Neutral Citation Number: [2023] EWHC 1970 (Comm)

Case No: CL-2022-000344

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, WC4A 1NL

Date: 28 July 2023

Before :

MRS JUSTICE DIAS DBE

- -

Between :

(1) JOHN WYLLIE **Claimants**
(2) WYLLIE FINANCIAL SERVICES LTD
(3) A' SCOTTISH NEWS LIMITED

- and -

Defendant

LIBERTY MUTUAL INSURANCE EUROPE SE

- -
- -

The **First Claimant** appeared in person for himself and on behalf of the **Second and Third Claimants**
Andrew Neish KC (instructed by **DAC Beachcroft**) for the **Defendant**

Hearing date: 13 July 2023

- -

Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Friday 28 July 2023.

Mrs Justice Dias DBE :

1. On 13 July 2023, I heard an application by the Defendant, Liberty Mutual Insurance Europe SE ("Liberty") to strike out the Claimants' revised Particulars of Claim in this matter which had been served on 14 April 2023. At the conclusion of the argument, I ordered that the Particulars of Claim were to be struck out in their entirety and the claim dismissed, indicating that I would give more detailed reasons for my decision at a later date. These are those reasons.

2. Liberty's application arises out of a longstanding dispute between the First Claimant and two companies of which he is the director and ultimate beneficial owner on the one hand, and a firm of specialist life insurance brokers, Arc Finance Group Ltd ("Arc") on the other. Arc has now been dissolved and has been substituted in these proceedings by Liberty, which was its professional indemnity insurer for the relevant policy year.

3. In broad terms, the Claimants' case is that in 2017 the First and/or Second Claimants entered into a commission sharing arrangement with Arc whereby the First and/or Second Claimants would introduce life insurance business to Arc, in return for which Arc would pay them 50% of the net commission it received from insurers. The initial agreement to this effect was concluded between the First Claimant ("Mr Wyllie") and Arc on 19 July 2017. It was superseded by a subsequent agreement dated 17 January 2018 between the Second Claimant and Arc on materially similar terms save that the commission rate was increased to 60% (the "Superseded Agreement"). It appears that the Superseded Agreement was accompanied by an agreed sales process for employees of the Third Claimant.

4. It is not disputed that the commissions were heavily front-loaded and that the agreements were subject to clawback provisions whereby commissions paid to the Claimants became repayable if the policy to which they related was cancelled or if payment of premiums ceased during the stipulated clawback period. Once the clawback period had expired, clawback was waived by Arc.

5. A substantial number of policies was placed by Arc at the behest of one or other of the Claimants between July 2017 and March 2018. These included policies on the lives of Mr Wyllie himself and his family, as well as on the lives of persons ostensibly employed by the Second and (mainly) Third Claimants, the latter being a company incorporated by Mr Wyllie in November 2017. In total 485 policies were placed, including policies on the lives of all of the Third Claimant's employees, a number of whom were insured on a "keyman" basis for substantial sums. It also appears that multiple policies were taken out on the lives of some employees, although there is a suggestion in the papers that this may have been due – in part – to errors in Arc's automated systems.

6. Premiums for the policies were paid variously by the First, Second and Third Claimants. Each of the Second and Third Claimants paid for the policies relating to their own employees, while Mr Wyllie initially paid for his own personal policies until About August 2017 after which the Second Claimant paid for all policies for Mr Wyllie and his son. Between July 2017 and January 2018, all commissions were paid directly into Mr Wyllie's personal account under the first agreement. From 16 January 2018, introductions were effected solely by the Second Claimant which received all

commission and shared it as appropriate with the Third Claimant. It should be noted that there was an express recital in the Superseded Agreement prohibiting direct contact between Arc and the Second Claimant's clients (which included, of course, the Third Claimant) without written consent. There was thus no direct relationship between Arc and the Third Claimant. It is common ground that the Second Claimant received at least £688,000 in respect of commission, of which some £243,000 was apportioned to the Third Claimant.

