

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY &
CONSTRUCTION COURT (QBD)
[2019] EWHC 206 (TCC)



HT-2017-000273

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 16 January 2019

Before:

MRS. JUSTICE O'FARRELL

BETWEEN:

LEWIS THERMAL LTD

Claimant

- and -

CLEVELAND CABLE COMPANY LTD

Defendant

MR A. WILLIAMSON QC (instructed by Cubism Law) appeared on behalf of the Claimant.

MR A. HICKEY QC (instructed by DAC Beachcroft) appeared on behalf of the Defendant.

JUDGMENT

MRS JUSTICE O'FARRELL:

1 The matter before the court is the defendant's application for:

- (i) summary judgment against the claimant in respect of part of the claim, namely, the claims for deceit and/or misrepresentation set out in paras.27 and 32-33.1 of the Amended Particulars of Claim and paras.2 and 3 of the prayer in relation to loss and quantum;
- (ii) alternatively, for those parts of the claim to be struck out on the grounds that they do not plead a proper case and/or have no real prospect of succeeding and are an abuse of process.

2 The proceedings concern the claimant's claim for damages in the sum of approximately £8 million caused by the defendant's supply of defective cables. The background facts to this matter are set out in my earlier judgment given on 15 August 2018 and I do not intend to repeat them now, but I can summarise the pertinent issues as follows.

3 The claimant's case is that Guardian had a successful business installing cables, mostly for John Lewis and Partners ("JLP") but also for others. Up to 2011, that business was a successful and viable one. As a result of defective or non-compliant cables supplied by the defendant which were discovered in November 2011, Guardian was removed from JLPs tendering list and not awarded any further work. As a result of the loss of further work from JLP, Guardian went into liquidation in March 2012. The loss that Guardian suffered is in the sum of about £8 million based on the value of the business if it had continued to trade until 2015 and was then sold on the basis of a willing seller selling to a willing purchaser.

4 Guardian's claim has been assigned to the claimant. The material parts of the pleaded case are as follows. Paragraph 27 pleads that by reason of the alleged breach, deceit and misrepresentation, the claimant has suffered loss and damage. Then at para.32:

"Accordingly, and as a direct result of the wrongdoing of Cleveland, Guardian lost –
(a) the opportunity of undertaking the remedial works and
(b) the opportunity to undertake further new work for its principle client upon which its business was in practical terms dependent.

Consequently, Guardian became insolvent and entered liquidation on 30 March 2012. Guardian therefore claims for loss of the value of its goodwill."

5 The particulars of loss include –

"1. During the period from April 2008 to December 2011, prior to the discovery by John Lewis of Guardian's breaches of the John Lewis contracts, Guardian had an average annual turnover of approximately £12.6 million of which an average of approximately £11 million was derived from contracts with John Lewis.

2. From 4 November 2011 until March 2012 –

(a) whereas it had previously been invited to tender for all major contracts for JLP, Guardian was not invited to tender for and was not therefore awarded any such contracts.

...

(c) Guardian lost the right to carry out the remedial works in respect of the twenty-eight stores in which the cables supplied by the defendant had been installed.

(d) JLP put Guardian under pressure to reduce its prices for the installation works at the John Lewis Parsons Green store.

3. There were a number of JLP projects that were available for tender between January 2012 and April 2012 which were not offered to Guardian.

4. The loss of goodwill and Guardian's subsequent liquidation was reasonably foreseeable to Cleveland at the time of the original contracts.

5. The claimant therefore claims for the loss of its business valued on the basis that it would have continued to contract with JLP but through the prospective of the prospects for the industry at that time which would have had a value of approximately £8.185 million.”

6 At para.33.1 it stated that that the loss and damage suffered by the claimant is the value of Guardian's goodwill. There are other minor claims, but they are not relevant for today's purposes.

7 The application is for an order that paras.27, 32-33.1 and paras.2 and 3 of the prayer of the Amended Particulars of Claim should be struck out and/or that the defendant is entitled to summary judgment. It is said in the application form that is because the Particulars of Claim disclose no reasonable cause of action against the defendant, the claimant has no real prospect of succeeding on its relief and there is no other reason for the case to be disposed of at trial.

