with the unlawful means conspiracy pleading which at APOC [48], previously POC [39], now pleads that D1 to D5 agreed the Assignment rather than caused or approved the Assignment to be entered into in breach of duty as set out in APOC [40.1].

175. It was a curiosity that the same approach was adopted in the APOC in relation to the provision of free development services in APOC [48] and [40.2] but no objection had been raised to proposed particulars at [40.2] that D1 to D5 had caused or allowed SL to provide those free services until Mr Mills submissions. Mr Riley argues that this objection based on inconsistency is a confusion about the different claims in the APOC. I agree with Mr Riley that the difference in what was POC [39] now APOC [48] is to do with different types of claim with APOC [48] relating to the unlawful means conspiracy and APOC [40] being part of the breach of duty claim.

176. It is then necessary to consider whether the opposed additional particulars in APOC [40] are particulars based on factual material in support of an existing plea or whether they are in fact irrelevant, or otherwise inappropriate and/or whether they are inconsistent with other parts of the APOC in a manner that means the claimant should not be allowed to advance them as currently formulated.

177. Mr Mills says there is no evidential basis for particulars that allege that the JPP defendants caused the Assignment to be entered into or completed. He argues that those particulars are inconsistent with the board minutes which simply noted the Assignment.

As set out above I am satisfied that the factual context is more nuanced and complex than simply looking at the board minutes. The decision making process at the combined meetings of the boards of SL, SSL and SGL are already in issue.

178. However, I still need to be satisfied that the particulars are not irrelevant, inappropriate or inconsistent even if they do not have to meet the same merits test as those in relation to a new claim.

179. Mr Riley submits that the addition of the words causing and completing does not change the claim or the particulars as advanced in the POC but was about clarification. He submits that if the JPP defendants approved SL entering into the Assignment they brought about the transfer thus he argues that the addition of the word causing is consistent with the approval to enter into the Assignment. The same submissions would apply to the addition of completing in [40.4].

180. Mr Riley's submissions did not help me understand why the claimant wanted to include causing and completing within the particulars in APOC [40] particularly if as he appeared to submit the addition of causing or completing was simply consistent with approval. It seemed to me that causing was likely to require the claimant to meet a higher evidential bar than approval so if approval was sufficient it appeared to add an unnecessary layer. However, if it did require the claimant to meet a higher evidential bar that did not preclude it being included in the particulars. Given Mr Mills views of the strength of the claim overall and his submissions on what the claimant's would have to prove in any event the addition of cause did not seem to add anything more than he considered the claimant would have to prove in any event.

181. The JPP defendants had been prepared to agree the amendment including causing in relation to APOC [40.2] and their change of position was unexplained. In addition they had accepted the inclusion of approval in the particulars in APOC [40] more generally. The objections to the addition of cause or complete based on an absence of an evidential basis when the other generic amendments to the particulars in APOC [40] were not objected to, particularly given Mr Mills view of what needed to be proved in any event did not seem to have any obvious reason, particularly once the de facto director claim was allowed. Again it appeared to me to be an argument for another day given my decision to permit the de facto director claim.

182. It is right that at present the specific details of what it is alleged that any of the defendants did to approve let alone cause the various acts relied on are sparse, but the broad particulars are now included. They are generic against all the defendants whether they are de jure, de facto or shadow directors and at some stage the claimant is going to have to further particularise its claim.

183. However, the general particulars are a step forward and I will therefore permit the opposed amendments to the particulars in APOC [40].

Dishonest Assistance

184. This is a new claim against the JPP defendants in APOC [42]. The claim against D7 is at APOC [43] and the remedies for both are at APOC [44]. This is not objected to by the TH defendants. As against the JPP defendants it is an alternative claim to the de facto director and shadow director claims. The claimant argues that if the JPP

defendants were found not to be de facto or shadow directors they were nonetheless liable for dishonestly assisting D1 and D2 in respect of their alleged breaches of duty. To that extent it would clearly overlap factually almost entirely with the facts and matters relied on in relation to the breach of duty claims and consequently will arise out of the same or substantially the same facts. At this stage in the claim there will not need to be any separate factual investigation out of order or in a piecemeal fashion that might otherwise militate against such a claim being advanced.

