SPL Guernsey ICC Limited et al & Moore Stephens **JUDGMENT 03/2014**
Royal Court
13th January, 2014

Defendant's Application for summary judgment/strike out/removal of parties.

Approved Text
13.01.2014

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

(1) SPL GUERNSEY ICC LIMITED
(2) SPL PRIVATE FINANCE (PF1) IC LIMITED
(3) SPL PRIVATE FINANCE (PF2) IC LIMITED
(4) SPL FINANCE OPPORTUNITIES (PF3) IC LIMITED
(5) SPL STRUCTURED FINANCE (PF4) IC LIMITED
(6) SPL ARL PRIVATE FINANCE (PF5) IC LIMITED
(7) [REMOVED]
(8) SPL BMS PRIVATE EQUITY (BM2) IC LIMITED
(9) SPL PRIVATE EQUITY (PE1) IC LIMITED
(10) SPL PARALLEL PRIVATE EQUITY (PE2) IC LIMITED
(11) SPL INTEGRATED FINANCE (PE3) IC LIMITED
(12) SPL PRIVATE MARKETS FOCUS (PE4) IC LIMITED
(13) SPL REAL ESTATE 1 (RE1) IC LIMITED
(14) SPL REAL ESTATE 2 (RE2) IC LIMITED
(15) SPL REAL ESTATE FINANCE (RE3) IC LIMITED
(16) SPL SUSTAINABLE OPPORTUNITIES (SO1) IC LIMITED
(17) SPL SUSTAINABLE OPPORTUNITIES (SO2) IC LIMITED
(18) SPL SUSTAINABLE FINANCE (SO3) IC LIMITED
(19) SPL TREASURY (AT1) IC LIMITED

Plaintiffs

-and-

MOORE STEPHENS

Defendant

Defendant's Application for summary judgment/strike out/removal of parties

Date of hearing: 18th October 2013

Judgment handed down: 13th January 2014

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Defendant: Advocate T W McGuffin
Counsel for the Plaintiffs: Advocate P Richardson

Cases, Texts & Legislation referred to:

The Royal Court Civil Rules, 2007
Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co EC [2013] EWCA Civ 1169
The Incorporated Cell Companies Ordinance, 2006
The Companies (Guernsey) Law, 2008
Silver Falcon Enterprises Ltd v International Hellenic Operations Ltd (unreported, 19 and 20 October 1994)
IFS Investments Limited v Manor Park (Guernsey) Limited [2003-04] GLR 308
Sandwith v Falla (unreported, 5 June 2013)
Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch)
Trinity Investments Limited v Long Port Properties Limited (unreported, 6 July 2001)
The Royal Court Civil Rules, 1989
Tchenguiz v Investec Trust (Guernsey) Limited (unreported, 26 June 2013)
Jefcoate v Spread Trustee Company Limited (unreported, 17 April 2013)
Ferbrache v C & R Homes (Guernsey) Limited (unreported, 27 January 2010)
Chitty on Contracts, 31st ed.
The Civil Procedure Rules 1998
Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2006] EWCA Civ 661
Swain v Hillman [2001] 1 All ER 91
E D & F Man Liquid Products v Patel [2003] EWCA Civ 472

Introduction

1. By an Application dated 14 June 2013, the Defendant seeks summary judgment pursuant to rule 19 of the Royal Court Civil Rules, 2007 against the First, Eighth, Ninth, Tenth, Eleventh, Twelfth, Sixteenth, Seventeenth and Nineteenth Plaintiffs. In the alternative, the Application seeks the removal of those parties pursuant to rule 37 or, in the further alternative, that references to them in the Cause be struck out pursuant to rule 52. In summary, the Defendant has submitted that there is no case pleaded against it seeking any relief and, as such, these nine Plaintiffs should not continue as parties to the action.

