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Case No: LM-2022-000258

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

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

Date: 27/10/2023

**Before** :

**Paul Stanley KC**
**sitting as a Deputy High Court Judge**

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**Between :**

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| **(1) KIRIL KLATUROV**<br>**(2) KMKH EOOD** | **Claimants** |
| **- and -** | |
| **(1) REVETAS CAPITAL ADVISORS LLP**<br>**(2) ERIC ASSIMAKOPOULOS** | **Defendants** |

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**Mr James Weale** (instructed by **Willkie Farr & Gallagher (UK) LLP**) for the **Claimants**
**Mr Jeremy Lewis KC** (instructed by **Fox Williams LLP**) for the **Defendants**

Hearing date: 27 September 2023

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# Approved Judgment

This judgment was handed down remotely at 10.30 am on Friday 27 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## PAUL STANLEY KC:

### The issue

1. The central issue in this application to re-amend the Amended Particulars of Claim is whether some draft amendments, relating to a buy out of the claimants' interest in a limited liability partnership, make a sufficiently strong prima facie case to justify permission. That raises two case-specific questions: is it arguable that the parties agreed a valuation process that bound the defendants? And what, if any, implied terms may (at least arguably) arise out of a written agreement to pay a member who was leaving a "buyout sum" based on an accountancy firm's valuation of the LLP?

2. For the reasons given below, I have concluded: (a) that the draft amendments alleging that there was a binding agreement to the process for valuation have a real prospect of success at trial, and should be permitted, (b) the draft amendments alleging that the first defendant owed a duty to exercise reasonable care in providing information should be permitted (but not that the second defendant owed such a duty in relation to information provided by first defendant), but (c) the draft amendments alleging other implied terms should be refused.

### Background and procedure

3. The first claimant, Mr Klaturov, is a lawyer. In 2012 he began working on secondment for the first defendant ("RCA"), which is a limited partnership specialising in investment management, particularly for Russian and Eastern European clients. Its managing member is the second defendant, Mr Assimakopoulos. Mr Klaturov decided to work full time with RCA. He became its general counsel. In 2016 he (or the second claimant, which is a company he controls—for present purposes it does not matter) became a member of RCA. In 2020 he became its Chief Operating Officer. He resigned in August 2021. He left on good terms. It is not in dispute that for all relevant purposes he was a "good leaver". Then the parties fell out over the financial terms of his departure. These proceedings were issued in July 2022.

4. A key source of the parties' rights and obligations is the LLP Agreement as it stood on 9 December 2020.

5. The parties have been in dispute over three main topics. First, Mr Klaturov says that he is owed deferred remuneration and bonus, fixed before he left, but not paid. Second, Mr Klaturov says that he is entitled under the LLP Agreement to a profit share in relation to periods during which he was with RCA. Third, he says that he (or the second claimant) is entitled to a buyout payment, representing the value of his rights at his leaving date. The first two claims have been fully pleaded. They are to be tried in December. The parties agreed, and I have ordered, that the third claim will not be tried then, whatever the outcome of this application. It is free-standing and has only recently arisen (at least in its current form). It is the only claim that matters for this judgment.

6. The relevant provisions in the LLP Agreement are in clause 21.4, which provides:

> "Save as otherwise expressly agreed between the LLP and any Member or any Former Member, in the event that the Former

> Member is a Good Leaver and so long as the Former Member remains a Good Leaver: ...
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> (d) if the Former Member had been a member of the LLP for more than three years (including any period served working for the LLP as an employee, consultant or other capacity) the Former Member's Interest shall be purchased by the LLP or the Managing Member in accordance with the following:
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> (i) as soon as is reasonably practicable after the such Former Member's Leaving Date, the Managing Member shall appoint a recognized firm of chartered accountants to determine the value (the 'LLP Value') of the LLP calculated as at such Former Member's Leaving Date;
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> (ii) the purchase price for the Former Member's Interest shall be equal to such Former Member's proportionate share of the LLP Value based pro rata to the proportion that such Former Member's Voting Percentages bears to the aggregate Voting Percentages of all the Members, provided, however, that the Managing Member and such Former Member may agree in writing to a different purchase price;
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> (iii) the purchase price shall be paid to the Former Member (or his personal representatives) in three equal instalments, of which the first instalment shall be paid on or before 2 months from the Leaving Date, the second instalment shall be paid on or before 12 months from the Leaving Date and the third instalment shall be paid on or before 24 months from the Leaving Date, provided, however, that the Managing Member and such Former Member may agree in writing to a different payment schedule."

7. When this case began last year, no valuation had been made. Mr Klaturov's leaving date is now disputed, but was either in mid-February or mid-March 2022. So, on the face of the LLP Agreement, accountants should have been rapidly appointed to do the valuation, and a first instalment paid in around May 2022. A claim that accountants had not been appointed in due time was made, and Mr Assimakopoulos was added as a defendant because (it was said) he had failed to make the appointment. Meanwhile the parties continued to engage with the valuation process. In circumstances that I describe below, they appeared to have reached some measure of agreement during the summer of 2022 by which chartered accountants, PKF Littlejohn LLP ("PKF") were instructed to carry out the valuation. But there was an escalation of hostilities which led (rightly or wrongly) to Mr Klaturov being excluded from the process in early 2023.

8. PKF produced a report on 28 July 2023. It was provided to the claimants on 1 August 2023. PKF determined that the equity value at the valuation date was nil. If that report stands, the buyout claim has no value.

9. The impending trial and expected emergence of PKF's report, and then its actual delivery, led to applications and a hearing before HHJ Pelling KC in early August 2023. The upshot was that the defendants disclosed documents bearing on the process by

which PKF had been instructed, and the information they had been given. The claimants then rapidly formulated the proposed amendments that are now before me. They attack the PKF report (but not PKF), alleging that it was the product of a flawed and impermissible process. That attack is made in strong terms. In their skeleton argument the claimants said that they were advancing a case that the defendants had "manipulated the valuation". There is, however, no proposed plea of fraud or bad faith.

