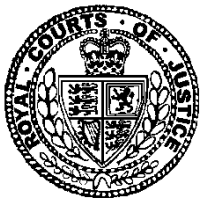

Neutral Citation Number: [2019] EWHC [2520] (Comm)

Claim No. CL-2018-000184

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Tuesday, 1 October 2019

BEFORE:

MR ADRIAN BELTRAMI QC
Sitting as a Judge of the High Court

BETWEEN:

PANASONIC EUROPE BV

Claimant

and

(1) CORE COMMUNICATION INVESTMENTS LIMITED
(2) JONATHAN LOVELL
(3) JASON PEARCE
(4) MARK WELLER
(5) ANTONY GREAVES

Defendants

Mr Jonathan Adkin QC and **Miss Amy Rogers** (instructed by Clifford Chance LLP) appeared on behalf of the Claimant/Applicant

Mr Derrick Dale QC and **Mr Stephen Brown** (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Defendants/Respondents

Hearing dates: 18, 19 September 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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1. By application notice dated 15 July 2019, the Claimant seeks permission to amend the Particulars of Claim and the Claim Form, together with consequential directions. The substance of the proposed amendment is the introduction into the action of a claim against all of the Defendants in fraudulent misrepresentation. The existing pleading already includes a claim for statutory misrepresentation under the Misrepresentation Act 1967. The effect of the proposed amendment, in broad terms, is to add a new cause of action in respect of largely the same representations. The application is opposed by the Defendants.

The action

2. The Claimant is part of the Panasonic group of technology companies. By Order of Bryan J dated 28 September 2018, the Claimant has succeeded Panasonic Europe Ltd as claimant in this action, pursuant to a cross-border merger. The proceedings concern the acquisition of Alan Dick Communications Ltd (**ADC**) pursuant to a sale and purchase agreement (the **SPA)** dated 15 June 2016. ADC carried on the business of providing end to end telecoms services to transport and mobile telecoms sectors. The First to Fourth Defendants were the shareholders of ADC and the vendors under the SPA. I refer to them separately as **CCIL**, **Mr Lovell**, **Mr Pearce** and **Mr Weller**. The Fifth Defendant, **Mr Greaves**, was the ultimate owner of CCIL. Mr Greaves and Mr Lovell were the directors of CCIL. Each of the individual Defendants was a director of ADC prior to the sale. Mr Lovell was the chief finance officer; Mr Pearce was the managing director; Mr Weller was the business development director; and Mr Greaves was the chairman.

3. The SPA provided for consideration by way of an upfront payment of £12 million (subject to adjustment) together with earn-out payments of up to £27 million, depending on results. Pursuant to Schedule 6, the first earn-out of up to £12 million was referable to the EBITDA to 31 March 2017, and the second earn-out of up to £15 million was referable to the EBITDA to 31 March 2018.

4. The Claim Form was issued on 20 March 2018. The only claim asserted was for damages for breach of warranty. Following a stay of proceedings to allow mediation to

be attempted, the Claimant served Particulars of Claim, settled by Counsel, on 16 November 2018. In this pleading, the following causes of action are asserted:

a. Under section C, claims for breach of warranty.

b. Under section D, a post completion adjustment claim.

c. Under section E, claims for pre-contractual misrepresentation.

d. Under section H, a claim on a guarantee provided by Mr Greaves.

5. The damages for breach of warranty are said to include (a) £12 million as the full amount of the consideration paid; plus (b) a further £12 million representing the total of emergency loans made to ADC and which are not recoverable. The damages for misrepresentation are in the same or similar amounts. There is also a claim of around £2.2 million in respect of the post completion adjustment.

6. The Defence and Counterclaim was served on 11 January 2019. All of the claims are denied. By way of Counterclaim, the vendors seek a declaration that they are entitled to the full earn-out consideration of £27 million (none having been paid), alternatively damages in like amount. It is to this end also alleged that the Claimant acted in breach of clause 12 of the SPA in respect of post completion conduct.

7. The Claimant has explained that, in parallel with its conduct of the litigation, it undertook investigations and analysis which led to a detailed letter before action from its solicitors, Clifford Chance LLP (**CC**) dated 8 March 2019. There followed an equally detailed response on behalf of the Defendants by Herbert Smith Freehills LLP (**HSF**) dated 5 April 2019. No agreement having been reached in subsequent exchanges as to the proposed new claim in fraudulent misrepresentation, the application was issued on 15 July 2019.

The application

8. In order to put the application into context, it is first necessary to describe the existing and rather intricate state of the pleading. As mentioned above, section C of the Particulars of Claim is concerned with the claims for breach of warranty. The accounts which were warranted under the SPA were the accounts of ADC for the period ended 30 June 2015 (the **2015 Accounts**). At Particulars of Claim [17], it is alleged that, in breach of warranty, the 2015 Accounts were not prepared in accordance with UK GAAP, did not show a true and fair view and did not fully disclose or provide adequately for debts.

