



Neutral Citation Number: [2023] EWHC 2498 (TCC)

Case No: HT-2021-000322

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT**

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

Date: 10/10/2023

**Before:**

**HHJ PARFITT**  
(sitting as a Judge of the High Court)

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**Between:**

**ENTERTAINMENT APPS LIMITED**

**Claimant**

- and -

- (1) **YASH PATEL**  
(2) **TEJ PATEL**  
(3) **KWANTYLE LIMITED**  
(4) **PROPTYLE LIMITED**  
(5) **PROPTYLE PRIVATE LIMITED**  
(6) **ARVIND PANNALAL PATEL**  
(7) **SARALA ARVIND PATEL**

**Defendants**

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**Daniel Goodkin** instructed by and for the **Claimant**  
**Gideon Shirazi** (instructed by **Deloitte LLP**) for the **First to Third Defendants**  
**The Fourth Defendant** and the **Fifth to Seventh Defendants** did not appear and were not represented

Hearing date: 19 September 2023  
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**Approved Judgment**

**This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30 am on 10 October 2023**

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## **HHJ Parfitt :**

### Introduction

1. The First to the Third Defendants apply to strike out, or for summary judgment on, the claims against them set out in the Claimant's amended particulars of claim ("APOC"). The application notice is dated 18 May 2023.
2. The dispute relates to a proposed property marketing website, the technology for which the Claimant says was purchased from the Defendants, then developed by the First to Third Defendants for and with the Claimant, but then, wrongly, was kept from the Claimant by the Defendants just prior to a proposed commercial launch in the Spring of 2021. Everything is hotly disputed.
3. The individual Defendants are all immediate family members. The Sixth and Seventh Defendants are the parents of the First and Second Defendants. The Third Defendant is a corporate vehicle of the First and Second Defendants. The First to Third Defendants are UK based. The parents are directors of the Fifth Defendant. The Fifth to Seventh Defendants are India based. It is the Claimant's case, but is much disputed, that the Patel Defendants and their corporate vehicles are in reality, as far as this affair is concerned, controlled by the First Defendant and/or the Second Defendant.
4. The Fourth Defendant, as I understand it, was a corporate vehicle now on the Claimant's side in the dispute and I say no more about it.
5. When I refer to the Defendants below I am intending to refer to all or any of them, except the Fourth Defendant. I do this without intending to pre-empt or in any way determine the issues between the parties as to which of the Defendants did or did not do anything and whether any of the alleged liabilities can be attributed to all or any of them.
6. At the conclusion of a judgment granting an interim injunction dated 3 November 2021, Alexander Nissen KC (QC at the time) described the parties standing on the edge of an abyss into which considerable legal costs were about to fall. The judge urged mediation. Notwithstanding this graphic and correct description, the parties continue to fight tooth and nail over each and every aspect of these proceedings. By way of typical example, each side's written and oral submissions before me disputed the other's narrative description of the procedural background that led to this application. In truth there was nothing substantially different in the two narratives, rather it was the spin that was being disagreed about. This was pointless but rather set the tone.
7. For my part, I set out the relevant background briefly. In an order dated 25 November 2022, HHJ Nigel Bird (sitting as a judge of the High Court), struck out the then particulars of claim, refused permission for a proposed amended particulars of claim, but gave permission for an amended particulars of claim to be filed and served by 4pm on 30 January 2023. The judge ordered that such particulars "had to comply with the requirements of the Civil Procedural Rules, Practice Directions and the TCC Guide". The APOC is put forward as that pleading.
8. The Defendants had to serve defences by 27 March 2023. I understand that date was pushed out by consent, but, in any event, the First, Second and Third Defendants'

response to the APOC was to issue the current application. The Fifth to Seventh Defendants, who are self-representing, have served a defence which the Claimant regards as abusive and in the run up to the hearing before me sent in an application to have that defence struck out. In his written skeleton Mr Goodkin asked the court to deal with that application but this was, rightly, not raised at the hearing. I say no more about it. It will need to be listed, if the Claimant wants to pursue it.

9. The question addressed in this judgment is whether the APOC raise claims which have sufficient substance to stand as the Claimant's particulars in this case. The gist of Mr Shirazi's submissions for the First to Third Defendants was that the APOC were obviously hopeless and incoherent. Mr Shirazi told the court that he had tried but it was not possible to even draft a defence to them. Mr Goodkin's position was that it was the application to strike out which was devoid of substance and sense.
10. In this judgment, I summarise the relevant principles and then address the APOC against Mr Shirazi's detailed criticisms and Mr Goodkin's responses. I then address separately the other aspect of the First to Third Defendant's application: which is to set aside the interim injunction addressing misuse of confidential information because such a cause of action is absent from the APOC.