8 The test to be applied in cases of this kind is set out in the Rules of Court. CPR 3.4(2) empowers the court to strike out a statement of case if it appears to the court –

“(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim.

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings or,

(c) that there has been a failure to comply with a rule, practice direction or court order.”

9 CPR 24.2 provides that the court may give summary judgment against a claimant on the whole of a claim or a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue, and there is no other compelling reason why the case or issue should be disposed of at trial.

10 There is no dispute between the parties as to the relevant elements of the test. My attention has been helpfully drawn to some of the key authorities, including the case of *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) in which Lewison J, as he then was, stated at para.15 that the correct approach on such applications is as follows –

“(i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91.

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].

- iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*.
- iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10].
- v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550.
- vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661.
- vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it."

11 To that summary should be added a reference to the following. In the *Doncaster* case, the Court of Appeal stated at para.12:

"12. In handling all applications for summary judgment, the court's duty is to keep considerations of procedural justice in proper perspective. Appropriate procedures must be used for the disposal of cases. Otherwise there is a serious risk of injustice.

...

17. It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment can be given. A mini-trial on the facts conducted under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice.

18. In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

12 Further guidance was given in the case of *Three Rivers District Council v Governor and Company of Bank of England* [2003] 2 AC 1 in which Hope LJ of Craighead stated at para.95 in relation to the approach to be taken by the court on such applications:

“The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases, it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be taken and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Woolf L said in *Swain v Hillman*, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.”

- 13 I bear in mind that guidance when approaching the issues in this case.
- 14 The application has been framed in terms that include a ground that the pleaded case does not disclose a reasonable cause of action. However, it is accepted properly today that the defendants' case is not, in truth, put on that basis. The real case, as explained by Mr. Hickey QC on behalf of the defendant, is not that the pleading is defective but rather that there is no adequate evidence to support the assertions made in the pleading, namely there is no real prospect of success. Therefore that is the main issue on which I have focused today when dealing with the submissions made by the parties.
- 15 In summary, Mr. Hickey's submissions on behalf of the defendant are:
- i) There is no real prospect of the claimant establishing a causal link between the cable issue and the loss of JPL work. Mr Hickey submits that it is fanciful and imaginary that at trial the claimant could even begin to establish the causal link that the cable issue led to a decision to exclude Guardian from working on JLP projects from November 2011 until Guardian's liquidation in March 2012.
 - ii) Secondly, the defendant relies on its submission that the claimant cannot satisfy the but-for test of causation, that its insolvency in March 2012 was caused by the cable issue. Mr. Hickey submits that it is obvious from all the available evidence that Guardian was trading insolvently in 2010 and 2011 and could not have survived into 2012 in any event. Since the claimant cannot satisfy the but-for test of causation, it is impossible for it to prove the essential loss ingredient of its claim in tort and under the Misrepresentation Act.
 - iii) Thirdly, it is submitted by Mr. Hickey that the claimant cannot prove and has no evidence to support the claim that its loss for the defendant's alleged wrongful acts was £8 million. His submission is that the public financial records that have so far been disclosed and/or obtained by the defendant demonstrate that the quantum case as pleaded by the claimant was, and is, wholly unsustainable. The dire picture of financial performance completely undermines the claimant's claim that, but for the cable issue in November 2011, it would have continued to trade profitably and achieve a value of some £8 million.