9. Paragraph [18] is prefaced as follows:

"*In particular, but without prejudice to the generality of the aforegoing and without limitation prior to disclosure and/or expert evidence herein, the 2015 Accounts…"*

There then follows the specific, and the only specific, aspects in which it is alleged that there was a breach of warranty in respect of the 2015 Accounts. At [18(b)], it is said that the 2015 Accounts included consolidated group net assets of £2.651 million, but (at [18(c)]) that they:

"(c) overstated such net assets by at least £1.020m as at 30 June 2015, in that they:

(i) Failed to eliminate intercompany balances and transactions, and so overstated assets by at least £131,380 (as corrected in the Accounts for the period ended 15 June 2016 and in particular in note 27 thereto);

(ii) contained double invoicing errors in relation to ADC's "Nexus" contract, and so overstated assets by c £189,000 (as explained inter alia by email from the ADC Finance Director, Paul Waller, to Mr Pearce dated 23 March 2017); and

(iii) applied an improperly high margin to ADC's "Nexus" contract, and so overstated EBITDA by c £700,000 (as explained inter alia by emails from Mr Waller to : (i) Mr Pearce dated 14 August 2015; (ii) Mr Pearce and Mr Lovell dated 9 March 2016; and (iii) Mr Lovell dated 14 March 2017)…"

10. At [19] and [20], there is a further claim for breach of warranty in respect of the Management Accounts (as defined in the SPA) for the period 30 June 2015 to 31 January 2016. It is alleged that the Management Accounts did not present the financial and trading position without material misstatement. The details of this allegation, at [20], are that the Management Accounts failed to incorporate the adjustments to the 2015 Accounts as previously pleaded at paragraph [18(c)].

11. The misrepresentation claim is pleaded under section E of the Particulars of Claim. At [27], two representations are alleged to arise by reason of the provision of the relevant documents to the Claimants:

    a. A representation that the Defendants reasonably believed that the information contained in the 2015 Accounts was accurately presented; and

    b. A representation that information contained in "*Management Packs*" was reliable. The Management Packs are described as monthly documents, which contained financial updates and forecasts and other financial information. Four Management Packs are identified, covering the months January, February, March and April 2016.

12. At [30], it is pleaded that the representations were relied upon and induced the SPA.

13. The plea of falsity is at [31]:

"*(a) the Representations and/or each of them in relation to the 2015 Accounts were false, for the reasons in paragraphs 17 and 18 above. The Representors could not reasonably have believed that the information contained in the 2015 Accounts was accurately presented; and*

(b) the Representations in the Management Packs in relation to EBITDA, net assets, and project performance including revenue, gross margin and backlog were false. The Management Packs did not reliably present the true financial results and position of ADC."

14. The pleaded representation claim is, accordingly, closely aligned with the pleaded claim for breach of warranty. Certainly, so far as the representation in respect of the 2015 Accounts is concerned, this is said to be false for exactly the same reasons that the warranty is said to have been breached. Hence, the only detailed allegation underlying both claims is that pleaded at Particulars of Claim [18(c)]. No particulars are pleaded of the allegation of falsity as regards the Management Packs.

15. This is the background against which the proposed amendments fall to be considered. These arrived in two formulations. The first is contained in the draft attached to the application notice by way of proposed Amended Particulars of Claim. As to this, and so far as material:

    a. No changes are proposed to section C, including [17] to [20], and so precisely the same criticisms are made of the 2015 Accounts and the Management Accounts.

    b. A refinement is proposed to the representations already pleaded at [27]:

        i. It is now sought to be alleged that the representation in respect of the 2015 Accounts was that the Defendants reasonably believed that the information was accurately presented, was reliable and was a reliable reflection of ADC's financial position and performance.

        ii. Similarly, in respect of the Management Packs, the proposed representation is that the information was accurately presented, reliable and a reliable reflection of ADC's financial position and performance.

    c. A new representation is sought to be introduced at [27(c)]:

        "*(c) at a meeting on 25 May 2016 between Mr Abadie and Mr O'Brien for the Claimant and Mr Greaves for the Sellers/Representors, Mr Greaves stated to Mr Abadie words to the effect that:*

            i. The data in the Management Packs was reliable; and

ii. ADC's performance difficulties stemmed from short-term cash flow issues and (accordingly) would improve."

d. At [30] there is a proposed modification to the case on reliance/inducement, it being expressly conceded in the draft that representations in respect of the January and February 2016 Management Packs did not induce the SPA.

e. There is a replacement paragraph on falsity at [31]:

"*(a) the Representations and each of them were false.*

(b) as to the Representations in respect of the 2015 Accounts, paragraphs 17 and 18 above are repeated. In the premises, the information in those accounts were not accurately presented, and/or the accounts were not reliable, and/or was not a reliable reflection of ADC's financial position or performance.

(c) as to the Representations in respect of the Management Packs, paragraphs 19 and 20 above are repeated. In the premises, the information in those Management Packs was not accurately presented, and/or was not reliable, and/or was not a reliable reflection of ADC's financial position or performance."

f. The proposed allegation of fraud is made at [31A]:

"*The Representations and each of them were made fraudulently, in that, as to each of them, each Representor knew that such Representation was false, or did not believe it to be true, or was reckless, not caring whether it was true or false. Such deceit is to be inferred in particular, as to each Representor, having regard to the totality of the facts and matters set out in the Amended Particulars of Claim including Schedule 2 hereto."*

g. Schedule 2 is a 10 page document, said to comprise particulars supporting paragraphs [31] and [31A] of the Particulars of Claim. It is pleaded that the Claimant's case as to deceit is necessarily inferential but that it relies upon the cumulative effect of a series of identified factors and, in particular, a number of emails from which passages have been extracted.