7. After these arrangements had been in place for several months, one of the insurers, AIG, began to have concerns about the scheme. I do not propose to go into details about those concerns which are, in any event, recorded in a judgment of HHJ Pelling in this case dated 16 March 2023. As a result, however, many insurers cancelled all or some of the policies they had written and sought a clawback of commission from Arc. Some of these insurers returned the premiums paid; others did not. There were also some policies which simply lapsed for non-payment of premium.

8. Having become liable to repay commission to the insurers, Arc in turn became entitled in principle to seek a clawback of commission from the First and Second Claimants in the sum of around £462,000. This was not paid. Arc subsequently went into liquidation.

9. The Claimants assert that they have suffered substantial losses as a result of the cancellations which are attributable to various errors and breaches of duty on the part of Arc. These losses include:

    i) Wasted premiums which have not been refunded;

    ii) The sums assured and future commissions due under the policies, including £7.25 million representing the cover placed under 11 policies taken out on the life of a Mr McCallum;

    iii) At least £71 billion in respect of commissions and anticipated cover under policies that the Claimants say would have been taken out on 6000 employees of the Third Claimant who would have been insured in the future as the Third Claimant's business expanded (the "expectation losses").

10. The Second and Third Claimants accordingly applied to the FSCS for compensation on the basis that the policies were worthless and this was due to Arc's errors when placing the policies. The claim was rejected on the grounds that FSCS was not satisfied that the Claimants had the necessary insurable interest in the lives assured – at least on a keyman basis. The FSCS was also not persuaded that any errors by Arc had caused the alleged losses. In its view, the cause of the losses was rather the fact that the Claimants had applied for policies on lives in which they had no insurable interest. In respect of Mr McCallum, the FSCS was not satisfied that he qualified as a keyman but noted in any event that the policies on his life were all cancelled more than 12 months before his death and that it would therefore have been possible for the Claimants to have sought alternative cover even if only on a non-keyman basis.

11. The Claimants sought judicial review of the FSCS's decision. Permission to bring judicial review proceedings was refused by Garnham J on paper and also by Fordham J on a renewed oral application. An application for permission to appeal Fordham J's

decision was rejected by Carr LJ who held that it was totally without merit, although she declined to make a civil restraint order against the Claimants at that stage.

12. On 1 July 2022, all three Claimants commenced the present proceedings against Arc claiming the losses referred to above in sums exceeding £80 billion. By now Arc had been dissolved and struck off the register. Liberty, as its professional indemnity insurer, sought permission to be substituted as defendant in place of Arc and also applied to strike out the Particulars of Claim on the grounds that: (i) they were not compliant with the CPR or the Commercial Court Guide, and (ii) they disclosed no reasonable grounds for bringing a claim and were an abuse of the court's process or likely to obstruct the just disposal of the proceedings.

13. The application came before HHJ Pelling on 14 March 2023 who ordered, so far as relevant to the present application, that Liberty should be substituted in place of Arc and that the Particulars of Claim should be struck out in their entirety. Despite Liberty's invitation to him to do so, however, he declined to dismiss the claim altogether but instead gave the Claimants permission to file new Particulars of Claim by 14 April 2023 with liberty to Liberty to apply to strike out the new pleading within 14 days of service. In those circumstances he did not make any order on Liberty's further application for security for costs but gave liberty to renew the application if so advised.

14. In his judgment, HHJ Pelling adopted Cockerill J's summary in *King v Stiefel,* [2021] EWHC 1045 (Comm) at [145]-[147] of the three purposes of a pleading in court proceedings, namely:

    i) to enable the other side to know the case it has to meet;

    ii) to ensure that the parties can properly prepare for trial without the expenditure of unnecessary time and costs on points which are not in issue or which lead nowhere;

    iii) to operate as a critical audit for the pleading party and its legal team that it has a complete cause of action or defence as the case may be.

15. I refer to the judgment itself for full details of the basis on which HHJ Pelling held that the Particulars of Claim should be struck out. However, he was highly critical both of the nature of the claims and the way in which they had been presented.

16. In relation to the claim for wasted premiums, he accepted that this was a good claim in principle but held that it would inevitably be subject to a defence of set off in respect of commissions which fell to be repaid. It was (and is) common ground that the Claimants cannot recover more under this head than the amount which they have actually paid in respect of premium, namely some £160,508. However, they had between them received a vastly greater sum in commission (some £688,000) which had become repayable to Arc and would on its face entirely offset any claim for wasted premiums.