2. At the conclusion of the hearing on 18 October 2013, I reserved judgment. Before I had had an opportunity to give judgment, Advocate McGuffin, who has appeared on behalf of the Defendant, lodged a Supplemental Written Submission dated 4 December 2013, drawing attention to a decision of the Court of Appeal of England and Wales dated 2 October 2013 (*Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co EC* [2013] EWCA Civ 1169). Advocate Paul Richardson, who has appeared on behalf of the Plaintiffs, has copied to the Court a letter dated 10 December 2013 addressed to Advocate McGuffin in which he offers his comments on this course of action. Having reviewed these comments, I do not consider it necessary to resume the hearing for further oral submissions. As a result of these developments, this judgment has been further delayed, for which I apologise.

Background

3. The Plaintiffs' Cause was tabled on 4 January 2013, when it was placed *inscrite*. The First Plaintiff was incorporated on 21 December 2006 as an incorporated cell company under the Incorporated Cell Companies Ordinance, 2006. During the course of the following 12 months, the Second to Nineteenth Plaintiffs were incorporated as cells of the First Plaintiff, all in accordance with the provisions of the 2006 Ordinance. The Defendant is a partnership carrying on business as auditors.

4. The Plaintiff's Cause alleges that the Defendant, as their auditors for the year to 31 March 2008, owed duties to the Plaintiffs to exercise reasonable care and skill in planning and carrying out the audit, to conduct the audit in accordance with the International Standards on Auditing (UK and Ireland) and in such a manner that it would have a reasonable expectation

of detecting any material misstatement in the financial statements of the Plaintiffs, and to explain to the Plaintiffs, in the event that any material misstatement was detected, the basis of, and the reasons for, concluding that a material misstatement existed, its nature and extent, and the parts of the business to which it related. It particularises the breaches of those duties arising from the financial statements materially over-stating "*the value of certain assets held by certain*" of the cells, ie, some of the Second to Nineteenth Plaintiffs and explains how this has resulted in the loss and damage pleaded at paragraph 67 as follows:

> "*In the premises, the Company and the Cells have suffered the following loss and damage:*
>
> a. *RE1 and RE2 have each lost around £1,324,703 on the Lonscale notes which they purchased after 31 October 2008 (attributing recoveries made under the Disposal Agreement to those investments on a pro rata basis).*
>
> b. *RE3 has lost £1,100,000, being the full amount which it lent to Nice Group Limited, none of which has been repaid.*
>
> c. *Additional management and performance fees (the quantification of which will be the subject of expert evidence following disclosure) which were paid by the cells as a consequence of the over valuation of the investments made in the Ship Loan Notes, Nice and Lonscale.*"

The prayer then claims on behalf of the Plaintiffs "*£3,749,406 as aforesaid or such other such or sums as the Court thinks fit*", "*Additional management and performance fees as referred to in paragraph 67c*", interest and costs.

5. The Defences were tabled on 5 April 2013. The Defendant's primary case is that its duties are derived from its retainer and the terms thereof and that there have been no breaches of duty. It comprehensively denies that the Plaintiffs have suffered the alleged or any loss as a result of any breach of duty. Paragraph 67.4 of the Defences criticises paragraph 67c of the Cause for its lack of particularity. In the alternative, the Defendant advances contributory fault, relief from liability under section 522 of the Companies (Guernsey) Law, 2008, or limitation of liability under the terms of its retainer pursuant to what has been referred to as its Engagement Letter.

6. By agreement between the parties, the Seventh Plaintiff, SPL Secured Venture Finance (PF6) IC Limited has been removed as a party. This occurred following an application dated 10 April 2013, although Advocate Richardson has queried why this issue was not addressed in correspondence before making that application. The basis was that there is no mention of that incorporated cell in the body of the Cause and no claim advanced by it against the Defendant. That application was in very similar form to the present Application in respect of the nine Plaintiffs now mentioned.

7. The parties also corresponded about paragraph 67c of the Cause, resulting in Advocate Richardson writing to Advocate McGuffin on 1 May 2013 agreeing that the Plaintiffs would, once the relevant figures had been calculated, "*provide further particulars as to the quantification of the management fees and performance fees*" referred to therein. That further information was provided under cover of a letter dated 4 June 2013.