10. The claimants' complaints can broadly be placed under three headings.

11. First, they say that PKF were wrongly told to use a leaving date of 16 March 2022 rather than one of 16 February 2022. That matters because Russia invaded Ukraine on 24 February 2022, which may mean that RCA's value if assessed "as at" mid-March was lower than its value if assessed "as at" mid-February. That aspect of the amended claim is not (as a matter of pleading) controversial. The defendants deny that the date used was wrong, but they accept that it is fair game.

12. Secondly, the claimants complain that the process followed in instructing PKF was not as had been agreed. The process agreed, they say, was one in which Mr Klaturov could participate so that, if he disagreed about relevant assumptions, PKF would be able to understand and consider his objections. They also say that certain assumptions were agreed. But they complain that the defendants did not follow that protocol. They gave PKF instructions and assumptions without Mr Klaturov having an opportunity to comment on them. They gave PKF information and instructions that differed from those that had been agreed. That aspect of the claim is not one that the defendants accept can be advanced. It depends on the proposition (alleged in paragraph 18B of the proposed Re-Amended Particulars of Claim) that such an agreement was contained in or evidenced by an email of 15 July 2022 and a letter from the defendants' solicitors dated 19 August 2022. But, say the defendants, if one reads those documents one can see that they do not contain or evidence any such agreement. So, they say, permission should not be given.

13. The third aspect of the claimants' complaint is that, quite apart from any agreement, the defendants gave PKF instructions, assumptions, and information that were wrong. The claimants say that this has undermined the fairness and reliability of the resulting valuation. They allege a variety of implied terms which they say were breached in this process, and assert that it renders the purported valuation a nullity. Again, the defendants take issue with this way of attacking the report. They say that none of the terms that the claimants have canvassed would ever be implied, so that the case is hopeless, and permission to amend should not be given.

## The court's discretion

14. CPR 17.1 provides that, at this stage of proceedings, a party may amend its case "only—(a) with the written permission of all the other parties or (b) with the permission of the court". The court's permission is granted or refused in accordance with the overriding objective. One aspect of this, as Mr Weale (who appeared for the claimants) reminded me, is that the court generally seeks, wherever it can fairly be done, to enable the parties' real dispute to be decided. But another aspect is that the court does not grant permission to amend if the amended case is wholly without merit.

15. In *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [17] Popplewell LJ identified the test as being whether the amendment has "a real prospect of success". As with the test for (reverse) summary judgment, it is not enough that the claim is merely "arguable". It must carry "some degree of conviction", both as a matter of law and by there being "evidential material which establishes a sufficiently arguable case that the [factual] allegations are correct": *Kawasaki Kisen Kaisha Ltd* at [18].

16. This is not the only relevant principle. Permission should not be granted for amendments which are not coherent and properly particularised (*Kawasaki Kisen Kaisha Ltd* at [18]). Distinct issues may arise with respect to late amendments (for instance if they will lead to an imminent trial being postponed) or if amendment causes prejudice that cannot be compensated in costs. One should not lose sight of the fact that these are not a tangle of rules, but a set of principles that reflect the fact that amendment is a discretionary matter governed by the overriding objective.

17. As to lateness, Mr Lewis KC (who appeared for the defendants) pointed out that at least some parts of the amended case could have been pleaded earlier. But the essential grounds could not have been known—indeed did not exist—until PKF had produced their report. The existing trial will not be adjourned. There was a time within living memory when a defendant would have insisted that the claims now made required new originating process, since the cause of action post-dates the original claim form. That technicality has been swept away. But it would be unjust, and inconsistent with the overriding objective, to hold that an amendment produced in September in response to a cause of action which only crystallised on 28 July is "late", or that the special considerations that may apply where amendments may disrupt an existing trial are in play, when no trial will be disrupted.

18. As to particularity, when any document is placed under the microscope it is usually found open to improvement. That also happened with the draft amendments. But the criticisms are not of the sort that would provide a reason to refuse permission, and I did not understand it to be submitted that they are. The overriding objective does not require perfect polish.

19. It follows that these are amendments which should be permitted so long as they meet the threshold merits test of having a real prospect of success.

20. Mr Lewis submitted that the defendants should be permitted to advance (now) any objections that they had already formulated to the amended pleading, and then (later) any further objections that they subsequently devised. I was not attracted to this approach. If the court is to decide whether a set of amendments is to be allowed, it should produce either permission or refusal, not a half-decided application ripe only for further argument, which would be unfair to the claimants and a poor use of court resources. On the other hand, I could appreciate the force of the point that the defendants have not had long to consider the proposed amendments, not long enough to investigate the factual allegations in detail, or to consider whether further details might be sought.

21. In the end, all parties wanted me to decide the amendment issues. Adjournment would leave the parties with no decision on matters they were ready to argue. They would have remained in limbo until at least mid-December, after the trial is over. That would be undesirable and unnecessary. I therefore decide whether to grant permission to

amend in the light of the objections that the defendants have made. Where there is no extant objection I shall grant permission. That will not prevent the defendants from making justified further applications (for example for further information, or summary judgment), provided they are not an attempt to re-open matters that I have considered and decided, or which ought properly to have been raised now.

**The valuation process: alleged agreement**

22. The defendants' first objection is to paragraph 18B of the draft Re-Amended Particulars of Claim. That paragraph alleges an agreement in the following terms:

> "Pursuant to clause 21.4 (which expressly provided for the Parties to reach further agreement on the valuation process), the Claimants and the First Defendant expressly agreed on a protocol for the valuation of the Claimants' share, which was contained in, and/or evidenced by, an email from Mr Bukovsky (on behalf of the First Defendant) to PKF dated 15 July 2022 and [Fox Williams]'s letter of 19 August 2022 (the 'Agreed Protocol'). On a proper construction of the terms set out in [Fox Williams]'s letter, the First Defendant agreed that (among others) the following steps should be undertaken and that the First Defendant would use 'reasonable endeavours' to ensure that the deadlines set out below were complied with …"

It goes on to set out the terms of the protocol that the claimants say was agreed.

23. The defendants do not dispute that clause 21.4, at least arguably, enables the parties to make agreements about the valuation process without going so far as to vary the LLP Agreement, and without the formality that such a variation might require. So much appears from its opening words ("Save as otherwise expressly agreed"). But the defendants submit that if the two documents on which the claimants rely are examined, they cannot be said to evidence any such agreement.