- 16 Mr. Williamson QC on behalf of the claimant submits as follows:
- (i) He submits that the issues of which complaint is made by the defendant, namely questions of causation and quantum, are issues of fact and the proper place for those issues of fact to be determined is at a full trial. He submits that it would be wrong, as a matter of principle, for the court to embark on a summary determination of the merits of the case. There have not been full witness statements exchanged by both parties, although there has been some factual evidence which I will consider later. The expert reports are not complete. There has not been an opportunity for the court to consider all of the documents that might be put forward in a trial, hear the submissions of counsel on both sides and, crucially, have the evidence tested through cross-examination.
 - (ii) Mr. Williamson also submits that the issues are not straightforward, and the court should be wary of granting summary judgment in such circumstances rather than awaiting the full evidence that would be available at a trial. In particular in relation to the case put forward by the claimant, namely that there is a link between the cable issue and the cessation of work from John Lewis, Mr. Williamson submits that this was always going to be a case of inference. If his clients could establish their case on deceit and misrepresentation, then it would be not such a great leap for the court to make in coming to the conclusion that it did in fact lead to a cessation of JLP work and for the court to conclude that there must have been some loss. Of course, the court is not being asked to make any summary determination of the primary issues of liability.
- 17 Mr. Williamson raises as a preliminary point the defendant's late skeleton and late additional evidence. It is submitted that this is so late, particularly in relation to an application of this kind, that the court should either exclude the evidence or adjourn this matter.
- 18 That additional evidence relied on by the defendant has been extracted from voluminous documentation served by the claimant's solicitors on the defendant's solicitors on 10 January 2019, i.e. last week.
- 19 From the additional disclosure, the defendant has identified Guardian's management accounts. The management accounts are relied upon by the claimant's expert, Mr. Marcus, in his expert accountancy report, but were not disclosed to the defendant when the report was served. A Mr Backhouse, who was the financial director of Guardian, has produced a witness statement in which he refers to the management accounts for the nine months to December 2011. He attaches, as an exhibit, the two-page overview providing a summary of those management accounts. What Mr Backhouse does not exhibit, and what is not exhibited or served with Mr. Marcus' report, is the full electronic spreadsheet which provides a full breakdown of the summary figures in the management accounts.
- 20 They were clearly discloseable documents. The claimant was in breach of the court order for disclosure in failing to disclose them. The fact that they were referred to and relied upon by Mr. Backhouse and referred to and relied upon by Mr. Marcus demonstrates to me that they were available to the claimants. Indeed, on taking instructions today, Mr. Williamson was able to inform the court that the claimant's solicitor had the documents that had recently been disclosed by late December of last year. There is therefore no excuse for them not being disclosed before last week.

- 21 It is claimed by the claimant that Guardian was trading successfully up until 2011 and historically had a very good working relationship with John Lewis, who was its major employer. Its case is that that work dried up shortly after the discovery of the defective or non-compliant cables and it was that which led to the very rapid downfall of Guardian in early 2012. Therefore, the management accounts for 2011 are critical probative documents in establishing what the financial position of Guardian was during the relevant period.
- 22 In those circumstances, I consider that the claimant is not in a position to complain about the late service of Mr. Roach's sixth statement which addresses this particular point, or the short letter produced by Mr. Conte dated 14 January 2019 in which he summarises the key points that one can ascertain from the full management accounts. To that extent, I consider that Mr. Roach's witness statement, Mr. Conte's letter and the extract from the management accounts are properly admissible and that the court should take them into account in determining this application.
- 23 I then turn onto the substance of the contentions made by the parties before me today. The first ground is whether there is a realistic prospect at trial that the claimant could establish a causal link between the cable issue and the cessation of Guardian work.
- 24 Mr. Hickey for the defendant makes reference to the first statement of Mr. Patel of Cubism Law, the solicitors instructed by the claimant. In his statement of 26 July 2018, Mr. Patel states that the claimant relies almost exclusively on documentary evidence to found their claim as set out in the Particulars of Claim and Reply. Mr. Hickey submits the claimant has not produced any documents to evidence an alleged causal link between the cable issue and the loss of JLP business between November 2011 and March 2012. There is no document which demonstrates that a decision was made by JLP to exclude Guardian from tendering or working on other JLP projects because of the cable issues.
- 25 Reliance is placed by the defendant on the witness statement of Mr. Burnett which was exhibited, perhaps rather unusually, to the defence and counterclaim. In that witness statement, Mr. Burnett stated that the discovery of the issues with the cables in 2011 had nothing to do with JLP's decision as to whether to use Guardian to undertake the remedial works or to bid for works on later JLP contracts. He explains that there was a marked decline in the amount of work that might have been available to Guardian because firstly, JLP had scaled back its works and the opening of stores for commercial reasons, secondly, a particular contact at JLP, Mr. Brian Hammond, had left and thirdly, the tender prices and rates quoted by Guardian increased which made it more expensive than other electrical sub-contractors.
- 26 Initially, the claimant responded to that statement through the statements of Mr. Ailing, Mr. Shah and Mr. Crawley's first statement. For the reasons set out in my earlier judgment, that evidence was not of great value. Mr. Ailing's evidence was that he recalled a conversation in the staff room but was unable to put a date on that or to recall the reason for any cessation of JLP work for Guardian. Mr. Shah's witness statement indicated that he did not know why Guardian had been removed from the tender list. Mr. Crawley's evidence simply reiterated the assertions made in the pleaded case.
- 27 However, what I have before me today is further evidence from Mr. Crawley in the form of his second witness statement dated 29 October 2018. In that statement he takes issue with Mr. Burnett's witness statement. He starts by saying at para.12 that:

“It just does not seem credible to me that the suggestion that it is mere coincidence that the precise point at which JLP decided to use Guardian having worked together for decades prior, was exactly the point at which the cable issue was discovered by JLP.”

28 Mr. Hickey submits, with some foundation, that that is mere speculation. However, Mr. Crawley also rebuts the other evidence given by Mr. Burnett, namely the reasons which were given by Mr. Burnett to explain the reasons for a downturn in work that might have been available to Guardian. He states that there was not any decline in the amount that JLP spent with Guardian in the months before November 2011, he identifies a significant amount of work that JLP put out to tender in 2012 and gives examples of various contracts that might have been available. At para.15 he says:

“I can't comment on whether JLP did in fact scale back their work and their opening of stores for commercial reasons or otherwise on an overall view, but from our point of view as explained before, we were continuing to receive just as much work from JLP as we've had before, if not more.”

29 At paras.37-40 he says that he believes:

“Mr. Burnett is carefully seeking to suggest that the reason why Guardian was excluded and/or not invited to tender for the other works was that they were not in JLP's view capable of performing the works. I do not understand the basis of this statement as we had consistently received a substantial amount of work from JLP for decades prior to the discovery of the inferior cables and as explained above, were due to receive significant work going forward into 2012 and beyond we had received no notification or warning from JLP that they had suddenly taken the view that Guardian was not capable of performing their works. I find it hard to believe that if there really was an issue with the price or quality of Guardian's work, that the main contractor would be unaware of this.”

30 At para.49 he takes issue with Mr. Burnett's evidence that Guardian were not excluded from the tender process as a result of the cabling issue, and with Mr. Burnett's assertion that there was no decision made by JLP to exclude Guardian from any JLP works due to the cable issues.

31 In response to the points made by Mr. Hickey, Mr. Williamson has drawn attention to those witness statements to which I have just referred and also to the report of Mr. Phillip, the costs expert report. Mr Phillip's opinion is that Guardian was one of the cheaper tenderers in respect of the relevant works. Mr Williamson also relies on email correspondence which shows that there appeared to be a dispute towards end 2011 / early 2012 regarding the scope and price and surveys in respect of the remedial works which might well throw light on the reasons for Guardian not being permitted to carry out for remuneration the remedial works that were required to the cables.

32 Looking at that evidence in the round, there is a clear issue that should go forward to trial as to whether or not as a result of the cabling issues that were identified in November 2011, JLP removed Guardian from its list of tenderers and/or sought to exclude them from carrying out further work. It is not possible for the court to form even a provisional view as to which side might prevail. In any event, as I have already canvassed with counsel, that

would not be an appropriate way to determine an application to strike out or for summary judgment.