#### Legal Principles

11. These were not in dispute. The parties disagreed about the extent to which the APOC met the requirements. I summarise briefly a number of points made by Mr Shirazi in his written submissions and which provide the focus for the criticisms of the APOC.
12. I have not needed to set out those cases and principles which are more concerned with obtaining permission to amend. The 25 November 2022 order gave the Claimant open permission to submit an amended pleading. It does not seem to me that it makes any difference in this case at this time that the court is considering the APOC through the lens of an application to have the APOC dismissed rather than an application for permission to amend. The predominant and determinative issue will be whether the APOC is fit for purpose.
13. The power to strike out a statement of case is contained in CPR 3.4(2) and the power to enter summary judgment is set out at CPR 24.2. When the court is concerned with the merits of a claim at a preliminary stage, the issue is generally about substance not eventual outcome. A claim of substance is one with a real prospect of succeeding at trial rather than a fanciful hope. The court is not concerned about whether it will win, or even might win, but whether it could win. The court must be astute not to conduct a mini-trial at the preliminary stage but is not bound to take mere assertion at face-value (*Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 229 (Ch), Lewison J (as he then was) at [15]).
14. A statement of case must also meet the basic requirements described in the relevant rules and practice directions. The point is all the stronger in the present case since the 25 November 2022 expressly required compliance with these things and the TCC Guide. The TCC Guide of October 2022 sets out general guidance at Appendix I. These include that the particulars should be as concise as possible and set out those factual allegations which are necessary to establish the cause of action to enable the opposing party to know the case it must meet.

15. In *King v Steifel* [2021] EWHC 1045 (Comm) at [146] to [153], Cockerill J, by reference to the caselaw, described the purpose of pleadings as having three complementary aspects: (1) to enable the opponent to know the case it has to meet; (2) to facilitate fair and efficient progress to trial within the overriding objective (i.e. the giving of disclosure and preparation of witness statements on the relevant issues); and, (3) to act as a reality check for the party and its lawyers that its claim or defence passes muster.
16. In what might be described as “the golden rule”, Cockerill J at [150] quoted Christopher Clarke LJ from *Hague Plant v Hague* [2014] EWCA Civ 1609 at [78]: “Pleadings are intended to help the Court and the parties”.
17. Here, if the APOC has the qualities described by Mr Shirazi then it would be unhelpful to both the parties and the court and per the overriding objective, it should be struck out. It would be a waste of time and cost to allow it to go further. The issue is whether Mr Shirazi is right about this.

#### Background Narrative

18. Since this is a judgment about whether the APOC meets the bare necessities for a claim which should be allowed to trial, I only sketch out the relevant background (*Trafalgar Multi Asset Trading Company Limited v Hadley & Ors* [2022] EWCA Civ 1639, Stuart-Smith LJ at [2]: “...bearing in mind at all times that we are dealing with...summary judgment or...strike out where any temptation to engage in a mini-trial was to be avoided...”).
19. As the source of information available to the court on this application is mainly the APOC, this description is necessarily likely to be seen as partial from the Defendants’ perspective but a narrative overview is still required to make sense of the parties’ arguments. I emphasise again that this is for the purpose of this application only. The court is making no findings but explaining the background to the Claimant’s case as set out in the APOC.
20. There are three relevant contracts. It is the Claimant’s case that these contracts came about because it wanted to exploit the commercial opportunities inherent in a website designed and run by one or more of the Defendants and which was available at the address proptyle.co.uk. The Claimant says it saw the commercial chance inherent in this website and entered into the various agreements with the Defendants to put it into a position to exploit that opportunity. The key to this opportunity is the site showing an aggregation of relevant data available on thousands of individual third-party sites. By providing this aggregation in an attractive manner and on a free to access basis, the site can generate user traffic, which can be monetised.
21. In an agreement dated 14 August 2017 entitled “assignment of rights in proptyle website”, the Defendants (including the Fourth Defendant) as “assignors” transferred to the Claimant, as “assignee”, various rights (“the Assignment Agreement”). The nature of those rights is apparent from the two recitals: “the Assignors own all the Intellectual Property Rights in the Software, the Software Documentation and the Name” and “The Assignors have agreed to assign...[all of that]...to the Assignee...”. The definitions of the terms in capitals appear to encompass anything that might be

relevant to the existence of and operation of the proptyle website. Such at least, for present purposes, is the Claimant's case.