24. The first document is an email written by Mr Bukovsky of RCA to PKF on 15 July 2022. The email set out a timetable which Mr Bukovsky said reflected "agreement between the lawyers in the various letters exchanged in June". It is not immediately obvious why, if the timetable did reflect an agreement between the lawyers in various letters, the claim does not rely on *those* as containing or evidencing the agreement. (Mr Weale told me that there was other material which would be relevant at trial, but accepted that the case I consider must be the one that the claimants propose to plead.)

25. The second document is more important. It is an emailed letter from Fox Williams (representing RCA) to Willkie Farr & Gallagher (representing the claimants) on 19 August 2022. That email begins by referring to a letter of 15 August from Willkie Farr & Gallagher which, after complaining about lack of progress, had asked Fox Williams to "confirm that your client agrees to the timetable set out below or provide us with your comments by Friday 19 August 2022", and set out a timetable. Fox Williams' letter of 19 August was, then, written in response to a request to confirm agreement.

26. After rebuffing complaints about delay or lack of cooperation, and saying that RCA was "keen to progress" the valuation, paragraph 5 of Fox Williams' letter stated:

> "To that end, we set out below the timetable that our client agrees to. You will note, we have divided the timetable into two separate sections and, in some instances, we have not included a deadline date as such dates are dependent on (a) the prior completion of other steps and (b) the position taken by the parties (for example see Steps A.4, B.2, B.6 and B.9). In such circumstances, it does not make sense to set deadlines. We have also not made provision for steps involving PKF, as it would be inappropriate for the parties to make deadlines relating to a third party."

It then set out a table. There were six headings setting out what would be done in relation to the "engagement process", in some cases with dates. There were eleven headings setting out what would be done in the "valuation process", in some cases with dates. These sometimes go into some detail about the parties' respective roles, including whether RCA is required to accept Mr Klaturov's comments, and references to RCA "reserv[ing] its rights" to disregard them.

27. The letter then continued through paragraphs 6-8 as follows:

> "6. For the avoidance of doubt, our client is not obliged to perform any of the steps outlined in the timetable above. Our client will use reasonable endeavours to meet the timings set out above but reserves the right to adjust them if it becomes necessary to do so.
>
> 7. Following receipt of this letter, we ask that KMK responds to Mr Bukovsky to confirm agreement to the timetable or suggest any amendments so that interactions relating to the Buyout are managed directly between the parties to avoid unnecessary costs, as previously agreed.
>
> 8. All our client's rights are reserved."

28. Mr Lewis submits that the terms of paragraph 6 are fatal to the claimant's proposed case, because it stated that "our client is not obliged to perform any of the steps outlined in the timetable above". So, he argues, it must have been clear that this "agreement" was not intended to be binding or obligatory: it was (as Mr Assimakopoulos has described it in evidence) a "goodwill gesture", a provisional plan which RCA was free to revise unilaterally at any time.

29. Mr Weale submits that this misreads the letter, considered as a whole. The point of the first sentence of paragraph 6, he suggests, was to make it clear that RCA had not unconditionally committed to guarantee that the timetable was met. It was not gainsaying a binding agreement to follow the process, but preserving *locus poenitentiae* if the steps could not be performed in accordance with the timetable. That, he submits, makes sense in the light of what went before paragraph 6 (especially the point made in paragraph 5, namely that RCA could not commit to the performance of third parties). More importantly, the rejection of an absolute obligation in the first sentence of paragraph 6 is accompanied by an acceptance, in the second sentence, of a more limited obligation ("our client will use reasonable endeavours to meet the timings set out above"). That would be consistent with a focus on whether deadlines would be precisely met, not on whether the steps set out would be performed at all.

30. I do not have to decide who is right. I accept that the claimants have, on this point, a real prospect of success. Fox Williams' letter was a considered response to a request, between lawyers, to confirm agreement to a detailed procedure. And it purported to confirm agreement. The terms of paragraph 6, with its reference to "reserving a right" to adjust timings and to "reasonable endeavours", are redolent of obligation (and similar expressions appear elsewhere in the document too). Why "reserve a right", if nothing is obligatory? It is possible without doing violence to its words to read the sentence of paragraph 6 on which the defendants rely as focused on the timing of the steps (the possibility that they would not be performed as set out in the timetable) not on whether they would be performed at all.

31. That is not inconsistent with the agreement being a "goodwill gesture" (as the claimants say it was, which would itself be a question for trial). Let it be assumed that RCA was not obliged to agree to any process or timetable, and that it did agree only in a spirit of generosity. That would explain why RCA agreed, and why the agreement made a difference. It would not mean that it did not agree. Nor would it show that it did not intend (or, which is what matters, give the objective appearance of intending) that the agreed process was obligatory.

32. The proposed paragraph 18B therefore has sufficient provisional merit to be permitted, and I shall grant permission for it.

**The valuation process: implied terms**

33. The claimants' amendments allege five implied terms which are said to govern the defendants' participation in the expert valuation exercise. The essential factual complaint is that by providing instructions, assumptions, or information to PKF about RCA's assets, liabilities, business, forecasts, and plans, RCA effectively (but it is not alleged dishonestly or even, at least directly, deliberately) tilted the valuation process against Mr Klaturov.

34. That complaint, however, needs a legal framework. The claimants must establish not merely that the defendants influenced the valuation, but that doing so was wrongful—an infringement of the claimants' rights. In one respect, the claimants can rely on an express term. The LLP Agreement requires the valuation to be performed "as at [the] Former Member's leaving date". So instructions to carry out a valuation as at some other date would nullify it. In other respects, the grievances may be covered by the allegation I have already considered: if instructions, assumptions, or information were provided contrary to what had been agreed, then that agreement provides a basis for challenge. But in other respects there is no express term, and the agreement (which is disputed) may not comprehensively cover all the matters of complaint. The claimants therefore deploy implied terms from which to derive obligations which they allege were breached.

35. The alleged implied terms are set out in the proposed Re-Amended Particulars as follows:

    i) Paragraph 17A, which, so far as it consists of new amendments, alleges that Mr Assimakopoulos owed a duty to

> "take reasonable steps to ensure [that the firm appointed] would produce a proper, independent and fair valuation".