16. Pausing at this stage, a few points may be noted as to the state of the existing pleadings and the draft pleading on which the application was made:

a. The existing pleading contains allegations (at [27(a) and (b)]) of implied representations in respect of the 2015 Accounts and the Management Packs. Those allegations remain, albeit with a measure of modification. There is now

sought to be introduced in addition (at [27(c)]) an allegation of an express statement made by Mr Greaves to (very broadly) similar effect.

b. The proposed allegation of reliance/inducement is narrower than the existing plea.

c. The proposed allegation of falsity is also narrower than the existing plea. In respect of the 2015 Accounts, the complaint remains that the Accounts were overstated by reason of the three factors alleged at [18(c)]. So far as the Management Packs are concerned, the broad and unparticularised claim is replaced by a narrower claim which is referable, through the Management Accounts, to the same three factors leading to the overstatement in the 2015 Accounts.

d. The claim in fraudulent misrepresentation is made unambiguously against each of the Defendants, the only allegation being that each had the applicable guilty knowledge or recklessness.

17. On the second morning of the hearing, and after he had completed his opening submissions, Mr Adkin presented two further documents. The first was headed "Proposed Revisions to the Draft APOC", which he described as "*tweaks"*. There were two revisions: (a) to delete the proposed amendment to the case on reliance/inducement at [30]; and (b) to expand the case on falsity in respect of the Management Packs by adding immediately after the end of [31(c)], the sentence: "*Further, an improperly high margin continued to be applied in respect of the Nexus contract in the Management Packs, with the result that profits were overstated in them."*

18. I regard these revisions as more than mere "*tweaks".* The first involves the withdrawal of what was at least a provisional admission that the Claimant did not rely upon and was not induced by the January and February Management Packs. The second expands the case on falsity in respect of the Management Packs beyond the historic matter of the 2015 Accounts. Mr Dale objected to the revisions but it is appropriate that I consider the application for permission to amend by reference to the pleading that, ultimately, the Claimant wishes to introduce. In any event, the effect of both revisions is to revert more closely to the existing pleading. It would be wrong to shut the Claimant out from pursuing that case.

19. The second document provided by Mr Adkin was headed "Particulars of Falsity". This contains a summary of the material said to be relied upon by the Claimant in support of its pleaded case that the alleged representations were in fact false. Mr Adkin indicated that the Claimant would be prepared to include this document as part of the Amended Particulars of Claim; I agree that this should be done.

The legal test

20. There was some discussion about the elements of the test that I should apply when considering the application to amend and the opposition to it, although this ought not to be controversial. Although there are some complaints in the Defendants' evidence that the proposed amendments are "*late*", and whether or not it is right that the application could or should have been brought earlier, on which I express no view, there is no suggestion of prejudice to the Defendants arising out of the timing of the application. The substance of the opposition, instead, is a substantive one, namely that the amendments should not be permitted because they have no real prospect of success.

21. The applicable approach when dealing with an application for permission to amend in such a situation was recently summarised by Bryan J in *Slater & Gordon (UK) Ltd v Watchstone Group plc* [2019] EWHC 2371 at [34]-[37]:

"34. The principles on applications to amend are well known. For the amendments to be allowed, Watchstone must show that they have a real, as opposed to a fanciful, prospect of success which is more than merely arguable and carries some degree of conviction. A claim does not have such a prospect inter alia where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance and (b) the claimant does not have material to support at least a prima facie case that the allegations are correct (see e.g. Elite Property Holdings Ltd & Anor v Barclays Bank Plc [2019] EWCA Civ 204 at [41]). In this regard:

"The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents." (Elite Property at [42]).

S&G submits that this applies to the proposed amendments.

35. By way of riposte, Watchstone say that nothing could be further from the truth and the documents speak for themselves and show clearly a prima facie case of breach of confidence and inducing of breaches of contract.

36. The authorities that I have just referred to are well-known and are also highlighted in volume 1 of the White Book at para.24.2.3 on p.779.