8. The further information on paragraph 67c of the Cause sets out estimated losses totalling £1,337,279 grouped into three heads relating to valuations of the Lonscale notes, the investments in Nice Group Limited and the Nice PF3 Loan Agreement and the investments in the Ship Loan Notes. Of those three paragraphs, the first refers only to the Third to Sixth and Thirteenth and Fourteenth Plaintiffs, the second refers only to the Fourth and Thirteenth to

Fifteenth Plaintiffs, and the third refers only to the Second to Sixth and Eighteenth Plaintiffs. Because no losses have been mentioned in respect of any of the First, Eighth to Twelfth, Sixteenth, Seventeenth and Nineteenth Plaintiffs, the Defendant has brought its present Application.

9. Two brief Affidavits of Lance Spurrier, a partner of the Defendant, have been filed in support of the Application, dated 14 June and 13 August 2013 respectively, the later one effectively replacing the earlier one so as to comply with the requirements of rule 21 of the 2007 Rules. In response, Advocate Richardson swore an Affidavit on 6 September 2013, exhibiting the Engagement Letter dated 1 September 2008, highlighting the first sentence of clause 32:

> "*The Limit of Liability [as defined in clause 31] shall be allocated between you and any Addressees in such proportion as you shall agree.*"

and further explaining that the Defendant charged a single fee for the totality of its work without distinguishing between the incorporated cell company and its individual cells, also exhibiting examples of the invoices rendered. The final piece of evidence is an Affidavit filed on behalf of the Defendant sworn by Helena Lavin, a colleague of Advocate McGuffin, on 13 September 2013, exhibiting a letter before action dated 23 December 2011 from Advocate Richardson to the Defendant setting out the basis of the Plaintiffs' claims, the response dated 26 April 2012 and the documents resulting from company searches in respect of SPL China AME Energy (NR1) IC Limited, SPL Fine Wine (NR2) IC Limited and SPL Global Forestry (NR3) IC Limited.

Discussion

10. In many respects, this is rather a technical application, turning as it does on the nature of pleadings. Before considering the bases on which the Defendant seeks the relief it does of no longer having to face claims from the nine Plaintiffs mentioned, I can put the arguments into context by referring to rule 10(2) of the 2007 Rules, which provides:

> "*The cause shall contain*
>
> *(a) a statement of the material facts on which the plaintiff relies for his claim, but not the evidence by which those facts are to be proved, and*
>
> *(b) a statement of the relief sought (including, where damages are claimed, particulars of the amount thereof so far as reasonably possible).*"

In that vein, Advocate McGuffin, in his Supplemental Written Submission of 4 December 2013, has drawn attention to some passages from the judgment of Moore-Bick LJ in the *Credit Suisse* case (*supra*), and especially what was stated at para. 17):

> "*Particulars of claim are intended to define the claim being made. They are a formal document prepared for the purposes of legal proceedings and can be expected to identify with care and precision the case the claimant is putting forward. They must set out the essential allegations of fact on which the claimant relies and which he will seek to prove at trial, but they should also state the nature of the case that is to be made in order to inform the defendant and the court of the basis on which it is said that the facts give rise to a right to the remedy being claimed.*"

11. In his letter of 10 December 2013 responding to the points made, Advocate Richardson has questioned the timing of making reference to this English case. It is fair to say that it appears that it could have been drawn to my attention at the hearing on 18 October 2013. However, that is not a good reason to disregard the judgment or Advocate McGuffin's submissions on

it, but the lateness of those submissions is something to which reference might be had when dealing with any question about the costs of the Application. That said, the passage to which I have just referred neatly summarised exactly how I regard the effect of rule 10, albeit His Lordship sets it out more eloquently than I would have been able to.