I asked at the hearing whether it was intended that this obligation should rest only on Mr Assimakopoulos, or whether the claimants wish to contend that both defendants owed such a duty. Mr Weale, on reflection, agreed that the claimants would wish to allege that both defendants owed such a duty.

ii) Paragraph 17C. This alleges:

> "It was implied (by reason of obviousness and/or to give business efficacy to the LLP Agreement) that any valuation inputs and assumptions provided by the First Defendant to the valuer would (insofar as not agreed) be fair and reasonable."

iii) An alternative (or "fallback") version of paragraph 17C, which Mr Weale formulated during the hearing. This alleges:

> "It was implied (by reason of obviousness and/or to give business efficacy to the LLP Agreement) that the Defendants would take reasonable steps to ensure that any valuation inputs and assumptions provided by the First Defendant to the valuer would (insofar as not agreed) be fair and reasonable."

iv) Paragraph 17D. This alleges:

> "It was implied (by reason of obviousness and/or to give business efficacy to the LLP Agreement) that the First Defendant would not provide information or assumptions to the valuer that were incorrect, incomplete and/or misleading."

v) A "fallback" version of that paragraph, again formulated during the hearing, which reads as follows:

> "It was implied (by reason of obviousness and/or to give business efficacy to the LLP Agreement) that the Defendants would take reasonable steps to ensure that the First Defendant would not provide information or assumptions to the valuer that were incorrect, incomplete and/or misleading."

36. The original draft of the amendments also pleaded that there was an implied term that the valuation should be free of "manifest error". During the hearing, the claimants withdrew that amendment.

37. Because the fallback terms were only formulated during the hearing, I allowed the defendants to consider them and make such additional submissions as they wished to in writing. Mr Lewis originally informed me, within the time I had specified, that the defendants did not object to the fallback versions of paragraphs 17C and 17D, but maintained their objection to those terms in so far as they alleged any duty lying upon Mr Assimakopoulos personally. On the next working day, however, he notified me that the defendants had changed their mind: they now wished to maintain their objection to

the fallback versions of paragraphs 17C and 17D, for reasons that he summarised. Mr Weale replied with brief submissions by email. I have taken those submissions into account.

38. The defendants' change of heart in this respect did not cause any prejudice to the claimants. I have therefore considered their objection on its merits.

**Implication of terms: the law**

39. We often speak as if the court implies terms, as if by doing so it were altering the contract for the better or injecting something from outside into it. It is not, however, for the court to improve or amend a contract, but to identify what the contract always was—what rights and obligations it imposed. The court determines the parties' rights both by construction and by implication, which are distinct but related exercises. Some rights in a contract are expressly stated. But express terms rarely exhaust the full range of the rights that a contract confers. Things may be left unsaid for various overlapping reasons: because they seem to go without saying; because they do not receive specific attention (the parties being content to set out key principles, and to assume such ancillary obligations as are required to make them effective); because the agreement falls into such a familiar category that the parties need not trouble to say much, or anything, so that scanning a packet of biscuits at a supermarket self-checkout triggers the creation of a complex of legal rights and obligations implicit in the idea of "buying" and "selling".

40. From this basic starting point, various more specific principles flow. They were not controversial. They are conveniently summarised by Coulson LJ in *Candey Ltd v Boseh* [2022] EWCA Civ 1103, [2022] 4 WLR 84 at [29] (in terms which closely follow a formulation of Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283):

> "The test for implied terms has been stated in slightly different ways in different cases over the years. Perhaps the most comprehensive summaries in recent times can be found in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742 and *Europa Plus SCA SIF & Anor v Anthracite Investments (Ireland) plc* [2016] EWHC 437 (Comm) at [33]. The test can therefore be formulated in this way:
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> (a) The term must be reasonable and equitable; and
>
> (b) The term must be necessary to give business efficacy to the contract (in other words, does the contract lack commercial or practical coherence without the term?); or
>
> (c) The term must be so obvious that it "went without saying"; in other words, if pointed out to the parties that it was missing, they would say "of course, so and so will happen; we did not trouble to say that; it is too clear": see *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605; and

> (d) The term must be capable of clear expression and be formulated with sufficient precision: see *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187, 1204; and
>
> (e) The term must not be inconsistent with, much less contradict, an express term: see *Marks and Spencer Plc v BNP Paribas* at para 28."

41. It was not disputed before me that at least two other principles apply:

    i) Whether a term is implied is decided by considering the position at the time the contract is concluded: *Marks & Spencer plc v BNP Paribas Securities Services Trust (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742 at [19] and [23]. The court is looking for a term which makes (and always made) sense of the contract, not to paint a target around the bullet-hole left by a particular dispute.

    ii) The test of "necessity"—the principle that a term will be implied only where it is *needed* to make the contract practically and commercially coherent—applies not only to whether any term is implied, but to the selection of the appropriate term among candidates. Sir Kim Lewison, in *Contractual Interpretation* (7th ed, Sweet & Maxwell 2020) at para 6.85, quotes a dictum of Lightman J in *Robin Ray v Classic FM* [1998] FSR 622: "a minimalist approach is called for. An implication may only be made if this is necessary, and then only of what is necessary and no more".

42. Those principles, however, should not be misunderstood.

    i) In applying the stringent test of necessity, and the "minimalist approach", the court is always concerned with whether a term is necessary to make the contract (as written) practically and commercially workable. It is not looking for a term which would still leave the contract practically and commercially defective. As much is implied as is required to make the contract work. No more, but also no less.

    ii) Although the court is not looking for terms which make a contract better, fairer, or more generous to one party than it is, it does not follow that in deciding whether a contract is "commercially" or "practically" workable without a particular term, the reasonable expectations of honest business people are irrelevant. They are integral to the notion of "business efficacy" (or the various equivalent expressions), because we do not readily suppose that rational people set about to agree seriously unfair or one-sided bargains. That a contract works very nicely for one party without any implication does not mean that it works in a way that the parties (jointly) can be taken to have intended. Sometimes the reverse. Necessity always involves a value judgment: see *Paribas* at [21]. Commercial and practical coherence means such coherence for both parties having regard to their joint purposes, not convenience for one.

    iii) A term may be formulated with adequate precision, and yet refer to a standard whose application calls for case-specific judgment. Many common implied terms are open textured in that way ("satisfactory quality", "reasonable skill and care", "reasonable time"), but nevertheless have sufficient precision.

iv) A long menu of possible alternative terms may militate against implying any at all, since any choice would be arbitrary. Sometimes, however, it may be clear that without some implication, the contract is unworkable, but a range of possible alternative solutions may present itself. That is when a minimalist approach—the implication only of the lowest common denominator term required to make the contract workable—comes most into play.