22. The Assignment Agreement took effect from 5 business days after the Claimant served a notice on any one of the Assignors. At about the same time as the service of such notice, the Claimant and the Third Defendant, on 27 December 2017, entered into a further agreement ("the Consultancy Agreement"). The Consultancy Agreement required the Third Defendant to make available to the Claimant the services of the First Defendant and/or the Second Defendant (or other individuals with the Claimant's prior approval) to provide "Services". Services were defined to mean "...to develop and maintain software...and other services required...as the need arises".
23. The Claimant says, and for present purposes this is a reasonable and substantial starting point, that the Consultancy Agreement enabled the Claimant to take advantage of the skill and abilities of the First Defendant to develop and enhance the possibilities inherent in the proptyle website for the purposes of its commercial exploitation. Anything produced under the Consultancy Agreement was owned and/or transferrable (both in terms of possession and ownership) to the Claimant (clauses 5.1 and 12.2). The Third Defendant gave various warranties supporting these obligations.
24. The only party to the Consultancy Agreement was the Third Defendant, the Claimant also entered into side letters with the First Defendant and Second Defendant, who were the named individuals in the Consultancy Agreement expected to carry out the work, and for whose input charges were agreed. The side letters are dated 5 January 2018 ("the Side Letters"). Under the Side Letters the First and Second Defendants, among other things, procured that the Third Defendant would meet its obligations under the Consultancy Agreement, indemnified the Claimant against any failure by the Third Defendant to perform, and accepted direct obligations in respect of various of the clauses in the Consultancy Agreement (including those concerned with Intellectual Property).
25. The Claimant bases its case on this package of agreements providing a legal framework within which anything needed or associated with the due operation of the intended website was the property of the Claimant and/or produced by the Defendants for the Claimant. For present purposes and as a matter of construction of the relevant contracts, this is a position with a real prospect of success.
26. Between 2018 and Spring of 2021, the Claimant says the First to Third Defendants, under the Consultancy Agreement, carried out various works which led to the development of an improved website (such improvements applying to both the front end of the site and the software doing the work behind) which was to trade under the name "AllTheProperties" and a further development of equivalent sites to be known as "AllTheMotors" and "AllTheLegals". The aim being to offer an equivalent free to use access point for cars and legal services as was envisaged for properties. The obvious intention was to create an "AllThe" brand identity.
27. The Claimant says the AllTheProperties service was all ready for a planned launch in March 2021. That did not happen because the Defendants stymied it. The Claimant alleges this was done by the First and Second Defendants refusing to continue unless they were paid £3 million. Thereafter, the Claimant says, such work product as the Defendants did supply was not what was required to enable the site to be operated at

launch. The parties' relationship then broke down with allegations around termination, non-payment and over-payment and so on.

### Discussion

28. Mr Goodkin and Mr Shirazi had opposing views about how the claim should be categorised. Mr Goodkin said that the primary claim was contractual: the Claimant paid the Defendants for a website and when the Claimant wanted to launch that website commercially it appeared that not only did the Claimant not have possession or control of the website but the Defendants demanded further payment to allow the launch to take place. Then, despite the Claimant having acquired the site under its contracts, it found the same service being offered by a site controlled by the Defendants under the original "proptyle" style. The Defendants would variously dispute the narrative in this paragraph. Not least my aggregation of "the Defendants" into a family group.
29. Mr Shirazi stressed that the claims were really about the abuse of IP Rights and perhaps a breach of a services contract as well but given the lack of necessary particulars, it was difficult to tell. In either case, by the basic rules of pleading, the APOC had to contain the essential facts relevant to the intended cause of action.
30. For a valid claim under the Copyright, Designs and Patent Act 1988 ("the CDPA") the essential facts would need to encompass those matters set out by Chief Master Marsh in *Nekoti v Univilla Ltd* [2016] EWHC 556 (Ch) at [16ff] or, if and so far as the rights were said to arise in other jurisdictions, the relevant equivalent under whatever the applicable law might be. For the CDPA this would include describing the relevant work, showing that such work was entitled to protection under the CDPA, establishing that the Claimant was entitled to enforce such rights, which would involve proof of authorship and provenance / chain of title, infringement of the relevant right and such actions being without authority. Since none of those facts were contained in the APOC then such claims must fail. Furthermore, CDPA claims were not even contained in the claim form.
31. For a claim for breach of a services contract the necessary fact include the contract, the request for the relevant service, the nature and extent of the obligation applicable to such service, how such an obligation was breached in respect of each relevant service request and the loss and damage caused. Again, Mr Shirazi said, those facts are not pleaded – the necessary factual building blocks of a breach of service claim are missing and so the APOC do not meet the basic requirements of a statement of case.
32. Mr Shirazi referred to the summary of what a contractual claim should contain given by Coulson LJ in *Building Design Partnership v Standard Life* [2021] EWCA Civ 1793 at [39] – [41]:

*CPR 16.4(1)(a) requires that a particulars of claim must include "a concise statement of the facts on which the claimant relies". Thus, where the particulars of claim contain an allegation of breach of contract and/or negligence, it must be pleaded in such a way as to allow the defendant to know the case that it has to meet. The pleading needs to set out clearly what it is that the defendant failed to do that it should have done, and/or what the defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated. Those are 'the facts' relied on in*

*support of the allegation, and are required in order that proper witness statements (and if necessary an expert's report) can be obtained by both sides which address the specific allegations made.*