12. Advocate Richardson has further commented that the decision is distinguishable. The claimant had sought and obtained summary judgment on the basis of a provision in an aircraft lease that had not been pleaded and the first occasion on which the claim on the basis of that provision had been raised was in the skeleton argument in support of the application. The Court of Appeal took the view that the claim made by the claimant in that case was confined to a claim under clause 18.3 of the lease and not clause 18.4, which was the provision on which the granting of summary judgment was founded. In the present case, Advocate Richardson has submitted that the Plaintiffs are pursuing a breach of duty claim and that it is put on the contractual and/or tortious basis. The Cause refers at paragraph 4 to the Defendant's appointment as auditor and repeats the reference to that appointment when setting out the duties owed in paragraph 58. Although Advocate Richardson acknowledged that the pleading might have been more explicit than it has been, he has referred (albeit giving an incorrect citation) to the principle that a lack of particularity alone is not regarded as a ground for striking out a pleading, or a part thereof, where it can be remedied by a request for necessary particulars. This is clear from the extracts from *The Supreme Court Practice* to which reference was made in *Silver Falcon Enterprises Ltd v International Hellenic Operations Ltd* (unreported, 19 and 20 October 1994), which were cited with approval and further explained in para. 33 of *IFS Investments Limited v Manor Park (Guernsey) Limited* [2003-04] GLR 308.

13. The Defendant has put its Application on the alternative bases of seeking summary judgment, striking out, or having the nine Plaintiffs removed as being unnecessary parties. I will describe briefly the applicable tests before going on to comment on how they affect the Defendant's assertion that the nine Plantiffs concerned have not pleaded any cause of action calling for a remedy to be awarded against it.

Test for summary judgment

14. By virtue of rule 19(2)(a) of the 2007 Rules:

> "*The grounds of the application for summary judgment shall be that-*
>
> *(a) the plaintiff has no real prospect of succeeding on the claim or issue, …*
>
> *and there is no other compelling reason why the claim or issue should be disposed of at a trial.*"

This test was expanded upon in *Sandwith v Falla* (unreported, 5 June 2013) by reference to para. 24.2.3 of the commentary to Part 24 in the CPR, which I will not repeat here, and the summary of the principles to apply given by Lewison J (as he then was) in *Easyair Limited (t/a Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch) (at para. 15), which I do consider helpful to set out in this judgment because I have been guided by them:

> "*The correct approach on applications by defendants is, in my judgment, 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] 2 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 [2007] FSR 63;

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. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that it is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

15. Insofar as Advocate Richardson submitted that the test to apply is that derived from *Trinity Investments Limited v Long Port Properties Limited* (unreported, 6 July 2001), namely that the Court has to be satisfied that "*there is no fairly arguable point*", I note that this was a case decided under the Royal Court Civil Rules, 1989, when a different rule for summary judgment existed and so I am not bound to follow it. Instead, I prefer to apply the simple test of whether the case for these Plaintiffs is "*bound to fail*", to which I had referred in *Tchenguiz v Investec Trust (Guernsey) Limited* (unreported, 26 June 2013).

Test for striking out

16. In the *Silver Falcon* case (*supra*), the Court of Appeal accepted that striking out a pleading or a part thereof, now pursuant to rule 52(2)(a) of the 2007 Rules for the reason that it discloses no reasonable grounds for bringing an action requires an applicant to demonstrate that the

claim made is "*unarguable*". The Court is required to consider only the allegations made in the pleadings and identify whether a cause of action with some chance of success exists (see, eg, the analysis in the *IFS Investments* case (*supra*, at paragraphs 19-33)).

17. Further or in the alternative, the Defendant has relied on the pleading being an abuse of the Court's process or otherwise likely to obstruct the just disposal of the proceedings (rule 52(2)(b)). There is a degree of overlap with the other bases on which the Application is advanced here, but Advocate McGuffin has invited me to consider whether permitting parties to maintain claims where no loss is alleged and where they would continue to have the obligations placed on them pursuant to the 2007 Rules for no apparent reason, eg, giving disclosure, amounts to such an abuse or will otherwise interfere with the just disposal of the real dispute between the other Plaintiffs and the Defendant. In effect, he has argued that Advocate Richardson has unnecessarily overloaded the Cause with parties.