**These alleged terms**

43. The question here is what terms, if any, are arguably implied by the valuation process set out in clause 21.4 of the LLP Agreement. In that respect, one should start first with the express terms and their commercial context. In relation to those, nine things stand out.

44. First, the parties will have known that in any valuation process their interests would conflict. It is likely to be in the interest of the former member to see the highest possible valuation, and in the interest of RCA and its managing partner to see the lowest one.

45. Second, the parties have chosen to entrust valuation to an external person with relevant expertise (a firm of chartered accountants). The parties would expect the chosen firm to bring professional objectivity to its engagement; but the process envisaged is not one of adjudication or arbitration. There is no requirement (at least expressly) that the accountants may not have an existing relationship with RCA. Nor that they must.

46. Third, although the clause does not expressly provide that the accountant's valuation shall be "final and binding", that is clearly its effect, expressed by saying that the firm appointed is to "determine the value" (not merely to express an opinion). The valuation is not expressed to be advisory, or informative, or provisional, but determinative.

47. Fourth, the parties have not specified in detail how the valuation is to be conducted—either in terms of the approach to be taken (for instance as between a discounted cash flow or by considering transactions in comparable businesses), or the assumptions to be made. They have taken a bare-bones approach: specifying the date as at which the value is to be determined, and what is to be valued (the LLP, rather than the value of the leaver's share in the LLP) but leaving much to future agreement between them or the assumed good sense of the accountants. They have not provided any contractual procedure by which one party is entitled to comment on information or arguments put forward by the other.

48. Fifth, the parties will have understood (given their business and the business of the LLP) that valuation is likely to involve assumptions, projections, and judgments. Although they use the word "calculated" they will have known that valuation is rarely a matter of "calculation" in any purely arithmetic sense.

49. Sixth, the parties will also have expected that the accountants would need information that they, in particular RCA, would have to provide. The LLP is not a physical object that could be inspected and appraised. It is a business, whose value will be affected by its financial performance, business plans, assets and liabilities. RCA would have to be the prime source of information in relation to those matters, and the parties would always have known that.

50. Seventh, however, the parties have not said anything explicitly about any obligations in that respect. They have not otherwise specified anything about the process to be followed, apart from by whom and how it is to be initiated.

51. Eighth, the parties have chosen to select as a valuer a qualified professional firm (they have also added the adjective "recognised") from a profession that has daily experience of testing financial information provided by management with a critical eye.

52. Ninth, the parties must have envisaged a rapid process. If the first instalment of the buyout consideration was to be paid within two months of the leaving date, they must have expected that the valuation would be complete by then.

53. Mr Weale emphasised that the parties must have wanted an accurate valuation, Mr Lewis that they must have wanted a final one. No doubt they ideally wanted both. When people entrust a particular decision to a professional specialist, they hope for finality and accuracy. But sometimes they cannot have both. Even experts make mistakes, and in valuation there will often be things that reasonable people differ about. In a process which depends on inputs from the parties and third parties, errors can occur there too, which may or may not be identified or identifiable by the expert. Easy challenge decreases the risk of error, but makes the process longer and more expensive. The parties may choose where to strike the balance. Some agreements prioritise accuracy (risking finality) and others prioritise finality (risking accuracy).

54. It is transparently clear that the emphasis in clause 21.4 is on finality. The process is to be quick. It is not encrusted by procedural stipulations. Almost everything is left to accountants to decide or the parties to agree in the future. It would have been possible to stipulate for the accountants' view to be merely provisional, or for the process to be extensively hedged around with procedural or substantive caveats. It is not—despite the obvious and inherent conflict between the participants' interests.

55. That emphasis accords with the presumption that the law brings to bear when an expert is appointed to determine a particular issue. So long as the expert answers the "right question", it does not matter if the answer is wrong: see *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277 (CA). This is not uncommercial or irrational. Skilled professionals make mistakes, but commercial actors regularly operate on the working assumption that they probably will not, and take the risk as acceptable and preferable to protracted argument.

56. It is always a disarming submission to say that the parties "cannot have intended" a valuation to be inaccurate, and Mr Weale duly made that submission disarmingly in various ways. But that addresses the wrong question. If parties place a high value on speedy finality, they accept some risk of error. If that risk happens, that is not something that anyone positively wanted—quite the reverse. But it is the anticipated possible consequence of a decision to accept a risk, and therefore a source of regret, but not (as such) of legitimate legal grievance.

57. Nevertheless, although the parties should be taken to trust the expert's judgment, it does not follow that they must be assumed to have trusted each other. Here, they must have expected that they (mostly RCA) would have volunteered or been asked to provide important material to the accountants. It seems inconceivable that RCA would have been acting within its rights if it refused to give information, or gave deliberately false

information. Some term to require honest co-operation needs to be assumed. That much, I think, is common ground, because the defendants accept that Mr Assimakopoulos was obliged at least to "co-operate with any request for information that the accountant might make", and cooperation must at least involve doing his honest best to provide it. RCA would be in the same position. The obligations must go at least a bit further, since there must be some constraint not only for information that is requested, but also for information that is volunteered.

58. At this point, as Mr Lewis submitted, a range of possibilities present themselves to any lawyer:

i) An obligation not knowingly or recklessly to provide false information or forecasts in which RCA does not honestly believe. It is not in dispute that at least such an obligation would lie upon the defendants. Fraud would "unravel all".

ii) An obligation to act "in good faith", which might be more extensive than an obligation not to act fraudulently (for instance, it might require a party to volunteer information, or to correct a misapprehension for which it was not responsible). No such term is alleged.

iii) An obligation to act "rationally", that is not capriciously or in an utterly unreasonable way. That also is not alleged.

iv) An obligation to act reasonably—to take reasonable care that information that is provided is accurate and that assumptions and forecasts are prepared with reasonable care. This is essentially the thrust of the fallback terms.

v) An obligation to ensure that information is accurate, and that forecasts or assumptions are fair and reasonable. For forecasts and assumptions this might differ only slightly from the obligation to take reasonable care (though one can imagine an unreasonable assumption which is put forward without fault, for instance if it emanated from a third party). For hard data it could go a lot further. This is essentially the thrust of the originally pleaded implied terms.