*...The other side of the same coin is that pleadings should not be vague and unparticularised, and if they are, they are liable to be struck out...*

33. The passage is a useful starting point, but not for the claim as categorised by Mr Shirazi but for the contract claim put forward by Mr Goodkin for the Claimant.
34. In my judgment the APOC provide a clear fact-based set of allegations that the First to Third Defendants were subject to obligations which meant that they were not entitled to scupper the Claimant's launch in March 2021 and that as a result of that launch not taking place the Claimant suffered loss and damage. The APOC sets out between paragraphs 8 and 13 and paragraph 53 background context for the contracts and the claim. The contracts and their relevant clauses are set out between paragraphs 17 and 39. Relevant performance of the contracts is set out between paragraphs 43 to 51 and paragraph 56. The allegation that the Defendants scuppered the launch, in breach of contract, is set out at paragraphs 57 and 60. More detailed allegations of breach are contained between paragraphs 67 to 71 and paragraphs 73 and 74. The First and Second Defendants' obligations to indemnify are contained at paragraph 75. The Claimant's alternative case on loss arising out of the alleged breaches (loss of profit or wasted expenditure) is set out at paragraphs 79 and 80.
35. The matters I have summarised in the preceding paragraph are the essence of the Claimant's case. For present purposes this works as a particulars of claim and sets out something with a real prospect of success. It is a pleading which is helpful to both the Defendants and the Court. It meets the basic requirements, at least, and is fit for purpose. The application to strike out or for summary judgment against the APOC fails for that reason.
36. However, this does not mean that there is not merit in some of the more detailed points taken by Mr Shirazi. I turn now to those points but not from the starting point that those detailed points mean the whole claim is flawed but from the starting point that there is a perfectly good claim, for pleading purposes, made against the First to Third Defendants in breach of contract.
37. The question then becomes whether it would be within the overriding objective to strike out parts of the APOC at this stage even though the claim in substance should go forward. Mr Shirazi referred me to Akenhead J in *Charter UK Ltd v Nationwide Building Society* [2009] EWHC 1002, at [15]. Among other pertinent observations, Akenhead J said: "Generally at least there should be no half measures taken in the...particulars of claim in terms of pleading matter which is immaterial to the relief or remedies sought" and "...the court has wide powers to strike out parts of a pleading if it contains immaterial matter, particularly when its continued presence will confuse the resolution of the underlying and properly pleaded claims".
38. I will take the points of detail in the order they first appear in the APOC and deal with them as briefly as circumstances allow. Paragraph references are to the APOC.

39. Paragraph 14 / 15 Mr Shirazi says this is an irrelevant assertion about who owned the proptyle IPR at 14 August 2017. Irrelevant because the Assignment Agreement is common ground and is the starting point for the parties' interactions which led to the dispute and these assertions of First or Second Defendant control are not relevant to any cause of action alleged. Mr Goodkin says that the First Defendant being the controlling defendant is very much part of the case. In my view, while the paragraphs could be clearer, 14.3 and 14.4 and the last sentence of paragraph 15, go beyond the 14 August 2017 date and encompass the duration of the relationship and this assertion of the First or Second Defendant being the dominant and controlling force within the Patel Defendants is relevant context to the contracts and the allegations of breach. It would be unfair for this issue to be excluded from the scope of disclosure and witness statements when it has clear relevance to the parties' dealings and the alleged plan to deprive the Claimant of its contractual rights. I will not strike these paragraphs.
40. I will, however, strike out the allegations about the Claimant's understanding of Indian law, which are the first two sentences of paragraph 15. The real allegation is that the Sixth and/or Seventh Defendants have acted on the instructions of the First and Second Defendants. The Claimant's understanding about Indian law is irrelevant to the substance of that allegation and in any event would not provide direct support for the assertion being made.
41. No Particulars of the Services Mr Shirazi criticised the APOC for making a claim for breach of a services contract without identifying the services which fell within that contract. Mr Goodkin said the claim was not about any particular service performed but about the denial of access / operating a Proptyle site in Spring 2019, in which context the details of the services provided were irrelevant. I agree with Mr Goodkin about this so that, for example, paragraph 34 is a sufficient pleading that the Claimant and the Defendants worked together following the various 2017 contracts. The details do not matter to the claim, at least at this stage (it is possible the Defendants' defences might make such details more relevant). The relevant allegation is not that any aspect of the services provided was wrong but that because services were provided which were relevant to the development of the website, then such developments were the Claimant's and, as part of the developed website, could not be used by the Defendants, or leveraged by them, for greater financial gain.
42. The Advisory Obligation At paragraph 36, the APOC plead the existence of an obligation on the part of the First and/or Third Defendant to advise properly. No term is identified but it is said to arise out of the First Defendant having provided advice and the Claimant reasonably believing that such advice was being provided. I cannot follow this reasoning which relies on conduct under the contract to imply a term into the contract from the outset (not, for example, the allegation being that a variation was agreed by conduct). It follows that paragraph 36 and any related allegations of breach (i.e. those following from the existence of the alleged advisory obligation, such as paragraph 72) must be struck out.
43. I add, since it is possible that a further application to amend might be made, that I am not determining that there was no obligation arising out of the Consultancy Agreement or Side Letters which would be relevant to any advice provided only that the basis for such an obligation pleaded in the APOC is hopeless and will waste the parties' time and cost if it is allowed to remain. I do not consider it proper for the court to attempt to formulate such a claim.