37. However, it is also important to bear in mind, as was common ground before me, that when one is considering an amendment and the question whether there is a real prospect of success, one is actually doing a similar exercise as one would be doing on a claim for summary judgment or setting aside a judgment in default, and the principles that apply are the same. That must be right because cases such as Swain v Hillman [2001] 1 All ER 91 and ED&F Man Liquid Products v Patel [2003] EWCA Civ 472 are in such contexts rather than permission to amend and also address whether there is a real prospect of success. It also means that the authorities in that context, which are stressed repeatedly, about the nature of the exercise that should be undertaken on a summary judgment application, have equal force and weight in relation to an application to amend. Thus, the commentary in the White Book , supported, as it is, by the various authorities referred to, is also apposite on an application for permission to amend:-

"The hearing of an application for summary judgment is not a summary trial. The court at the summary judgment application will consider the merits of the respondent's case only to the extent necessary to determine whether it has sufficient merit to proceed to trial. The proper disposal of an issue under Part 24 does not involve a court conducting a mini-trial (per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91). How the court decides whether a defence is real without conducting a mini-trial has led to a series of unsatisfactory cases now hopefully concluded by the clear statements of authority in Three Rivers DC v Bank of England (No.3) [2001] 2 All ER 513 , HL (a summary judgment application; see especially, the speech of Lord Hope of Craighead at paras 94 and 95) and ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472 (a set aside application; see especially paras, 9, 10, 11, 52 and 53 in the judgment of Potter LJ)/ At a trial, the criterion to be applied by the court is probability: victory goes to the party whose case is the more probable (taking into account the burden of proof). This is not true of a summary judgment application. 'The criterion which the judge has to apply under CPR Part 24 is not one of probability; it is absence of reality.' (Lord Hobhouse of Woodborough in Three Rivers DC v Bank of England (No.3), supra."

22. In addressing the various issues below, I adopt certain synonyms, such as whether the claim is viable or sustainable. The connotation in each case is whether the claim satisfies the above test. In the specific context of an action in which there is a proposed allegation of fraud, there is also a further matter to be considered. As explained by Lord Millett in *Three Rivers District Council v Bank of England* [2003] 2 AC 1 at [185]-[186], two principles are then engaged. The first is that, as a matter of pleading, the claim in fraud must be distinctly alleged, so that there is no room for equivocation. The second is that sufficient particulars must be pleaded to support the allegation. As to what, at the pleadings stage, amounts to sufficient particulars, this was addressed by Flaux J in *Jsc Bank of Moscow v Kekhman* [2015] EWHC 3073 at [20]:

"The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty". At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge."

23. The question that I have to ask, therefore, is whether or not the facts pleaded in the proposed amendment justifies the allegation of fraud. Mr Adkin submitted this test would be satisfied if the facts pleaded were "*capable*" or "*sensibly capable*" of leading to a finding of fraud. Whilst this may provide a convenient steer, there is no support for adding a still further gloss on the test. Bearing in mind what needs to be established at trial, the Court can at the pleadings stage form a sensible view on whether the facts

pleaded justify the allegations made. However, I do agree with Mr Adkin that this may end up an academic exercise, at least in the context of a case such as the present. As explained by Bryan J, the substantive exercise for the Court is similar to that on a summary judgment application. Hence, I must consider whether the case proposed to be pleaded shows a real and not a fanciful prospect of success. If it doesn't, then that is an end of the matter. If it does, then it is difficult to envisage circumstances in which the amendment would nevertheless be refused on the grounds that the pleading of a fraud claim was not justifiable.

24. Finally, and as I have indicated above, the proposed claim is advanced against each of the Defendants and the allegation is made (at Amended Particulars of Claim [31A]) that "*each Representor knew that such Representation was false*". I asked Mr Adkin whether he accepted that he needed to show a sufficient case of knowledge against each Defendant separately and he agreed that he did. Right at the end of his reply submissions, at about 4.45 pm on the second day of the application, he said that there was also a case in agency, such that the fraudulent knowledge of any one Defendant, if and to the extent that he acted as agent, could be imputed to all the others even absent any guilty knowledge on their own part. Whilst there is (at [29]) a general and unparticularised assertion of agency, this is not explained, there is no plea of imputed knowledge, there are no supporting facts, and I received no submission or law on what I would regard as a wide-ranging proposition. I approach the proposed amendment on its face, namely as comprising a claim that each Defendant had the requisite knowledge to sustain a plea in fraud.

The evidence and materials

25. The following evidence was submitted on the application:

    a. For the Claimant:

        i. 1st witness statement of Donna Kirk dated 11 July 2019. Ms Kirk is the current financial director of ADC. She joined ADC in 2011 and worked as financial controller. She left in April 2016 and returned in December 2016.

        ii. 1st witness statement of Laurent Abadie dated 10 July 2019. Mr Abadie was the chairman of the Claimant from 1 April 2009 to 31 March 2019, including therefore at the time of the SPA.

        iii. 1st witness statement of Matthew Scully dated 15 July 2019. Mr Scully is a partner at CC.

        iv. 1st witness statement of Nigel Grummitt dated 15 July 2019. Mr Grummitt is a forensic and investigation services partner of Mazars LLP. As he explains at [7], he has been instructed by CC "*to review the material provided by the Claimant to the Sellers in support of its*

claim…" and "*to provide my preliminary views on that material from the perspective of an accounting expert."* This could only be expert evidence but no application was made to adduce it as such. Whilst not formally withdrawing it, Mr Adkin accepted that he could not place reliance on the opinions expressed in the statement, and I will not do so either.

b. For the Defendants:

i. 2nd witness statement of Philip Carrington dated 12 August 2019. Mr Carrington is a partner at HSF.

ii. 1st witness statement of Kenneth Embleton dated 12 August 2019. Mr Embleton was employed by ADC as a senior quantity surveyor between December 2014 and March 2018.

iii. 1st witness statement of Paul Waller dated 7 August 2019. Mr Waller was employed as the group finance director at ADC from December 2014 to July 2017.

c. For the Claimant in reply:

i. 2nd witness statement of Mr Scully dated 6 September 2019.

ii. 2nd witness statement of Ms Kirk dated 6 September 2019.

iii. 1st witness statement of Yuji Hirota dated 5 September 2019. Mr Hirota is a director of the Claimant.