17. Nonetheless, as the judge recognised, each Claimant is a separate entity and it is therefore necessary to look at the position of each one individually in order to compare the amount of premium paid and commission received by that particular Claimant. He held that while the original Particulars of Claim were wholly inadequate for this

purpose, they were capable of being rectified. This was one of the reasons that he did not strike the claim out altogether but gave the Claimants a last chance to do the necessary calculations and put forward a claim for any Claimant whose claim for wasted premiums was not eliminated by the commission repayable.

18. HHJ Pelling concluded that there was no merit at all in the claim for the loss of the sums assured on Mr McCallum's policies on the information currently available. In order to recover the Claimants would have needed to demonstrate that they could have obtained cover in this amount on his life but that there was nothing to show this.

19. As regards the expectation losses, the judge held that it was inherently improbable that sums of the sort claimed could ever have become payable to any of the Claimants had it not been for the alleged breaches of contract and duty by Arc. Quite apart from anything else, the claim assumed that every single employee insured would have died during the life of the policy. Moreover, it was unclear to him how many people would have had to be employed and at what salaries in order to yield the benefits referred to.

20. That said, the judge accepted that *if* the Claimants could establish that they had been actionably misled by Arc into believing that they could insure the lives of their employees for the sums contemplated, then they *might* be able to recover any expenditure which they had wasted as a result and this *might* include *some* of the heads of loss set out in paragraphs 69(10)-(23) of the pleading. He regarded the remaining heads as not even arguably recoverable. It should be noted in this regard that the claim which the judge had in mind as being potentially arguable related to expenditure wasted through taking out policies which turned out to be invalid, which is wholly different from the amounts that the Claimants could have hoped to receive if the policies had in fact been valid.

21. As I have already said, the judge declined to make any order dismissing the claim, even in respect of the parts he thought were unarguable. He took the view that the Claimants had been afforded one last chance to put forward a viable claim and that it would be better to wait and see what emerged before considering any questions of dismissal.

22. Importantly, in paragraph 32 of his judgment he set out clearly and in detail exactly what the Claimants would need to do in order to produce an acceptable pleading, namely *in relation to each Claimant separately*:

    i) To state whether the claim was brought under a contract or for breach of a tortious duty;

    ii) To plead the relevant contract, and the facts and matters said to give rise to any duty relied upon;

    iii) To set out the facts and matters said to constitute a breach of whatever contractual or other duty was relied upon;

    iv) To state how the alleged breaches allegedly caused whatever loss the relevant Claimant alleged it had suffered;

v) To set out a properly particularised summary of the loss and damage which was alleged to have been caused to each claimant by the alleged breach of contract or duty relied on.

23. On about 14 April 2023, the Claimants served new Particulars of Claim, apparently settled by counsel, although counsel did not appear at the hearing before me and the court gave permission for Mr Wyllie to represent the Claimants in person.

24. This is the background against which the following applications came before me on 13 July 2023:

i) Liberty's application to strike out the new Particulars of Claim and to dismiss the claim in its entirety with indemnity costs;

ii) Liberty's renewed application for security for costs in the event that the claim was allowed to proceed;

iii) The Claimants' application to stay execution of an interim costs order in the sum of £100,000 made by HHJ Pelling on 16 March 2023.

Application for strike out/dismissal

25. Under CPR Part 3.4, the court has power to strike out a statement of case such as a Particulars of Claim if it appears to the court that:

i) it discloses no reasonable grounds for bringing or defending the claim;

ii) it is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

iii) there has been a failure to comply with a rule, practice direction or court order.

26. Where the court strikes out a statement of case, it may make any consequential order that it considers appropriate. This would include an order dismissing the claim.

27. I accept, as did HHJ Pelling, that striking out a statement of case is a serious step which should only be deployed as a last resort. Nonetheless, the ultimate test of whether it is appropriate to do so is what is just and proportionate in the particular circumstances.