59. The claimants do not allege fraud or bad faith, although they sometimes sidle in their direction. It is still important to remember that there is at least an obligation not to provide false information knowingly or recklessly. That is not controversial. That matters because the background question—consistently with the minimalist principle—is whether any more extensive obligations could be necessary to make the contract commercially workable. And the immediate question for me is, of course, not whether they *are*, but whether there is at least a "real prospect" that the claimants will establish that they are. Equally, as Mr Lewis submitted, the proposed terms must be assessed on the basis that they apply to errors made in complete good faith. However suspicious Mr Klaturov may be, a complaint of deliberate malfeasance should not be advanced in camouflage.

60. **Paragraph 17A.** The words "proper, fair and independent" are not found in clause 21.4, which simply requires a recognised firm of chartered accountants to be appointed to determine value. Mr Weale submitted that the parties can hardly have wanted an improper, unfair, or non-independent valuation. That, like the proposition that they did

not desire inaccuracy, is the wrong way of testing things. The claimants are seeking to put a gloss on the words the LLP Agreement uses, and they can only do that if it is necessary. It is not. The parties required a valuation by a firm of chartered accountants. They will have expected such a firm to act with objective professionalism—because that is what anyone expects of a firm of chartered accountants. But precisely because they will have expected that, there is no need to decorate the agreement with adjectives or to impose obligations on the parties to achieve them. The process does not need the parties to make it proper, fair and independent: so long as the valuation is the accountants', it is as proper, fair, and independent as the parties wished it to be.

61. The pleaded glosses are, moreover, of uncertain meaning. What would an "improper" valuation be? As the claimants now accept, a valuation might be proper, but wrong. What, then, short of fraud or some other breach of duty makes the valuation not "proper"? Is fairness directed at the procedure ("fair hearing") or the outcome ("fair value")? What does "independent" add? Does it mean that the accountants may not rely at all on information provided by RCA? That every estimate must be their own? That they must have no relationship with RCA? And what reasonable steps might Mr Assimakopoulos be expected to take to "ensure" independence? It would run against the grain of the contract to imply terms of such contestable scope into a process which has swift finality as a prime objective.

62. In my view the parties said all that they meant, and meant no more than they said. They wanted a recognised chartered accountancy firm's determination of value. That means that the determination must be the accountants' determination (not someone else's). They left open the possibility of agreeing a more specific procedure. But absent such agreement they relied on a professional firm to decide what was needed to produce a valuation, which is everyday grist to the accountant's mill. No gloss is required. In deciding what other specific terms might be implied, and in construing the agreement, "fairness" and "independence" may seem relevant purposes that the parties are likely to have shared. But that is insufficient to elevate them to qualities that, as such, the parties were contractually obliged to pursue or ensure.

63. For this reason, the amendments to paragraph 17A should not be permitted. There might come a point at which the instructions given to the accountants so fettered their ability to exercise professional judgment that it could be said that the result was not the firm's determination of value at all. But Mr Weale made it clear that the amendments do not go so far. They seek to add nebulous additional requirements. There is not any real prospect that the claimants will persuade a judge at trial to do so.

64. This makes it unnecessary to resolve Mr Lewis's additional submission that even if such an obligation existed, it lay only on RCA, not on Mr Assimakopoulos. That objection, however, is one that the defendants maintain in relation to the fallback versions of paragraphs 17C and 17D, and I consider it when I come to deal with those terms.

65. **Paragraphs 17C and 17D: original formulations.** In their original formulations, these terms would oblige RCA to ensure that all valuation and inputs it provides are "fair and reasonable", and not to provide any information that is "inaccurate, incomplete or misleading". As the terms are alleged, those qualities are to be assessed objectively. It matters not whether RCA did, or should, or could have known about any defect. The terms are unqualified by reference to the materiality of the information or the extent of

the error (though the claimants accept that only a "material" error would justify re-opening the determination).

66. These terms fall well short of the threshold of plausibility as candidates for implication. They would place the whole risk of honest error (even honest and reasonable error) upon RCA. Suppose that RCA obtains a third party's opinion about some relevant asset or liability (for instance, to take an example germane to these facts, their solicitors' or counsel's assessment of the prospects of the claimants' remuneration claims succeeding). If the third party gives an unreasonable assessment, RCA would be in breach of its obligations; and if the assessment were materially wrong, the entire valuation exercise would collapse, even if RCA itself acted with exemplary honesty and diligence. Examples could be multiplied. Far from being necessary to make the LLP Agreement work, these terms would be positively unfair to RCA, and subvert finality.

67. I therefore refuse permission to make the amendments in their originally drafted form.

68. **Paragraphs 17C and 17D: fallback formulation.** As I have already mentioned, the defendants have flip-flopped in their opposition to these terms. They originally opposed them. Then withdrew the objection (maintaining it only in relation to the imposition of a duty on Mr Assimakopoulos). Then reinstated it.

69. The claimants' core point is that this is a process which is (a) inherently dependent on information and assumptions which RCA will provide but (b) unequipped, unless there is some further agreement or some other implied term (which was not canvassed), with any right for Mr Klaturov to know or comment on that information. Although the accountants, experienced in assessing information provided by management, may pick up some errors, they cannot be expected to identify them all. That gives RCA a role in the process which is highly influential, but not clearly amenable to scrutiny or supervision by Mr Klaturov, and not comprehensively under the control of the accountants themselves. Plainly, as Mr Lewis accepts, RCA must act honestly. But even that, the claimants say, may not be enough—and it would be obviously unacceptable if RCA benefited, at Mr Klaturov's expense, from its own careless errors.

70. The counter-argument is that the parties may have been willing to take that risk as the price of finality, regarding the process as sufficiently fair if RCA is honest and the accountants bring their own experienced critical judgment to bear. There is a risk of error, but it cannot be said that the risk is not one that the parties might have agreed to take. If so, no term is to be implied. As Mr Lewis summarised the point in written submissions:

> "The reasonable steps obligation imposes a positive obligation involving considerable uncertainty which is inconsistent with the certainty which the expert determination provision is designed to provide. It would be applicable irrespective of the circumstances, enabling the departing partner to retain a wide ranging ability to challenge the determination."