26. In addition, I have been provided with several files of underlying documents, including the emails referred to and relied upon in Schedule 2 to the proposed Amended Particulars of Claim. Whilst I have read all of the witness statements and all of the documents to which my attention was drawn, and whilst I have sought to bear all of this information in mind, it is to be remembered that this is an application for permission to amend a pleading, and so it is not my function to determine disputes of fact. Nor is it my function to make evaluations which can only properly be arrived at after hearing the evidence at trial.

27. Whilst this is or ought to be self-evident and uncontroversial, the limited nature of the exercise which I am to conduct does need to be emphasised, in the light of both the evidence that was submitted and the arguments that were presented on the back of such evidence. In determining whether the proposed amendments show a real as opposed to a fanciful prospect of success, I am most informed by a consideration of the material presented by the Claimant in support of the case it wishes to bring. I am not necessarily to take that case at face value, it is right that I scrutinise it to determine what in fact it

does or could legitimately amount to and it is important that I have regard to its context. But these are relatively narrow parameters. At least in part, the Defendants' case involved an invitation for me to go deeper into the evidence and to find that there could not have been the fraud which is alleged, for example because the individual vendors would have had no motivation to act in such a way, or because the matters of which complaint is now made were not (it seems) uncovered by KPMG when it undertook an investigation in 2017. It was even submitted that, when assessing the evidence of Ms Kirk, I should have regard to what was said to be a difference in tone ("*a sharpening of the knife*") between her first and second statements. If there were a piece of evidence which conclusively destroyed the allegation of fraud then clearly I would have regard to it. But, where, as in the examples I have given, these are matters of nuance or evaluation, then they fall outside the ambit of the test which I have to apply.

The issues

28. It is convenient to consider the issues which arise by reference to the various objections raised by the Defendants. These may be grouped under three heads:

    a. There was a complaint about the form of the pleading, which was said to be too vague and too generalised for the purpose of a claim in fraud (the **pleading point**).

    b. It was said that the pleaded case on representations was (at least in part) unsustainable (the **representation point**).

    c. It was said that there was no sufficient case on the core issues of falsity or fraud (the **core issues point)**.

The pleading point

29. I have described above the format of the proposed amendment. It is drafted by way of an extension to the existing claim in statutory misrepresentation. The critical difference, at Amended Particulars of Claim [31A], is the addition of the allegation of fraud, which is said to be supported by Schedule 2. Schedule 2, in turn, sets out the matters from which the inference of fraud is said to be drawn. Paragraph 2 is in the following terms:

    "*In particular, the Claimant relies upon the cumulative effect of the following facts and matters, and the inferences properly to be drawn therefrom:*
    (a) the Representors' knowledge and experience;
    *(b) the Representors' close involvement with and oversight of the ADC business, and with preparation of the accounts and management packs (the "**Financial Information**") set out in paragraphs 27 (A) and 27 (B) of the Amended Particulars of Claim (the "**APOC**");*
    (c) the Representors' knowledge and intention that the Claimant would rely upon and be induced by the Representations to enter into the Sale on the terms of the SPA;

(d) the starkness and extent of the misstatements in the Financial Information;
(e) the inferences to be drawn from the contemporaneous documents; and
(f) the inferences to be drawn from the Representors' conduct post-Completion."

30. The remainder of the Schedule is made up of further paragraphs which purport to explain or elaborate upon the matters pleaded in paragraph 2. In particular, between paragraphs 11 and 14, the Claimant pleads a series of emails before or after the date of the SPA and which are said to constitute material from which the inference of fraud should be drawn.

31. Mr Dale objected to this form of pleading as a matter of principle. He said that it did not set out any "*primary facts*". Furthermore, he suggested that, in order to plead a proper claim in fraud, it would be necessary to identify with much greater precision each of (a) the actual representations alleged and their full intended scope; (b) the detailed respects in which each representation was in fact false; and (c) separately, what each alleged representor knew about each representation and its falsity, together with supporting particulars. The Claimant has, he submitted, done none of these things but has instead sought to advance a "*rolled-up*" plea made generically against everyone and by reference to no more than parts of emails.

32. I do not accept these submissions. I agree that several of the matters pleaded at paragraph 2 of the Schedule could not, taken alone, justify a plea in fraud but that does not mean that they are not capable of providing some support for such a plea. I would regard many of the matters pleaded, including at least the emails, as "*primary facts"* but, as I suggested to Mr Dale, the real question is not as to the precise characterisation of such matters but as to whether they are sufficient to support the inference of fraud. I entirely agree that a fraud pleading must be clearly expressed, and that it ought to carry as much precision as is possible. It must also be particularised. But it is necessary to avoid counsels of perfection, not least because the available material may by its very nature not lend itself to clarity, certainly at an early stage. This is all to my mind a matter of degree. If the pleading is vague, and if the allegations of fraud are generic rather than precise, then it may well be harder to satisfy the test for an amendment. But I do not consider that (and this is what I understood Mr Dale's submission ultimately to amount to) there is a fixed form of pleading which must be adhered to in a fraud claim.