28. In this case unfortunately, despite the very clear explanation by HHJ Pelling of the deficiencies in the original pleading and his even clearer explanation of what was necessary in order to put the pleading into proper form, the Claimants have completely failed to produce a viable pleading – even with the benefit (as it would appear) of counsel involvement in the drafting.

29. At paragraph 31 of his judgment, HHJ Pelling held that the original Particulars of Claim consisted of a lengthy, discursive and prolix narrative which in almost all cases failed to provide relevant particulars where they were obviously required and completely failed to set out the basic ingredients of the causes of action relied upon. The new Particulars of Claim are undoubtedly less prolix and discursive than their predecessor and some of the more egregiously irrelevant material has been omitted (for example, the lengthy list of interested parties and detailed assertions concerning the judicial

review proceedings). To that limited extent, they represent a considerable improvement. However, although paragraph 32 of the judgment could have left Mr Wyllie and counsel in no doubt as to what was required, the new Particulars of Claim still fail to set out in any clear or coherent way the basic elements of the causes of action relied upon or to provide the necessary particulars and details of the losses claimed.

30. It is fair to point out that the Particulars of Claim were accompanied by a 963-page spreadsheet and 16 attachments totalling some 200 pages which were not expressly referenced or explained in the pleading. Absent such explanation, the relevance of many of them was unclear. It may be that Mr Wyllie intended to rely on them as evidence in support of his allegations but the fact is that evidence is only admissible in support of a case which has been properly pleaded and particularised in the first place.

31. As I made clear at the start of the hearing, I am dealing only with the applications before me. Mr Wyllie's wider concerns about the financial services industry, the handling of his claim by the FSCS and the subsequent judicial review proceedings have no bearing on those applications and, so far as strike out is concerned, the only question for my determination is whether the wording and form of the new Particulars of Claim raise a sufficiently arguable and coherent case to avoid being struck out. I am not concerned with what the pleading could or might have said if it had been differently formulated, only with what it actually says in its current iteration. The whole point of HHJ Pelling's order was to give the Claimants a last opportunity to re-plead their case in a legally coherent manner. If they have failed to do so, as I am afraid they have, then it is irrelevant that they could have done so. This was their last chance and my only concern is to determine whether the pleading which they have in fact chosen to put before the court can be supported.

32. As they stand, the new Particulars of Claim purport to plead claims in contract, negligence and misrepresentation. I deal with each in turn and in doing so I am prepared to overlook minor incoherences such as, for example, the reference in paragraph 14 to clause 3.1 of an "Agreement" which does not appear to be either of the only two agreements pleaded; and the grammatically nonsensical paragraph 18.

Contract

33. Paragraph 16 of the pleading under the heading *"Breaches: Contract"* pleads that the insurance policies for the Second and Third Claimants had been *"incorrectly completed and grossly managed.*[1] *The employees were to be the person insured and the company was the owner of the policy with the policy assigning into the company trust. This was a complete mess and had such adverse and/or detrimental consequences to those concerned."*

34. However, this wholly unspecific assertion altogether fails to identify the precise respects in which any particular policy was incorrectly completed or to identify the specific provisions of any contract with Arc which it is said were breached as a result. The nearest we get is paragraph 22 where it is said that Arc had *"erroneously misapplied the life and critical illness insurance policies taken out by the Third Claimant as they had been mostly set up with the employee being the person insured and company being the owner of the policy and the policy being assigned into trust."*

[1] I assume this is a typographical error for "mismanaged".

The problem with this is that it appears to be contradicted by paragraph 28 and the attached spreadsheet which suggest that Arc's failure in fact lay in doing precisely the opposite, and that *"The policy should have been company owned and written into group trust with the company as the beneficiary. However, the Broker had arranged an individually owned basis with employees as the beneficiary and no assignment into the company trust."*

35. The Claimants seek to rely in paragraph 29 on alleged admissions of breach by Arc, but nowhere does the pleading identify what specific breaches were allegedly admitted or by whom or when. It may be that the pleader had in mind paragraph 36 where four statements are set out which apparently constitute some of the clearest admissions. However, this hardly improves the position since:

    i) all four statements appear to have been made after the events in question;

    ii) two of them are not admissions at all but merely summarise insurers' position;

    iii) one simply states *"Company owned policy, it is yeah"* which can hardly be read as an admission of anything;

    iv) the final one refers to an acceptance that Arc *"have been more wrong than we have ever been in this scenario"* but does not identify what Arc thought they had been wrong about, still less admit that they had committed any legally culpable error.