Test for removal of party

18. Rule 37(1)(a) of the 2007 Rules enables the Court to order that "*any person who has been improperly or unnecessarily made a party, or who has ceased to be a proper party, shall cease to be a party*". In commenting on an application brought under the same wide-ranging heads as the Defendant's present Application, the Bailiff said (at para. 20 of *Jefcoate v Spread Trustee Company Limited* (unreported, 17 April 2013) that it added nothing to the tests in respect of summary judgment and striking out. I agree with that approach, which is why I will deal generally with the Application because the arguments advanced seem to me to apply interchangeably to each of the rules under which the Application has been made.

Cause of action and relief

19. This Application begs the questions of what is in dispute and who are the proper parties to the action. Put another way, if any one of the nine Plaintiffs referred to in the Application were to "win" the case, what would the consequence be?

20. Taking the pleadings as a whole, this is clearly a dispute alleging breach of duty. The source of the duties it is alleged were breached may well be the terms of the Defendant's retainer, which is how paragraph 58 can be read, but it is potentially open to the Plaintiffs to argue that they also exist in tort. The pleading of these causes of action may not have been spelt out as clearly as it might have been, but the way in which the Defendant has put its Defences demonstrates that it has understood the case being pursued against it by reference to the terms of its retainer and in tort (see paragraph 58 of the Defences). The Plaintiffs then join issue on the terms of the Engagement Letter in their *Replique*.

21. This is not, in my judgment, a case like the *Credit Suisse* case (*supra*) where a different basis of the claim is being advanced without having been addressed on the face of the pleadings. The Cause contains the material facts on which the Plaintiffs rely and states the relief sought. If perceived inadequacies remain, particularly as regards detail, they can be addressed by requests for further information. I consider the issue turns more on whether or not the Cause discloses any cause of action on behalf of the Plaintiffs mentioned by which those Plaintiffs seek some relief from the Defendant.

22. It is obvious that a person can be named in a pleading without being made a party to the action. Advocate McGuffin has analysed the Plaintiff's Cause and identified that the Eighth, Sixteenth and Seventeenth Plaintiffs are mentioned only once in paragraph 61(d) and then simply in the context of the dates when the Defendant completed each cell's audit. The Ninth to Twelfth Plaintiffs are not mentioned specifically at all in the body of the pleading, appearing solely amongst the list of Plaintiffs. The Nineteenth Plaintiff is described in paragraph 5(f) as "*a treasury cell*" and is referred to thereafter in that capacity by reference to

what that cell did as it affected the dealings of the operational cells. It is appropriate to set out the role played by, eg, the Nineteenth Plaintiff, because that forms part of the material facts, but just because a person is named does not mean it has a cause of action against the Defendant.

23. All but one of the Plaintiffs were mentioned in the Engagement Letter of 1 September 2008 (under their previous names). That letter was addressed to the Directors of the First Plaintiff and listed the incorporated cells in an Appendix. The affidavit evidence of Helena Lavin deals with some of the cells mentioned in that Appendix, in respect of which the Defendant's audit services were retained, but which have not been included amongst the list of Plaintiffs. There was no evidence on behalf of the Plaintiffs not otherwise mentioned in the body of the cause, distinguishing between their positions and that of the three cells dealt with in Ms Lavin's Affidavit.

24. Advocate McGuffin submitted that the different treatment of the three cells which had not been included as Plaintiffs showed that the nine Plaintiffs mentioned in the Application should similarly have been omitted as parties. Advocate Richardson's response was simply that omitting these cells from the Cause is not determinative of the issue of whether other Plaintiffs have been properly included. I agree that it is not determinative, but regard it as a factor to take into account when considering Advocate Richardson's submissions about the way the Plaintiffs mentioned have an interest in the proceedings as parties. In a similar manner, I can bear in mind that the Seventh Plaintiff was removed as a party by agreement, but the position of that Defendant does not automatically mean that the same outcome follows for those Plaintiffs who are not mentioned in the body of the Cause. The Seventh Plaintiff may have also had a valid claim but chosen not to pursue it further, perhaps in the interests of keeping its costs to a minimum. I certainly do not regard that Plaintiff's decision as amounting to any concession on behalf of other Plaintiffs that they are wrongly pursuing the Defendant.