Furthermore, the defendants submitted, even if some term were to be implied, it should stop short of an obligation to take reasonable care. A term requiring good faith, or rationality would suffice.

71. I find it easiest to deal with that second point first. If the core obligation of honesty is not enough—if more is required to make the contract operate effectively—then I do not think that the alternative implied terms of "good faith" or "rationality" are so conspicuously preferable (or markedly less intrusive) than an obligation to use reasonable care, so that the claimants would have no real prospect of establishing such a duty.

72. "Rationality" is a standard usually applied to decisions, not acts, reflecting the common law's conception of the nature of discretion. But RCA is not called on to make any decision. Although I can understand a "rational" forecast ("how much do we expect to earn next year"), I cannot easily make sense of an obligation to be "rational" in providing concrete information ("how much did we make this month?"). The implication of terms of good faith is itself controversial (see *Candeh v Boseh*). An LLP Agreement might be thought the sort of long-term contract that might attract a term that caters for a wide variety of circumstances through a flexible obligation which reflects mutual trust and can adapt to circumstance. But it is insufficiently clear that the *possible* implication of such a term makes it unarguable that a term requiring the use of reasonable care would not be more certain and reckonable as a standard to apply to a specific activity such as providing information for a particular valuation. As Mr Weale pointed out in his written submissions, terms imposing standards of reasonableness have been regarded as consistent with—even illustrative of—the "minimalist principle": see *Liverpool CC v Irwin* [1977] AC 239 (HL), and the commentary in Lewison at para 6.85.

73. Just as importantly, it is not clear that these terms would, in practice, be appreciably more likely to produce finality than the proposed fallback terms. Reasonable care conventionally permits a range of responses (conduct may be reasonable even though *some* reasonable people would behave otherwise—reasonable practice need not be best practice). So the distinction between the "irrational" (so unreasonable that no reasonable person would do it) and the "unreasonable" (not within the range that reasonable people would accept) is not clearcut. And as to "good faith", unless it is restricted to fraud or dishonesty, one might fairly ask whether a supplier of information is acting in good faith if they do not trouble to take care over the information they provide. Perhaps there might be a difference, judged by some species of subjective unreasonableness: the distinction between someone who cannot be bothered and the person who is trying their incompetent best. But, again, we are looking here not at categorical distinctions but shades of difference. The supposedly less intrusive terms would still involve potentially wide-ranging inquiries, going beyond honesty, and they would bring with them considerable conceptual uncertainty. I do not therefore accept the argument from minimalism.

74. So I return to the main argument, which effectively comes down to saying: honesty is enough. Anything more undermines finality, and finality here is critical.

75. It is an argument with considerable force. The court may well ultimately conclude that the leaving member is sufficiently protected by (a) RCA's obligation to act honestly, (b) the fact that much of the information and assumptions will derive from data that RCA uses in the ordinary course of its business, and (c) the accountants' professional experience of analysing management forecasts and information with critical objectivity. It might also be said that if the gap here lay in the absence of any express right to comment upon RCA's information, that gap would better be filled by an implied right

to comment than by an implied contractual duty of care. Moreover, distinguishing between errors made by the accountants (which are, it is admitted, immaterial) and those made by RCA may not be easy. Since the threshold for implication is stringent, the claimants will not find it easy to surmount.

76. But that is not the test for permitting or refusing an amendment. The amending party need not satisfy the court that it is more likely than not that the amendment will succeed—only that it carries sufficient conviction to give it a real prospect of doing so. In my judgment the proposed fallback terms cross that hurdle. It is fairly (not barely) arguable that the process could not achieve its purpose unless the parties were contractually entitled to rely upon RCA to take reasonable care when it instructed the accountants, and that they would obviously not have tolerated the chance that RCA might benefit from a careless error of its own. It is fairly (not barely) arguable that a "reasonableness" standard provides a workable objective benchmark which is practically required if the process is to operate with tolerable precision and equity. When I say that it is "fairly" arguable, I do not mean that it is argument that seems more likely to succeed than to fail; but that is not the question.

77. In summary judgment cases, the court will sometimes "grasp the nettle" and decide short points of law or construction, as Lewison J put it in *Easyair Ltd v Opal Telecom* [2009] EWHC 339 (Ch), at [15]. I have considered whether I should do so here. It might be said that the court already has the material that would be relevant to reach a definitive answer. Why wait?

78. I do not, however, think that this is how the defendants put their objection. Nor that it would be the right course to take here. The fallback amendments were drafted rapidly, and the arguments about them were sketched rather than developed at length. They deserve, in the interests of both parties, considered thought and research. For example, it seems desirable to consider them against a comprehensive analysis of the authorities on expert decision-making and those on the terms generally regarded as implicit in an LLP Agreement. They have not yet received that attention. In case management terms, a decision in the defendants' favour might not affect the ambit of the trial much. A lot of the same factual material may need to be covered anyway when the court tries the other allegations for which permission is being granted. That trial will take place come what may. The validity of the valuation will be in suspense until then. Grasping this nettle would not produce a true final answer. Reminding myself that the ultimate purpose in deciding whether to permit or refuse amendments is the overriding objective, I conclude that the case will be more likely to be dealt with justly and at proportionate cost if the amendments are permitted so that the merits of the proposed terms can be full explored.

79. I shall therefore permit the fallback amendments, subject to the point that I now consider.

80. The question that remains is whether the claimants' argument, even if it succeeds with respect to RCA, applies to Mr Assimakopoulos with sufficient force. He (a) is party to the LLP Agreement (so there is no privity issue), (b) has a contractual role in the process (he chooses the accountants), (c) may well, as managing member, have a role directing RCA's general approach, (d) has a potential interest in the outcome. Moreover (e) the defendants accept that he had at least some obligation sometimes to cooperate. On the other hand, he (unlike RCA) is not likely to be the direct source of much of the financial

information, and the LLP agreement gives him no defined role in that. He may endorse, and perhaps direct, much that RCA says. But it is not likely that he will provide information other than on behalf of RCA, and not alleged that he did.