44. Implied Terms about Payment and Time I agree with Mr Shirazi that the express payment terms in the Consultancy Agreement at clause 6 preclude the implied terms set out at paragraph 37.1 and that that paragraph should be struck out.
45. Continuation of the Consultancy Agreement after its 18-month term This relates to paragraphs 41 and 42. While the drafting might perhaps be clearer, I will not strike these paragraphs. There is a claim with a real prospect that the parties continued the Consultancy Agreement after its term expired and that accordingly it extended. The Claimant offers three routes to this but all involve the continuation of the rights to terminate (and so “indefinitely” does not mean a forever contract so much as a “while the parties continue to operate the Consultancy Agreement” contract, which is unremarkable). I tend to agree with Mr Shirazi that the idea of an implied 18-month extension is unlikely but it is not so unlikely that it would be necessary or proportionate to strike it out.
46. Other Websites There is no difficulty with the APOC introducing the AlltheMotors and AlltheLegals as part of the works which were carried out under the Consultancy Agreement. These are set out at paragraph 47 and sufficient particulars are given at paragraph 48. These sites are referred to as “Associated Websites”. In a request for clarification following seeing this judgment in draft, the First to Third Defendants were concerned that the court had missed out their argument being a criticism of an assertion of ownership of these sites without due particulars. However, the reason there is nothing wrong with the pleading in respect of these additional websites is that it is pleaded, with particulars, that the work in relation to these websites was carried out under the Consultancy Agreement. This is sufficient for the purposes of raising a substantial claim.
47. IPR Ownership At paragraph 44.1 of the APOC, the Claimant alleges that one or more of the First to Third Defendants developed for the Claimant a new front-end website defined within the APOC as “ATP Website” and a modified engine for the website, defined as “ATP Engine” both of which are captured by the expression “ATP Platform”.
48. Later, at paragraph 51, the APOC bundle together “the ATP Platform” and the “Associated Websites” with “Consultancy Agreement Works”. I suspect this is duplicative because the latter definition is a general description of works carried out under the Consultancy Agreement, which is necessarily, within the logic of the APOC, inclusive of the ATP Platform and the Associated Websites but this is not a redundancy which would justify a strike out. It is then alleged that as a result of the contracts all of this intellectual property (i.e. that which is the subject of the contracts and used for the purpose of the AlltheProperties, AlltheMotors and AlltheLegals websites) is owned by the Claimant.
49. As far as this is alleged to be the consequence of the contracts, this is sufficiently pleaded. The gist of the allegation, as summarised by Mr Goodkin, was the Claimant bought what was there in 2017 and between January 2018 and Spring of 2021 paid for it to be further developed ready for launch on the basis that what was developed also belonged to the Claimant. There is a real prospect of such allegation being made out.
50. However, in addition to this contract-based allegation, the Claimant also includes a different allegation which is that as a result of the input of Mr Oyston and Mr Allitt of

the Claimant, “original literary works” came into existence which are owned by the Claimant. Mr Shirazi complains that the detail of these works is not particularised when it should be and that such details as are provided do not give rise to a substantial case, not least because those details appear to lack the element of expression / fixation which would be necessary for copyright to arise.