185. Mr Mills argues that the claimant has not pleaded the requisite elements of a dishonest assistance claim. He accepts that the mental element of the claim is pleaded at [42.1] and [42.2], and knowledge is pleaded in the first sentence of [42.3] where the claimant pleads it was obvious that the Assignment and provision of free services would be contrary to SL and its creditors interests. However, he argues that the only evidence relied upon for the assistance part of the claim is the final sentence of [42.3] which pleads "*Nonetheless [the JPP defendants] approved [the Assignment and provision of free services] and allowed [D1] and [D2] to cause SL to proceed with them*."

186. He submits that is insufficient assistance to enable the breach. I agree with Mr Mills that the assistance relied on in [42.3] is weaker than the assistance pleaded against D7 in [43] and on its own might raise questions about the sustainability of the claim. However, Mr Riley's explanation is that the claim is pleaded "*further or alternatively*" so he is entitled to rely on all the matters pleaded earlier in the APOC. He explains that since the claimant has to prove the breaches of duty in any event rather than re-plead all the matters already set out and relied on in the APOC he had just pleaded the additional elements to make good the dishonest assistance claim relying on the contents of the APOC by reason of the plea of further or alternatively.

187. The dishonest assistance claim cannot be said to have no merit and be unarguable given the facts and matters it relies on. It arises as a corollary of the breach of duty claims against the JPP defendants. For the same reasons it would in principle overcome the low bar for amendment and for the same reasons I have already set out it will arise out of the same or substantially the same facts that are going to be investigated as part of this claim in any event.

188. It seems to me therefore that the amendment should in principle be allowed. However, if the only assistance relied on were that set out in [42.3] there would be more force in Mr Mills complaints. Consequently, Mr Riley should provide a little more clarity about which parts of the APOC he is relying on for his plea of "*further or alternatively*" and if all of the APOC he should say so to avoid any confusion at a later date and so that the scope of what the JPP defendants have to contend with as relied on as assistance is clear. They are entitled to know how the claim is put against them.

189. I do have some sympathy with Mr Mills, Mr Weaver and Mr Riley. Mr Mills in particular has been wrestling with a complex claim against the JPP defendants which was far from clearly articulated and even now in a perfect world might need a bit more work. And indeed the claimant might want to consider whether further particulars might be helpful prior to the CCMC to provide more focus to for example disclosure even if they are not met with a Part 18 request from the defendants.

190. Against the obvious shortcomings in the original POC, Mr Weaver has properly recognised that there has to come a point when the claim moves on. Mr Riley has made

considerable progress and whilst some of the claims even as reworked by him might have looked different if he had started with a blank piece of paper, I am satisfied that as they are currently formulated, they are the right side of the line and should be allowed to proceed.

191. This claim now needs to move on. It has been stalled at the statements of case stage for too long. I have noted that some aspects of the existing claim may be considered weak or improbable but that they are not subject to any application to strike out and/or their fact sensitive nature has been recognised by the defendants at least at this stage as militating against such an approach.

192. Ultimately, I am satisfied that it is more consistent with the overriding objective and good case management, having regard to the need to deal with cases justly, efficiently and proportionately, to allow the amendments and move on. As set out above all of the claims including the amendments arise out of the same facts and matters the court will be considering in any event and any continuing perceived shortcomings to the way in which the claims are advanced can be dealt with in other ways. The balance between the parties therefore favours addressing the whole suite of overlapping claims together.

193. The hearing to address consequential matters has already been fixed. Whilst I will hear submissions from the parties at that hearing as necessary it seems to me that although the claimant has ultimately been successful, that it should be realistic about both the costs of the applications and ongoing security.

194. Although a consequentials hearing is fixed as set out in the Chancery Guide at 12.88 to 12.93 the court will usually expect consequential matters to be suitable to be dealt with on paper. If the parties are able to reach agreement on consequential matters including a timetable for amended statements of case, or those outstanding matters are suitable to be dealt with on paper they should file an agreed order and/or a draft order and brief written submissions and the consequentials hearing can be vacated.