The representation point

33. The representation point was argued at some length although, by the end, I was not completely sure where it was intended to take the Defendants. As I have explained above, the existing pleading alleges implied representations at Particulars of Claim [27(a) and (b)] and the proposed amendments allege express statements at Amended Particulars of Claim [27(c)]. Mr Dale accepted, realistically, that he could not challenge on this application the allegation that such express statements had been made and so he did not object to the new sub-paragraph on that basis. He did submit that the pleaded

case was vague but that is not a reason to exclude it. However, he also submitted that the existing (and proposed) allegations of implied representation were inherently unsustainable. This was for two principal reasons:

a. He said that the provision of financial documents from proposed seller to proposed buyer, for the purpose of due diligence in the context of an intended sale, and where the sale agreement would include financial warranties, could not give rise to implied representations of the nature alleged.

b. He relied also on the terms of the disclosure letter dated 15 June 2016, which accompanied the SPA. This letter, together with the documents listed at Appendix 1 and Appendix 2 thereto, was said to constitute the Disclosure Letter referred to at clause 9 of the SPA. The documents listed included the 2015 Accounts and the Management Packs. The letter stated as follows:

"2. *The purpose of this letter is to disclose matters which may be relevant to the Warranties… The Warranties are qualified by the matters that are Disclosed…*

3. The disclosure of any matter or document shall not imply any warranty, representation or undertaking not expressly given in the Agreement, nor shall such disclosure of itself be taken as extending the scope of the Warranties."

34. On the first point, Mr Dale sought support from the decisions of Mann J in *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 and of Andrew Baker QC in *Idemitsu Kosan Co Ltd v Sumitomo Corp* [2016] EWHC 1909. However, I agree with Mr Adkin that neither of these cases supports the proposition advanced. The issue before the Court in each case was whether it could be said that a contractual warranty given in an agreement could for that reason, and for that reason alone, also constitute a representation. That this was the issue was confirmed, for example in *Sycamore* by Mann J at [202]:

"It is to be noted that the Claimants do not rely on anything other than the terms of the warranties in the SPA as amounting to representations for this purpose. There is no reliance on any pre-contract representations: the warranties are relied on as both warranties and representations."

35. The claim advanced by the Claimant in the present case is not that the warranties given in the SPA thereby also constituted representations but that, separately, pre-contractual representations were made which induced the Claimant to enter into the SPA. That is an entirely different claim. There remains an outstanding issue as to whether, on the facts pleaded, the Defendants did indeed make the implied representations alleged. I anticipate that issue will fall to be resolved by reference to those cases which address the test for the implication of representations, such as *IFE Fund SA v Goldman Sachs International* [2007] 1 Lloyd's Rep 264 and *Property Alliance Group Ltd v The Royal Bank of Scotland plc* [2018] 1 WLR 3529, but there was no discussion of this on the application. At all events, I consider the point to be at least arguable.

36. So far as the disclosure letter is concerned, and without wishing to delve too deeply into the merits, I consider that it is also at least arguable that (a) on its true construction, the letter excluded (at most) the implication of representations by reason of the disclosure of documents made under the letter itself, and said nothing about the implication of representations by reason of matters occurring outside, and indeed prior to, the letter; and in any event (b) to the extent that the letter might be said to give rise a form of contractual estoppel, this would not operate to preclude a claim in fraud: see for example *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6.

The core issues point

37. That leaves for consideration the core issues point. The Defendants contend that, quite apart from any specific criticisms of the amendments as a pleading, and without prejudice to their case on the representations, there is simply no sustainable case that any representations were in fact false or that, if they were, this was to the knowledge or with the recklessness of each of the Defendants.

38. It is convenient at this point to narrow down the focus of the debate. As I have explained, the pleaded allegation of falsity, at least as regards the 2015 Accounts, is limited to three components making up an alleged total overstatement of at least £1.020 million. These components are (a) a failure to eliminate intercompany balances (£131,380); (b) double invoicing errors (£189,000) and (c) the application of an improperly high margin on the "Nexus" contract (£700,000). Mr Dale submitted, with some force, that there was nothing at all to suggest that the first two components (which were admitted errors, subsequently discovered) were either deliberate or even known by the Defendants. Mr Adkin, whilst eschewing the term "*makeweights*" accepted that by far the most significant element of the complaint was the third component and, indeed, that it was unlikely that the first two could stand on their own without the third. For the purpose of my exercise, and in line with the substance of the arguments before me, I can focus on this third component, namely the margin on the Nexus contract. If there is a viable claim in fraud in that respect then I will permit the whole amendment. If there is not, then I will refuse it.