51. I agree with Mr Shirazi that this claim of authorship lacks any substance as pleaded. The words used to describe the element of authorship are “devised” and “conceived”. Neither suggest that the relevant person did anything which might give rise to rights under the CDPA. The other aspect is the creation of the slogan “the biggest free property for sale and let search engine in the world”. This seems to lack any originality and to be merely descriptive but, in any event, is put forward as a particular of authorship rights in the ATP Platform and Associated Websites. I cannot follow this as pleaded. These problems mean that the assertion of authorship separate from ownership rights derived from the contracts should be struck out. This applies to paragraphs 49, 50, 51.3 and 52.5.
52. In this instance, however, I would not strike out the breach paragraphs, 77.2.3 to 77.2.5, which refer to the slogan since independent of the allegation that there was some sort of IPR in the slogan those allegations can be particulars of the more substantial breach allegation: that the Defendants were using the Claimant’s IP to substantially duplicate the website the subject of the contracts. The use of the similar slogan, even if there is not IPR in the slogan itself, can still be a particular fact supporting the wider allegation of infringing the Claimant’s rights acquired under the contracts and breaching those contracts.
53. In reading this judgment in draft, Mr Shirazi and his clients sought clarification as to whether an independent IPR claim was being permitted in respect of the slogan. It is not. There is no arguable case for such rights. What is being permitted is the pleading of the similarity of the slogan as a particular of the Defendants having breached their contracts by attempting to take what was the Claimant’s for themselves and/or not give to the Claimant what was promised: the more fully developed website. The use of a similar slogan does not have to be a breach of itself, it is a secondary fact which in combination with the allegations of actual breach (the use of the website software), adds to the Claimant’s case. Generally, allegations of secondary fact do not need to be pleaded but here it is a relatively trivial issue and not one that requires the intervention of a strike out once the allegation of IPR infringement in this respect is removed.
54. I add here that I disagree with Mr Shirazi’s related submission, regarding the Claimant’s acquisition of IP rights, that the Assignment Agreement, with its reference to an assignment of “future” software could not create rights in IPR that did not exist as at the date of the agreement. This may be a matter for argument at the right time but I do not think the Claimant’s case in this respect lacks a real prospect of success. I, at least without the benefit of more argument on the point, do not find the idea of an agreement for the transfer of IP rights to be created in the future necessarily bad. In particular where, as here, the future rights are necessarily tied to those the subject of the assignment. Of course, whether such a transfer is operable will be dependent on the new works having been created in circumstances when they would fall within the scope of the assignment clause. Here this would depend on the works being a development of the website the subject of the assignment. For real prospect purposes this seems unremarkable on the pleaded facts: that was what the First to Third Defendants were

agreeing to do under the consultancy agreement and side letters, all of which were in existence by the date of the actual assignment and the Defendants enhancing and developing the existing software / IPR at the date of the Assignment Agreement was likely in contemplation at the date of the Assignment Agreement (the parties' envisaged an on-going relationship).

55. Finally, on this area, I agree with Mr Goodkin that it is not necessary for the Claimant to give particulars of all the IP rights which it alleges are captured by the rights acquired from the Defendants as a result of the Assignment Agreement and the Consultancy Agreement. Those rights are self-defining because they relate to the websites which were the subject of those agreements and under those agreements the Defendants were obliged to transfer those rights to the Claimant. The case set out in the APOC is that this was what the Defendants promised. It is not necessary for the Claimant to tell the Defendants the items which comprised the software which made the websites when the Claimant's case is not about the detail of that software but about the Defendants depriving the Claimant of its substantial contractual benefit: a go-live website in Spring of 2021.
56. It follows from my agreement with Mr Goodkin's contract-based approach set out on this issue that there is no need for the Claimant to amend the claim form to bring the IP claims discussed in this paragraph. The gist of the allegation in the APOC is that the Claimant has been deprived of its contractual benefits by the alleged infringements. This is within the general words contained in the claim form as it currently exists.
57. The Third Defendant's Termination At paragraphs 58 and 59 of the APOC, the Claimant alleges that the Third Defendant wrongfully purported to terminate the Consultancy Agreement. Mr Shirazi argues that in the absence of any allegation that the alleged repudiatory breach was accepted and any claim for relief associated with such, then these allegations go nowhere. Mr Goodkin appeared to accept this but argued that it seemed sensible to anticipate what might be said by way of defence. In my view, as currently pleaded paragraphs 58 and 59 are irrelevant and likely to confuse. They should be struck out.
58. "wrongfully interfered" On a number of occasions in the APOC, the Claimant alleges that the Defendants have "wrongfully interfered" with the Claimant's IP rights. Mr Goodkin explained that this meant "infringed" in the simple sense of acting contrary to those rights acquired by the Claimant under the Assignment Agreement and Consultancy Agreement. The point needs to be clarified because "wrongfully interfered" is apt to mislead. I suggest the most sensible way to do this at present would be by way of a recital to the order arising as a result of this judgment stating that for the purposes of the APOC "wrongfully interfered" should be read as "infringed". If the Claimant subsequently re-amends (by consent or order) then this tidying up can be included at that time. It is too trivial to require the time and cost of formal re-amendment at this stage. I am assuming the strike outs following from this judgment can be struck through as part of this order while the pleading retains its status as the amended particulars of claim.
59. Expectation Loss Mr Shirazi says it is fanciful to suggest that the Claimant might have a claim for "tens of millions of pounds" (APOC, paragraph 80.1.2) premised on the business being a success. Such a claim is doomed to fail. However, the existence of such a potential claim is unexceptional. There may well be considerable difficulty in

proving it and, often, such difficulty will cause a claimant to elect to limit its claim to the wasted expenditure method of assessing loss (see the discussion in *Soteria Insurance Ltd v IBM* [2022] EWCA Civ 440, Coulson LJ [40] to [47]) which will throw a burden on the defendant to prove the extent to which expenditure would not have been recouped. But that does not undermine the substance of a loss of profits claim.