- 33 The court has to be satisfied that there is a real prospect of succeeding on the claim as opposed to a fanciful prospect. If the relevant witnesses were to give evidence at the trial, there must be a real prospect that Mr. Crawley's evidence might be preferred to that of Mr. Burnett.
- 34 In that respect, it seems to me that it would be quite wrong for the court to attempt to decide this issue without the benefit of all of the disclosed documents that are relevant for the purposes of the trial, all of the witness statements that might cast light on this, the expert reports that must be tested under cross-examination and, of course, the benefit of cross-examination of those witnesses in the witness box.
- 35 For those reasons, I reject ground one relied upon by the defendant. There is a real prospect of success on that part of the claim.
- 36 The second ground relied upon by Mr. Hickey is that the claimant cannot satisfy the but-for test of causation, that its insolvency in 2012 was caused by the cable issue. The submission that is made by Mr. Hickey is that it is obvious from all the available evidence that Guardian was trading insolvently in 2010 and 2012 and could not have survived into 2012 in any event.
- 37 The key documents that are relied upon by Mr. Hickey in support of his submission are the documents that have been obtained from the liquidators, including the interim reports made by the liquidators during the course of dealing with Guardian's affairs. First of all, the statement of affairs for Guardian under 4.19 that was signed by Mr. Crawley on 30 March 2012 showed that Guardian was insolvent with a deficiency of £2.4 million. Further, that deficiency included trade creditors amounting to some £1.4 million and unpaid liabilities to HMRC in respect of PAYE, national insurance and VAT sums. In fact, the national insurance PAYE and VAT figures increased rather dramatically to £1.96 million and £686,000 in respect of the PAYE liabilities, so just over £2.5 million.
- 38 Further, Mr. Hickey invites the court to consider the report of the meeting of creditors on 30 March 2012 in which Mr. Crawley explained that the failure of the business was due to the defective cabling which had been installed, as a result of which no new work was forthcoming from JLP. This was challenged in the meeting. It was noted that in the absence of any accounting information for the years 31 March 2011 and 30 March 2012, the deficiency account showed that a trading loss of £2.796 million had been sustained for the two-year period up to when the company ceased trading. This would equate to a monthly trading loss of £116,000 per calendar month.
- 39 The report records that Mr. Crawley was unable to offer an explanation for such a massive loss, but he did admit that the company had not achieved profits for some months prior to the cabling problem. The meeting expressed its concern at the lack of accounting information available to the meeting as well as the lack of explanation on the part of Mr. Crawley. It transpired that Mrs. Pepperell had been in charge of the day to day finances and unfortunately for the meeting, she was not present to be questioned. In addition, a creditor at the meeting noted that the company had continued to take credit from his company in March 2012 at a time when it knew it could not pay. That was identified as a matter for the liquidator to investigate.

40 Mr. Hickey also relies upon various other investigations that were carried out by the liquidators, including investigations into transactions at an undervalue, preference payments, wrongful trading and so forth. However, the court does not have any evidence as to the outcome of those investigations, save for a settlement in terms of the assignment of the claim by Guardian to the claimant in this matter. Therefore, that does not particularly assist in assessing the financial position of Guardian between the end of 2011 and March 2012.

41 It is quite clear that one of the issues that the court will have to grapple with is whether Guardian was in such dire financial straits that regardless of the cable issue, it would not have been able to continue to trade into 2012 and that its demise was inevitable, or whether as the claimant contends, if the JLP work had continued towards the end of 2011 and into 2012, whether by actual contracts of work or other tendering opportunities, that may have allowed Guardian to obtain funding to support continued trading which would have enabled it to trade out of its losses so as to become a going concern and potentially a successful venture over the following years.

42 In this regard, Mr. Backhouse has set out in his witness statement dated 2 November 2018 at para.10 that:

“Guardians' financial performance for the year-ending March 2011 was quite poor. It is clear from the management accounts for the nine months to December 2011 that by the end of 2011 we had been able to turn around the issues that Guardian was facing. In particular, for the nine months to December 2011, Guardian's turnover was £11.7 million and when compared with the prior year of sales of £8.8 million, this was an increase of thirty-three per cent. Further, sales for the quarter 31 December 2011 were also up thirty-one per cent on the same quarter of the prior years but for the issues that Guardian encountered with Cleveland, the company was on track to grow profitably.

11. I can identify that in or around 2011 and early 2012 I produced various forecasts to assess how we saw Guardian performing over the course of the next few years. These projections were created for various reasons, including but not limited to good internal management control for presentations to the company's bankers in respect of discussions as to renewing Guardian's overdraft facility and with a view to discussions with potential investors.”

43 I have been shown a couple of work projections by Guardian and, in particular, a projection produced, it would appear, at the end of September 2011. Without the underlying explanations, assumptions and details of the projects, the tenders, the results of the tenders, the works and the accounts relating to the works, it is not possible to form a concluded view on precisely what this shows in terms of the financial health of Guardian. However, what it does show is that towards the end of 2011, Guardian was continuing to tender for projects for significant sums in relation to projects where in some cases it had tendered without being in competition. It included tenders in respect of John Lewis, but also other companies and it does also show a relatively substantial turnover for 2011.