81. It might be arguable that if Mr Assimakopoulos *personally* provided information, and if RCA is under an obligation to exercise reasonable care about the information *it* provides, he might be obliged to exercise reasonable care that his personal contribution was accurate. The same might be said of Mr Klaturov. It seems unlikely that either would often be called upon to do so. But if they did then at least some of the arguments that weigh in the balance in favour of RCA having an obligation of care also apply, most notably the point that the process gives no rights to other participants to comment. Basic fairness might also point towards any duties of care being mutual.

82. But that is not the term pleaded. It is not suggested that Mr Assimakopoulos personally provided information. The term that is pleaded is that Mr Assimakopoulos had a personal duty to take care that *RCA* had provided accurate information and reasonable assumptions and forecasts. That is qualitatively different from the position in relation to his obligation to appoint accountants in the first place—an obligation which squarely rests on him. Different, too, from any obligation that might apply to his own provision of his own information. The terms seek to impose upon him an obligation to supervise RCA's activities diligently, not just to discharge his own express obligations.

83. An implied obligation to that effect is neither necessary nor obvious. It is not necessary, because any problem that the implied term is supposed to solve is adequately dealt with by imposing the obligation upon RCA, so that the claimants need no belt to reinforce their braces. It is not obvious, because there is no obvious reason why one member of a limited liability partnership (a corporate entity whose purposes include insulating members from personal responsibility for its obligations) should accept personal liability if it is careless. It would require consideration of Mr Assimakopoulos's personal knowledge and conduct. That would add further complexity and cost to an inquiry which will already entrench upon finality. And it might dictate (perhaps perversely) how the managing member involved himself in the process of instructing accountants. He could not, for instance, safely decide to take no part in it at all and leave it to other members, because he would be under a personal obligation to exercise reasonable care—although there are surely circumstances in which it might be in everyone's interests if he distanced himself from what RCA was doing.

84. For all those reasons, the claimants have no real prospect of showing that the fallback implied terms—whatever prospects of success they have in relation to RCA's duty—apply to Mr Assimakopoulos. To that extent, they should not be permitted.

85. I therefore refuse permission for paragraphs 17C and 17D in their original forms. I grant that permission in relation to their fallback forms, but only if the words "the First Defendant" are substituted for "the Defendants".

86. **Paragraphs 34F and 34G.** Paragraphs 34F and 34G contain what are, as things stand "rolled up" pleas of breach of a number of terms, including some that are the subject of uncontested amendments, and some that are the subject of amendments I have permitted, and some that are the subject of allegations that I have held cannot be made. Those paragraphs will need to be confined to matters for which permission is being

given. If the parties cannot agree how that is to be done, I will consider submissions in writing.

## Summary

87. For the reasons given above, I grant permission to make the amendment adding paragraph 18B, refuse it for paragraph 17A, refuse it for the original formulation of paragraphs 17C and 17D, and grant it for the fallback formulations if "the First Defendant" is substituted for "the Defendants", but otherwise refuse it. I grant permission to make all the other amendments, which were not objected to, and to amend paragraphs 34F and 34G only in so far as those paragraphs are consistent with the permission that has been given for rest of the Re-Amended Particulars.

## Consequential matters

88. This judgment was circulated in draft, and the parties largely agreed a draft order. They made succinct and focused submissions on consequential matters, for which I am grateful. In so far as any matters are not agreed (or were unclear), my decision on them is as follows:

    i) In paragraph 3, I prefer the form of order proposed by the claimants, which simply grants permission to amend in the form of a revised draft which it is agreed reflects my judgment, but it would be desirable to add the words "Save as aforesaid, the Claimants' application for permission to amend be refused." That makes the position clear. The success or failure on particular issues I will address in dealing with costs.

    ii) The dates for service of a defence and reply (paras 4 and 5) should be 22 November 2023 and 15 December 2023 respectively.

    iii) The "not before" date for the CMC should be 8 January 2024, so that there is time to consider the position after close of pleadings.

    iv) The date in paragraph 2.1 of the order for service of witness statements should (as agreed) be 27 October 2023.

89. The parties agree that in the unusual circumstances of this case the usual order that the claimants pay the defendants costs of and occasioned by the amendments is not appropriate, and that the costs should be reserved to the trial judge. That is because many (though probably not all) of the amendments are being made now because the relevant facts have only arisen since the case began. It is unnecessary for me to make any further comment.

90. As to the costs of the amendment application, both parties claim their costs. The defendants say that the costs of the amendment application ought in principle to be borne by the amending party (even if successful), and that in any event the claimants have failed on important points: they withdrew their application to amend paragraph 17E, they failed in relation to paragraph 17A, and they succeeded only in relation to the fallback versions of paragraphs 17C and 17D, those being version produced only during the hearing. The claimants say that they have succeeded in the face of what was ultimately root-and-branch opposition in obtaining permission to amend. They suggest

that where a party decides to oppose an application to amend, and loses, the ordinary rule should apply and there should be no "free shot".

91. I see no reason why costs should not follow the event so far as the contested application was concerned. Although the argument before me was about amendments, it was mostly about amendments to plead causes of action which have only arisen recently—and entirely (I think) to plead causes of action that have arisen since the claim form was issued. So even if it might sometimes be right to allow a party a "free shot" at opposing amendments (which I doubt), that is not the position here. The defendants have in effect got an early opportunity to seek to strike out a new claim, and have taken it.

92. But is there a winner? The claimants clearly won in relation to paragraph 18B. The defendants won a judicial victory in relation to the original formulation of paragraphs 17A, 17C, and 17D, and a retreat under fire in relation to paragraph 17E. But the claimants succeeded in salvaging what was largely a victory in relation to the reformulated terms, and although those can have caused hardly any costs to be incurred, it must be likely that if they had been put forward earlier they would still have been opposed (as they were), and the argument would probably have covered much the same ground.

93. On balance, I would have been inclined to adopt an "issue by issue" approach. But the sums at stake are not large (around £30,000 on each side) and it would be difficult to disentangle the issues precisely. Since an issue-based order would almost inexorably lead to the payment of approximately same amount by each party to the other, I think that the fair course is to reflect that by making no order for costs on the amendment application.