60. I can well see that there will come a point, perhaps even as early as the CCMC, when the Claimant ought to make an election about which head of loss it will choose to recover under or at least be at risk as to costs thrown away if it continues to run the alternatives, but for strike out purposes the loss of profits claim is not fanciful. In this respect (the points were not argued) the Claimant may wish to note paragraph [71] of Coulson LJ in *Soteria*.
61. In a similar way, although I see the strength in Mr Shirazi's point that the APOC's reference, at paragraph 80.3, to the Claimant having a potential cost of £132,000 to get the website up and running in a production environment and with missing control files (a defined term in the APOC which refers to those bespoke bits of code which provide the functionality to scrape data from relevant third party sites), strongly points to any substantial loss of profits claim being stymied by a failure to mitigate, I am not prepared to strike out on that basis. Again, for present purposes it suggests a weak or difficult claim but not a fanciful one at this stage.
62. Wrongful £34,000 charge Paragraphs 81 and 82 of the APOC set out a claim to recover £34,000 said to be the difference between the true value of work done by the Third Defendant against the sums invoiced and paid. This is premised on a breach of the implied terms at paragraph 37, one of which I have struck out. The allegation cannot survive that strike out. In any event, I do not consider there are sufficient primary facts set out in these paragraphs to plead a claim for recovery of a sum paid. It is not possible to link the sums said to have been paid with the only potentially relevant contractual payment obligation pleaded under the Consultancy Agreement (which provided for fixed sums) and I cannot understand the legal or factual basis of the claim for recovery either on a contractual breach basis or on an unjust enrichment basis given the facts pleaded.
63. Accounting Remedy I have no difficulty with the claim for an account in respect of the allegation that the Defendants wrongfully benefitted from the IP assigned to or created for the Claimant. This is at paragraphs 83 and 84 and flows from the allegation that under the contracts the Claimant was the owner or should have been the owner of the IP related to the websites. This is an account in support of a proprietary claim and is unremarkable. The same cannot be said for the claim for an account set out at paragraph 85. The gist of this is that the Claimant is not sure if it has overpaid the Defendant and so would like an account to investigate that issue. I do not consider this to be a claim with a real prospect of success. On the contrary, it appears to be an attempt to use the remedial powers of the court to see if there might be a cause of action. This is abusive and must be struck out. This covers paragraphs 85 and 86 of the APOC.
64. Injunctions In respect of various of the injunctions set out at paragraph 88 of the APOC, Mr Shirazi argues that they would require the performance of personal services by the one or more Defendants for the Claimant or would require supervision of services by the court which makes them unsuitable for injunctions. There is much in these points but I do not consider it proportionate at this stage to strike out any particular claim for

an injunction. This is simply because it is not cost effective at the present time to do so. Although it seems extremely unlikely that the Claimant might obtain an order that the Defendants “train” the Claimant or “cooperate” with the Claimant, it is not necessary for the saving of time or expense to remove these from the APOC. If it turns out after trial that the Defendants are in breach and subject to a relevant contractual obligation which can be fulfilled by the court requiring a particular action then that might be the appropriate subject of an injunction or damages in lieu (the nature and extent of which might provide an encouragement to the relevant Defendant to volunteer to do the necessary). At this stage, the uncertainty about how the landscape will have been determined after trial and so the basis upon which the court might seek to exercise remedial powers makes strike out premature and disproportionate.

#### Conclusion on Strike Out / Summary Judgment

65. Save in respect of those paragraphs that I have directed should be struck out the bulk of the APOC can go forward and the First to Third Defendants should now put in their defences to the claim.

#### Dismissal of Interim Injunction

66. By an order dated 11 November 2021, the court made an interim injunction against the First to Third Defendants that prevented them from: (a) using or replicating the websites, and (b) publishing, using or disclosing confidential information as defined in the Assignment Agreement or Consultancy Agreement.
67. The First to Third Defendants seek the discharge of the injunction now that the APOC no longer include a claim for breach of the confidential information obligations in the contracts.
68. The relevant legal principle was not in dispute. It is expressed by Eder J at paragraph [32] of *Speedier Logistics v Aardvark Digital* [2012] EWHC 2776 (Comm):

*It seems to me important that, in relation to freezing injunctions and injunctions generally, in circumstances where the claimant has in effect gained the benefit of the exercise of the court’s discretion on a certain basis when that basis no longer exists, it is imperative that the claimant obtains either the consent of the defendant to the continuation of the injunction or reverts back to the court so that the court itself can decide whether or not to continue the injunction.*

69. Mr Shirazi says this fits just this case. Once the Claimant filed the APOC, which does not include a claim for breach of confidential information, then, since the injunction was obtained in reliance on a claim for breach of confidentiality, the Claimant was subject to a duty to either drop the injunction, agree its continuation with the Defendants or apply back to court. None of this was done and just as in *Speedier Logistics*, the court is bound to mark this breach of duty with the discharge of the injunction.
70. Mr Goodkin’s case was that nothing in substance had changed. The claim has always been about the preservation and maintenance of the Claimant’s IPR and the injunction remains necessary to protect those rights against infringements such as those that occurred at the time of and immediately after the proposed website launch.