36. In short, as set out in the pleading, these statements neither help identify any specific breaches nor amount to admissions of wrongdoing.

37. In the result, the new Particulars of Claim fail to plead any coherent cause of action for breach of contract.

Negligence

38. As far as negligence is concerned, the new Particulars of Claim correctly plead a duty of care owed by Arc to the Claimants. Liberty would no doubt argue that in the circumstances of this case Arc in fact owed no duty of care to the Third Claimant, but that is a point which goes to the substance of the case, not the adequacy of the pleading.

39. However, the only indication as to the nature of the alleged breach of duty is in paragraph 32 which pleads as follows:

    "There are countless examples exhibited to these Particulars of Claim where the Broker has failed to carry out their duty as an expert in their field with care and skill. Examples of the negligence include, but not limited to:

    "EMAILS & VOICE RECORDING FROM DIRECTORS OF ARC ADMITTING LIABILITY. FSCS EVIDENCE CONFIRMING NO INSURABLE INTEREST EXISTED. FSCS CATEGORICALLY STATED THAT ALL POLICIES WERE INVALID AS PER THEIR SUBMISSIONS MADE TO THE COURTS. ***LADY JUSTICE CARR*** *ACCEPTED ALL* ***FSCS SUBMISSIONS*** *AND DECLARED ALL POLICIES INVALID AS PER HER JUDGEMENT. EMAIL FROM ROYAL LONDON CONFIRMING* ***THE BROKER ADMITTED LIABILITY FOR NEGLIGENT ARRANGING OF***

MULTIPLE POLICIES FOR MULTIPLE PEOPLE ACROSS MULTIPLE INSURERS *AND THAT THEY DEEMED ALL OF THESE POLICIES INVALID."*

40. Similar criticisms can be made of this plea as above, in that there is no attempt to identify any specific acts or omissions or advice on the part of Arc which are alleged to have been negligent. The quoted passage in capital letters (which has been taken from the Claimants' spreadsheet where it appears in identical terms against each of the 485 policies) seems to be relied upon for two purposes:

    i) To show that the policies were invalid for lack of insurable interest;

    ii) To show that Arc had admitted liability.

41. However, the mere fact that the Claimants may not have had any insurable interest in the policies does not by itself establish that Arc failed to exercise reasonable care or, if there was any failure, that it was the cause of the losses claimed. So far as the pleading goes (and of course that is all I am concerned with), it is equally consistent with Arc having been given erroneous instructions, or having given advice which was ignored by the Claimants. This precisely illustrates why it is necessary for the pleading to set out exactly how and why the invalidity of the policies is alleged to have been due to the negligence of Arc so that the Defendant can be in no doubt of what Arc is said to have done wrong.

42. Likewise, in relation to the admissions, it is wholly unclear what Arc is allegedly admitting liability *for*. Paragraph 32 is effectively a summary of the evidence that the Claimants seek to rely on, rather than (as it should be) a statement of what the breach of duty consists of. Moreover, even if Arc erroneously took out multiple policies for the same individual, it is not clear how that would have caused the entirety of the losses claimed.

43. Finally under this head, paragraph 33 contains a previously unheralded reference to fiduciary duties without identifying which fiduciary duties were breached or how.

44. Again, I regret to say that in my judgment the new Particulars of Claim disclose no reasonable grounds for asserting a cause of action in negligence.

Misrepresentation

45. Paragraph 35 of the new Particulars of Claim assert that the First and Second Claimants were induced to enter into the agreements with Arc by virtue of representations made by Arc's employees. The representations relied upon are pleaded by reference to a chronology. This is a closely-typed 31-page document summarising (it would appear) every communication between Mr Wyllie and Arc from early 2017 to March 2023. The first seven pages relate to the period up to 17 January 2018. However, only one entry in those seven pages refers to advice being given by Arc and even that does not set out what advice was given.