39. The Nexus contract was a long term contract for the completion of radio installation works on the Tyne and Wear Metro in Newcastle. Nexus, via its nominated contract manager, Kapsch CarrierCom AG, concluded the contract in around July 2014 and work began in September 2014. It was initially expected to be completed in December 2015 but there were delays and work was eventually completed in September 2017.

40. The 2015 Accounts, for the period ended 30 June 2015, were presented by the directors under a directors' report signed by Mr Pearce on 5 November 2015. They received an unqualified auditors' report, by Bishop Fleming Bath Ltd, dated 9 November 2015. I was taken to the profit and loss account, which showed a net profit figure for the period of £276,063. The Claimant's case is that the figures presented in these Accounts were

overstated by (amongst other things) an inflated margin on the Nexus contract, such that the true position was, in a word used several times by Mr Adkin, "*catastrophic."*

41. So far as concerns the claim for misrepresentation through the Management Packs, the originally pleaded amendment did not go beyond the position stated in the 2015 Accounts. The revised version, albeit without particularisation, alleges falsity in respect of updated figures in the monthly documents.

42. There are two immediate difficulties with this case. The first is that the 2015 Accounts do not on their face specify the margin that had been applied on the Nexus contract, or the revenue or profit figures that were used. I was not shown any other document, whether by way of management accounts or auditors' material or otherwise, which identified the actual figures for the Nexus contract which were fed into the 2015 Accounts and which are said to have been wrong. My understanding is that the Claimant, which is now the owner of ADC, has access to its books and records, so it is not obvious why this has not been done. The figures are, however, included in the Management Packs. The second difficulty, which applies to the allegations in respect of both the 2015 Accounts and the Management Packs is that there is no clear indication of what the true figures should have been or why.

43. I agree with Mr Dale, at least to this extent, that, even before any question of a guilty mind falls to be considered, the anterior elements of the proposed claim, in particular as regards the allegations of falsity, are indistinctly expressed and evidenced. The only analysis I was shown was that contained in a report prepared by CC, dated 4 May 2018, in support of the originally pleaded case. This stated that significant costs were being incurred on projects, including Nexus, which would not be recoverable and that, rather than generating a margin of 57.8% as included in the Completion Accounts (prepared to 15 June 2016) the margin was 30.4%, with £1.152m of gross losses recognised in the posts acquisition period. This does lend some support to a claim of falsity, albeit against the Completion Accounts and without any real detail.

44. The main thrust of the Claimant's case, however, is to couple the various element of its claim together and to rely on the same material in support of both falsity and fraud. That material is comprised principally of two elements. The first is the evidence of Ms Kirk in her two witness statements. Ms Kirk makes serious allegations about the honesty of the accounting processes within ADC. She contends that these were directly influenced by Mr Lovell and Mr Pearce and that, in short, false entries were placed in the accounts in order to drive up profits. As a flavour, I quote from one paragraph of her second statement:

"*In the months prior to the acquisition by Panasonic on 15 June 2016, the figures in the Management Packs were significantly distorted by the overstatement of revenues and profits on the major contracts, which arose from the imposition by Mr Pearce and Mr Lovell of assumptions that were unrealistic and were not in line with ADC's stated accounting policy as I have explained. My impression at the time was that their primary*

concern was to ensure that the figures in the Management Packs did not cause Panasonic to walk away…"

45. Mr Dale subjected this evidence to a sustained attack. He pointed out that the witness statements do not exhibit any documents and are largely lacking in detail, that (if true) Ms Kirk appears to have been at least complicit in the overstatements and that her evidence is somewhat at odds with the fact (as she notes but does not otherwise explain) that, after she returned to ADC, she identified a series of errors in the balance sheet at 15 June 2016 but these did not include the overstatement on the Nexus contract in respect of which she is now so vocal. He also submitted that I should view her evidence in its totality as demonstrating no more than a difference of opinion on the correct accounting treatment to be given to a long-term contract and that the evidence of Mr Embleton and Mr Waller presented a more balanced and relevant picture of the true position. I see the force in a lot of these points but am of course concerned only with the position at a preliminary stage.

46. The second principal element relied on by the Claimant comprises a series of emails, before and after the date of the SPA which, it contends, supports its claims both as to falsity and guilty mind. These emails are said to show two different things: (a) a general propensity to, as Mr Adkin put it, "*cook the books*"; and (b) a recognition that the profits on the Nexus contract had in fact been deliberately overstated. I am cautious about the material relevance, even at this stage, of the supposed general propensity, because of the dangers of making unfocused fraud allegations through snippets of exchanges and without full context and understanding. However, there are some emails which may be capable of suggesting, and I put it no higher than that, that the profits on the Nexus contract had indeed been knowingly overstated. Given my overall conclusion on this application, it is not appropriate for me to seek to analyse the evidence in any detail but I quote from one of the examples relied upon. This was an email from Mr Waller to Mr Lovell and Ms Kirk dated 14 March 2017. He said the following:

"*Just to illustrate what I was saying yesterday about June 2015 being overstated, attached is a costing for Nexus from Oct 15, one of the earliest I can find. Shows margin at 63% on £4.6m revenue, which equates to £2.9m. However, the point to note is that at Oct 15 we'd recognised £2.378m of GM on costs of £1.399m. If you then wind forward to Feb and the revised costing I sent to Donna this week, we show margin to the end of Feb of £2.448m on costs of £2.555m. This means that costs we've incurred since Oct 15 of £1.2m have generated GM of £70K.*

This shows the impact of the margin erosion over the last 18 months and hence why I say some of the over-recognition exists in 2014/15. If we had reset the margin back in 2015 to 48% then we would have reduced GM on Nexus, and overall EBITDA by £700K."