71. Mr Shirazi took me through the various references to breach of confidentiality in the Claimant's application for injunctions. It is correct that both the particulars of claim and the evidence in support of the injunction, I was shown Ms Wilkinson's witness statement dated 20 August 2021, refer to breach of confidence.
72. As I have said above, the injunction was granted in terms that matched the contractual obligations so that (b) refers to "the Deed of Assignment Confidential Information" and "the Consultancy Agreement Confidential Information".
73. Schedule 2 to the injunction sets out the relevant contractual definitions:
- 'Deed of Assignment Confidential Information' bears the definition given in clause 1.1 of the Deed of Assignment, namely "all information relating to or comprised in the Software or Software Documentation which is not public knowledge and has not been disclosed to third parties, including all know-how and trade secrets".
- 'Consultancy Agreement Confidential Information' bears the definition given in clauses 11.1 and 11.3 of the Consultancy Agreement, namely, "any information relating to the business of the Claimant, its customers, employees, finances, processes, specifications, designs, technology, pricing methodology, business plans, marketing plans and/or any information in respect of which the Claimant owes an obligation of confidence to any third party where knowledge or details of the Information was received by the Third Defendant during the period of [the Consultancy Agreement] or previously other than for the performance of the obligations under [the Consultancy Agreement] or as required by any Governmental or other authority or regulatory body or as is otherwise required by law", save where, "other than by reason of breach, the information concerned enters or has entered the public domain".
74. It is instructive to note the discussion in the judgment of Alexander Nissen KC which led to the granting of the injunctions against the First to Third Defendants. If I can summarise from about paragraph 34 of the judgment onwards:
- i) There was a serious issue to be tried that the Defendants had been misusing the rights of the Claimant acquired pursuant to the contracts. That serious issue extending to the alleged communality of action on the part of the Defendants.
  - ii) Given the lack of argument addressed to damages as an adequate remedy, the balance of convenience favoured an order restraining the First to Third Defendants from using or inciting the use of the Proptyle websites and so breaching the assignment agreement in the manner in which they were alleged to have done previously. This led to the injunction at paragraph 3 a. of the injunction order.
  - iii) No interim injunction would be made regarding the deliver up of software or related documentation because of a dispute about whether such documents existed or might have to be created.

- iv) The confidential information injunction was made because there was a serious issue to be tried that the Defendants had been developing the Proptyle websites in a manner “contrary to the rights acquired by the claimant” and so, if the balance of convenience favours it, an injunction should be granted.
  - v) The First to Third Defendant argued that there was no threat or evidence of a threat in relation to confidential information and such an injunction should only lie where the party seeking it can identify the relevant information and why an obligation of confidentiality attaches to that information. Definition was essential so that the party subject to the injunction knew what was permitted and what was not permitted under threat of contempt.
  - vi) This argument was met by the court using the contractual definitions: the court rejected the idea that an order within the terms of the contracts would be too uncertain.
75. It will be seen that the orders were not made because of an allegation that any particular confidential information had been disclosed (or even existed) but because there was a serious issue to be tried that the Defendants had developed the websites contrary to the Claimant’s rights under the contracts. The subject matter of the Claimant’s rights which the injunction was designed to protect was not confidential information as usually understood, if it had been then, in my view, Mr Shirazi’s arguments would have had more traction, but the software and related IP necessary for the due operation of the proposed and developed website: what the Claimant had been promised under the contracts.
76. I can see that this is much more clearly the case under the definitions contained in the Assignment Agreement rather than the Consultancy Agreement but these distinctions did not figure in the judgment granting the interim injunction and I am not concerned with the re-argument of that application but rather whether the basis for it, or any significant part of the basis for it, has changed so as to trigger the Claimant’s *Speedier Logistics* duty.
77. In those circumstances I agree substantially with Mr Goodkin. The gist of the APOC is the same as the substance of the case which persuaded the court to grant the interim injunctions and while it has now been categorised without reference to the phrase “confidential information”, this is still a case about the Defendants having acted “contrary to the rights acquired by the claimant”.
78. In my judgment, therefore, the Claimant is not subject to the *Speedier Logistics* obligation as a result of its case being set out in the APOC rather than the case as presented to the court who granted the injunction because in relevant and operative substance the claims are the same and the application to have the interim injunction discharged is dismissed.

### Conclusion

79. Save to the limited extent found above, the application dated 18 May 2023 is dismissed.