44 In the light of that evidence, I then have to consider whether there is a real prospect that Guardian could succeed through the claimant in demonstrating that but for the cable issue, Guardian would have continued to receive work from JLP or would have continued to be

able to tender for projects from JLP that would have enabled it to get funding to continue trading.

- 45 Mr. Hickey has raised a number of severe difficulties that the claimant will face in pursuing such claim. The dire financial position of Guardian as at March 2012 disclosed to the creditors and the liquidators indicates that Guardian was facing a number of very severe difficulties, including very substantial claims for additional sums from HMRC. It also faces the difficulty of explaining away the substantial losses that Guardian appeared to have been making, not just towards the end of 2011 but over the previous two years.
- 46 Subject to those very severe difficulties, this court cannot rule out the prospect that Mr. Backhouse's evidence, accompanied by the records of tendered and successful works carried out for JLP and others in the years up to the end of 2011 / beginning 2012, might be sufficient for the claimant to show that if JLP had continued to use it in the way that it had used the claimant company in the past, that it might have continued to be a going concern. Because I cannot rule that out, it seems to me it follows that on the evidence that is currently before the court, the claimant demonstrates that it has a real as opposed to a fanciful prospect of success. On that basis, the defendant does not succeed on ground two.
- 47 I then turn to Mr. Hickey's ground three which is that the claimant cannot prove and has no evidence to support its claim that its loss, but for the defendant's alleged wrongful acts, was goodwill of £8 million. Mr. Hickey has, quite rightly, drawn the court's attention to the fact that Mr. Marcus, who has produced an expert report in support of the claim for this loss, is subject to severe criticisms made by Mr. Conte, the defendant's expert. The criticisms include an unconventional approach to valuation, the lack of disclosure of documents, evidencing the historical transactions with JLP and the full financial records of Guardian in the years up to 2012, and the assumptions for the forecasts used by Mr. Marcus. These raise serious question marks over the credibility of Mr. Marcus' opinion evidence as to valuation.
- 48 As against that, Mr. Williamson has drawn to my attention the fact that Mr. Marcus has produced an expert report which supports the valuation of the business if it had been allowed to continue trading and then sold in 2015. That has not yet been tested through cross-examination or, indeed, examination of all of the documentary evidence that might support it. Further, he draws my attention to the report of Mr. Conte which does produce a valuation, albeit a lower valuation for the company. On that basis, Mr. Williamson submits, with some force, that as of today the court is not in a position to say that the claim would be zero.
- 49 Again, based on the evidence that is currently before the court, I am satisfied that the claimant has a real prospect rather than a fanciful prospect of succeeding in establishing some damages. It is unlikely, I have to say on the basis of what is before the court, that it would be anywhere near £8 million. I say that because Mr. Marcus has simply not taken account in his valuation of the significant losses that were clearly being made by the company in the years prior to 2012, including the very substantial liabilities to HMRC.
- 50 I consider that it is essential that Mr. Marcus should have an opportunity to consider all of the historical documents of Guardian, including a full inventory of the historical works for JLP, their profitability or otherwise, and the financial records of Guardian. Mr Marcus should also have an opportunity to investigate the assumptions for the forecast that he has then either been instructed to take or has simply made in his current report. Beyond that,

this court is not in a position to form even a provisional view as to what the claim might be worth.

- 51 For the purposes of the application to strike out and/or for summary judgment, it is not necessary for the court to take any provisional view and so, I simply leave it as being that the court is satisfied that there is a real prospect of establishing some loss if the claimant succeeds on the other limbs of its case.
- 52 That is sufficient to dispose of the application. The defendant's application is dismissed. I do have concerns about the level of disclosure that appear to have been given in this case and the lateness of disclosure. Bearing in mind the time that we have reached, I do not propose to go on and deal with any of those issues and in any event, I suspect that neither party is in a position really to take that forward. It does seem to me that if the parties are going to keep their trial date, outstanding matters regarding disclosure need to be dealt with sooner rather than later. The court will take a dim view if the parties are still attempting to address clear issues of disclosure at trial.

CERTIFICATE

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