47. Mr Dale submitted that this email showed nothing at all, other than, in the last sentence, the application of a condition. It seems to me that it may be capable of going further

than that and evidencing an understanding that there had been and would continue to be a very substantial overstatement in respect of this contract. And there are other emails, none of which is in any way conclusive, but which are capable of supporting the same conclusion. As a further example, in an email dated 9 March 2016 to Mr Pearce, Mr Lovell and Ms Kirk, Mr Waller said of Nexus that he "*had wanted to start the unwind on this as it's a major problem waiting to happen",* that there had been a "*recent hand sitting policy",* that they would "*have to begin this correction"* at some point but that "*the longer we leave it the bigger the problem."*

48. Mr Dale argued that none of the emails evidence any direct instruction to act illegally. Whilst this may be right, and whilst he may well be able to establish at trial that the emails, taken in their proper context and explained by the witnesses, do not in fact support the Claimant's case, I have to apply a lesser test. On the application before me, I must have regard to the materials relied upon in support of the proposed amendments, within the confines of the test which I have set out. In my judgment, and taking in particular the evidence of Ms Kirk together with the emails which have been pleaded and which I have been shown, there is a case against Mr Lovell and Mr Pearce which presents a real as opposed to a fanciful chance of success. I say nothing about the merits of that case, other than it surmounts the relatively low threshold which I have described. To reach any other conclusion would necessitate a slide into the sort of evidential assessment which is fit only for trial. For the same reasons, and to the extent that this gives rise to a separate enquiry, I consider that the proposed pleading is justifiable, in respect of those two Defendants. On the basis that Mr Lovell was a director of CCIL, I am prepared to permit also the claim against that company.

49. However, I am unable to reach the same conclusion respect of Mr Weller or Mr Greaves. Here, there really is a vacuum of evidence in support of the proposed allegation of fraud. Ms Kirk makes no specific allegation against these two Defendants but focuses her complaints against Mr Lovell and Mr Pearce. Indeed, the inference from her statements, for example that it was Mr Lovell and Mr Pearce who "*dictated the accounting decisions on the profits that were to be shown in those accounts"*, that "*Mr Pearce and Mr Lovell were both fully aware that very material contract variations had been recognised in the Management Packs that had not been accepted by and agreed with the relevant customer and that the result was to over-recognise revenues and profits"* and that "*the purpose of the adjustments was artificially to achieve the numbers that Mr Lovell and Mr Pearce required for the purposes of maintaining Panasonic's interest in the deal"* is that Mr Weller and Mr Greaves were not involved in these matters, at least so far as she was concerned. Mr Adkin made the point that she does make some references to "*the ADC Board*", but, even then, Ms Kirk provides nothing to suggest that she has any evidence of misconduct by those other two directors.

50. Equally, and whilst a number of the emails relied upon were sent to or from Mr Lovell and/or Mr Pearce, the same does not apply to Mr Weller and Mr Greaves. The heaviest reliance was placed on a single email involving these two individuals, dated 20 February 2016. In that email, the content of which is obscure but which is in the context of the February management accounts figures, Mr Greaves says that he would "*prefer*

to take the heat on missing a month's profits." That seems to be suggesting that he was in favour of a lower figure for profit for that month. There is nothing to indicate that he or anyone else thought that a lower figure was inappropriate or erroneous (and it is not even clear that it occurred). Nor is this a comment relating on its face to the Nexus contract, and it scarcely fits with a case of knowing overstatement. Mr Adkin submitted that it demonstrated that there was a "*culture of manipulation*" but I do not agree that the email can possibly bear such weight. He even submitted that the form of words used by Mr Greaves to express his opinion ("*my vote*") was itself indicative of fraud, on the grounds that the correct accounting treatment could not be a matter of votes, but this to my mind underscored just how stretched and unrealistic the case had become.

51. Beyond the evidence, such as it was, Mr Adkin made the more general submission that, if there was indeed a persistent and knowing overstatement on Nexus, then all of the directors must have known about it, but that is not to my mind a satisfactory basis for a claim in fraudulent misrepresentation. Absent supporting evidence from Ms Kirk and absent anything in the emails to suggest that Mr Weller and Mr Greaves were parties to or were aware of the alleged overstatements on which the proposed claim is based, this is a fanciful claim which has no real prospect of success. Furthermore, the pleaded claim against these two Defendants is unsupported by particulars and is not justifiable.

Disposition

52. I permit the proposed amendments, as modified during the course of the hearing, insofar as they advance a claim against Mr Lovell, Mr Pearce and CCIL. I refuse the proposed amendments as against Mr Weller and Mr Greaves.