46. A plea of misrepresentation requires the claimant to set out, as a minimum:

    i) the gist of the representation made, by whom it was made, when, how and in what circumstances;

ii) the respects in which the representation was incorrect;

iii) the facts relied upon as demonstrating that the representor knew or ought to have known that the representation was incorrect;

iv) the respects in which the claimant relied upon the representation in doing/failing to do something which it would not otherwise have done/failed to do;

v) how this caused loss.

47. Nowhere are these essential ingredients of the cause of action clearly set out. In argument, Mr Wyllie placed great reliance on the alleged admissions by Arc set out in paragraph 36 of the Particulars of Claim but for the reasons already given, these do not assist the Claimants. Paragraph 38 then pleads that *"further representations"* (not identified) *"turned out to be false as shown in the spreadsheet and in summary: 'ARC'S FAILURE TO SET UP THE POLICY CORRECTLY & FAILURE TO PLACE POLICY INTO TRUST FOR THE COMPANY."* While it can at least be deduced from this that Arc should have placed the policies into company trust, it does not help identify what representations were thereby falsified.

48. Paragraph 39 then asserts – almost in passing, and in the context of a plea that the representations caused loss and damage – that they were fraudulent. This, I regret, is absolutely unacceptable. It is a basic principle of pleading which is or should be well-known to all legal practitioners that an allegation of fraud must be properly pleaded and particularised. This includes setting out clearly:

i) What representation was made;

ii) The respects in which it was false;

iii) The facts, matters and circumstances relied upon as showing that the defendant *knew* that it was false or was *reckless* as to whether it was true or false.

49. It is not sufficient in this context to plead facts which are equally consistent with mere negligence. Moreover, there is a express provision in Rule C9.2 of the Bar Council Code of Conduct that a barrister must not draft a statement of case alleging fraud without clear instructions to do so *and* reasonably credible material which establishes such a case. For this reason, I was somewhat surprised to see a bare allegation of fraudulent misrepresentation apparently signed by counsel but without any attempt at particularisation. Mr Wyllie assured me that the final draft of the pleading had been approved by counsel, but since counsel is not here to answer for themselves, I say no more about it other than that I regard this as wholly inadequate and indefensible as a plea of fraudulent misrepresentation.

50. As with the other two causes of action, therefore, the basis on which Arc is said to be liable for misrepresentation is completely obscure.

Loss and damage

51. Unfortunately, the deficiencies in the pleading do not end there. First, it is unclear from the Particulars of Claim how the claimed losses are said to have been caused by the alleged errors. This is then compounded by the fact that the losses have been pleaded

compendiously without any attempt (despite HHJ Pelling's guidance) to relate different heads of loss to different causes of action and different Claimants. Furthermore, some of the heads of claim are clearly misconceived and there is no realistic prospect of them ever succeeding.

52. I consider each of the three broad categories of loss separately. For this purpose, I am prepared to assume (contrary to my findings above) that the Claimants can make good a case in principle of breach of contract and/or negligence and/or misrepresentation.

Wasted premium

53. As accepted by HHJ Pelling, it is not controversial that where a policy is cancelled from inception (as many of the policies were in this case), the assured is generally entitled to a return of premium, although there is an exception in cases of fraud. Normally a claim for unreturned premium would lie against the insurer but here I am assuming that the Claimants have an equivalent claim against Arc on the basis that the cancellation was due to the actionable fault of Arc.

54. The problem is that the Claimants appear completely to have ignored HHJ Pelling's clear guidance that, in light of the potential defence of set off available to Liberty, they would need to identify the amount of premium recoverable by each Claimant individually in order to demonstrate that it was greater than the amount of commission potentially repayable. No attempt whatsoever has been made to do this. Instead the pleading simply pleads a global figure for wasted premium without any attempt to allocate it to specific Claimants.

55. The new Particulars of Claim are somewhat coy about which of the First and Second Claimants was party to which agreement. The pleading itself draws little distinction between them but appears to treat them as jointly entitled to commission. In those circumstances, it seems reasonable to take them together, in which case it is clear that they received vastly more in commission than the amount of any unrecovered premiums.

56. On this basis, Liberty have calculated from the Claimants' own spreadsheet that unrecovered premiums paid by Mr Wyllie amounted to £13,718.01. This is to be contrasted with the figure of £23,439.19 put forward in the Claimants' letter of claim (albeit not pleaded), but whichever figure is correct the commission paid to him was far greater with the result that he could never recover a monetary payment in his favour. The same is true of the Second Claimant. Neither can therefore realistically hope to succeed on this limb of the claim.

57. This leaves the Third Claimant. Mr Neish submitted (as he would have done before HHJ Pelling had the point arisen for argument) that the position in relation to the Third Claimant is no different even though (as is common ground) there was no direct contractual relationship between Arc and the Third Claimant. As he pointed out, policies were placed on behalf of the Third Claimant by the Second Claimant effectively occupying the position of a sub-broker. The Third Claimant thus paid or accounted for premium to the Second Claimant who paid an equivalent amount to Arc. Commission on those policies, as noted above, was paid by Arc to the Second Claimant who then accounted to the Third Claimant for its appropriate share. As far as Arc was concerned, therefore, it would pay any premium refund to the Second Claimant and

could only look to the Second Claimant for any clawback of commission. Conversely, the Third Claimant would have to bring any claim for unrecovered premium against the Second Claimant (who would then in turn seek to recover from Arc) unless it could show that, notwithstanding the lack of any direct contractual relationship, Arc nonetheless owed it a direct duty of care. However, it is well-established on authority that in these circumstances, Arc would not owe any duty of care in tort to the Second Claimant's clients unless it had voluntarily undertaken responsibility to them and this would need to be pleaded specifically. It may be that the Third Claimant would have wanted to place some reliance on the agreed sales process in this regard but, if so, then it should have been pleaded expressly.

58. During the course of argument, Mr Wyllie referred several times to the fact that Arc had agreed to waive clawback. There was indeed reference to a waiver in the commission agreements but this took effect only after the clawback period had expired which it had not at the date that the policies were cancelled. In so far as there was some other agreement to waive clawback in relation to certain commissions, the short answer is that this was simply not pleaded.

59. My Wyllie also referred to the fact that the Claimants were owed some £1.7m in unpaid commission. However, it should be borne in mind that the claim for wasted premium necessarily presupposes the *invalidity* of the policies. Accordingly the sums that the Claimants might have been entitled to recover if they had been *valid* are irrelevant because they would never have become payable on this basis. They cannot therefore be brought into the equation.

60. For these reasons, I am satisfied that the new Particulars of Claim disclose no reasonable grounds for bringing the claim for wasted premium since it would be bound to fail by reason of Liberty's set off defence. Given that the Claimants were given a last chance to put their house in order on this point and were told very clearly what they needed to do, I am also satisfied that continuing to advance the claim on an inadequate basis is an abuse of the process of the court and likely to obstruct the just disposal of the proceedings.

Loss of sums assured including on the life of Mr McCallum

61. This I can take more shortly. The claim is for the loss of the sums assured under each and every incepted policy. But even if the cancellation of the policies could be shown to be the fault of Arc, the Claimants could never hope to recover more in damages than they would have been entitled to recover under a valid policy. This in turn depends on establishing in each case the extent of the Claimants' insurable interest in each employee. Again, however, there is no attempt in the pleading to do this and no evidence to support the case. Indeed, none of the employees is specifically identified except for Mr McCallum.

62. As far as he is concerned, HHJ Pelling concluded at paragraph 40 of his judgment that the claim was entirely irrecoverable. He assumed in the Claimants' favour that Mr McCallum was indeed employed by the Second Claimant at £300,000 per annum as a business consultant (itself open to some doubt given his previous career as a professional wrestler) but even so held there was no pleaded basis for asserting that the Second Claimant had an interest in his life to the extent of £7.25 million, even as a keyman. Moreover, as he pointed out, the policies on Mr McCallum's life were all

cancelled more than 12 months before his death. The Claimants had said that it was impossible to take out alternative insurance because they had been blacklisted as a result of AIG's concerns. However, even if that were true, they would have needed to plead (i) that they could have secured alternative cover if there had been no blacklisting and (ii) the amount of cover that could have been procured.

63. Regrettably, the new Particulars of Claim do nothing to address this point. Instead, they plead that insurable interest only has to exist at the date of inception of the policy. This is not in dispute. But if there is no insurable interest at all, then the date at which it must exist hardly matters.

64. This claim has therefore not advanced since its previous iteration and remains as misconceived now as it was previously.

Expectation losses

65. This claim relates to more than £71 billion in commissions and payouts that the Claimants anticipated receiving on policies to be written in the future. HHJ Pelling considered it wholly improbable that sums of this magnitude would ever become payable and I agree. The pleading suggests that the Claimants expected to take out policies on the lives of a further 6000 employees of the Third Claimant. However, the Third Claimant had only been incorporated in November 2017 and while Mr Wyllie no doubt hoped that its business would grow, it is completely speculative that it would have grown to anything like this extent. Quite apart from anything else, it would almost certainly have been severely affected by the Covid pandemic. Further, as the judge pointed out, the claim assumes that every life assured would have died within the life of the policy, which itself is inherently improbable. Finally, the new Particulars of Claim simply replead the original claim in identical terms without any attempt to set out the basis on which the figures claimed have been calculated.

66. Again, therefore, this claim is no better pleaded than it was before and in my judgment should be struck out.

Wasted expenditure

67. When HHJ Pelling outlined in paragraph 42 of his judgment the basis on which he felt that the Claimants might be able to articulate a viable claim against Arc for misrepresentation, he made it very clear that any damages recoverable could only relate to expenditure which had been wasted in reliance on Arc's advice and that this *might* include some of the losses pleaded in paragraphs 69(10)-(23) of the original Particulars of Claim.

68. Surprisingly, however, the new Particulars of Claim make no attempt to identify any particular items of wasted expenditure. Instead, as already noted, the losses are pleaded compendiously in relation to all causes of action and relate entirely to benefits which the Claimants hoped to obtain if the policies were valid. Even if a claim for misrepresentation could be established in principle, the failure to identify any legally recoverable loss flowing as a result would be sufficient to justify striking the claim out.

Conclusion

69. For all these reasons, the new Particulars of Claim are wholly unsustainable in their current form and fail to achieve the objectives set out in *King v Steifel (supra)*. They must therefore be struck out. The only remaining question is whether I should now take the final step and dismiss the claim altogether. HHJ Pelling did not do so because the Claimants were acting through Mr Wyllie effectively as a litigant in person and he wished to give them one last chance.

70. Mr Wyllie drew attention to his dyslexia which he submitted severely affected his ability to manage and assimilate large quantities of information. I accept that this can be a substantial disadvantage to someone suffering from it. But in circumstances where the Particulars of Claim in question were settled by apparently experienced counsel in the light of clear guidance from the judge as to what was required, I do not regard it as a factor of overriding weight. In that regard, I have some sympathy with Mr Wyllie in so far as it appears that he relied on the professional advice of counsel to revise the Particulars of Claim. Counsel is not, of course, here to answer for themselves but I assume that they put forward the best case that they felt could be pleaded. It is unfortunately inadequate and in my judgment the time has come to put this claim out of its misery and dismiss it altogether. The Claimants have already had two chances to put their house in order and regrettably there is insufficient merit in any of the claims to justify giving them a yet further chance.

71. I therefore dismiss the claim which I certify to be totally without merit as pleaded. Under CPR Part 3.4(6), I am required to consider whether it is appropriate to make a civil restraint order. However, a limited civil restraint order can only be made where a party has made two or more applications which are totally without merit and Mr Neish accepted that this threshold had not yet been reached.

72. After I had indicated my decision orally, Mr Wyllie assured the court that this would now be the end of the matter. I would only point out that although it would in theory be open to the Claimants to commence fresh proceedings if a properly sustainable claim could be articulated, they would almost certainly have to satisfy the court that it was not an abuse of process for a second claim to be allowed to proceed in circumstances where the first claim had been certified to be totally without merit after they had been given more than one opportunity to plead it properly.

73. In these circumstances, Liberty's application for security for costs became moot and Mr Wyllie indicated that he was withdrawing his application for a stay of execution. It is therefore unnecessary for me to address either application further.