Nominal damages

25. Advocate Richardson further submitted that, even if there was no claim for substantial damages, whilst acknowledging that the Cause did not plead any specific elements of recovery sought by the nine Plaintiffs which are the subject of the present Application, they had valid causes of action for breach of contract and/or in tort and, as such, would be entitled to invite the Court to award nominal damages. In doing so, he has relied on the approach outlined by this Court in *Ferbrache v C & R Homes (Guernsey) Limited* (unreported, 27 January 2010), which in turn referred to a passage from *Chitty on Contracts*, now being para. 26-009 in its 31st ed.:

> "*Whenever the defendant is liable for a breach of contract, the claimant is in general entitled to nominal damages although no actual damage is proved; the violation of a right at common law will usually entitle the claimant to nominal damages without proof of special damage. Normally, this situation arises when the defendant's breach of contract has in fact caused no loss to the claimant, but it may also arise when the claimant, although he has suffered loss, fails to prove any loss flowing from the breach of contract, or fails to prove the actual amount of his loss. A regular use of nominal damages, however, is to establish the infringement of the claimant's legal right, and sometimes the award of nominal damages is "a mere peg on which to hang costs".*"

26. As a matter of principle, I accept that, if the Plaintiffs mentioned have a valid claim for breach of contract and/or in tort, then they are entitled to pursue that claim to trial and invite the Court to award nominal damages in whatever amount is appropriate. Of course, if the amount any such Plaintiff actually recovers falls below the Petty Debts Court limit, there may be costs consequences arising, but that would be an issue for argument on another occasion. To that

extent, Advocate McGuffin's submission that the participation of these Plaintiffs is "*pointless and of no commercial value to them*" is not, in my view, a sound argument for allowing the Defendant's Application. The key question is whether these Plaintiffs have actually pleaded their claims because, if they have, then the grounds for summary judgment, strike out or removal do not exist.

Disclosure obligations of Defendant

27. In reply to Advocate Richardson's submission that the Application was a futile exercise because it would not narrow the issues in dispute between the Plaintiffs and the Defendant, Advocate McGuffin raised the issue of the extent of the Defendant's disclosure obligations. There was no evidence in relation to this issue, however, the argument has been put on the inference that the fewer the number of parties, inevitably the fewer documents would fall to be disclosed. In this regard, I prefer the submission made by Advocate Richardson on the basis of the contrary inference, namely that all the documents in question would still fall within the Defendant's disclosure obligations because of the way in which the Defendant has put its case. Without descending into detail and subject to the way in which the evidence will be developed at trial, it seems that the Defendant approached its auditing task at least in part in an holistic manner rather than recognising that each of the incorporated cells is a distinct legal person from the incorporated cell company and each other cell. Accordingly, on the basis of the evidence before me, I cannot say that the full suite of documents held by the Defendant (and possibly by each of the Plaintiffs) will not fall into the description of document falling within standard disclosure under rule 65(4) of the 2007 Rules, especially when those documents are or have been in the parties control.

28. For that reason, insofar as the Defendant has sought to rely on it, I reject the contention that granting its Application will reduce the disclosure exercise by approximately 50% and doubt it would make much difference at all. In any event, this would not be directly relevant as to whether any of the tests applicable to the Application is satisfied, and so, at best, is a factor to take into account once that hurdle has been surmounted, having regard to the overriding objective in rule 1 of the 2007 Rules.

Conclusions

29. Taking pleading points seldom finds favour with the Court. In an appropriate case, they can be well-made points that help to clarify the nature of the dispute between the parties. As I have already indicated, I commend the comments of Moore-Bick LJ in the *Credit Suisse* case (*supra*) as accurately describing the purpose of pleading claims in this jurisdiction.

30. The Plaintiffs' Cause is not pleaded as explicitly as it might otherwise be. That in itself is not a ground on which to award summary judgment against the nine Plaintiffs concerned. I could only do so if satisfied that there is, on the pleading as it stands, no real prospect of each of those Plaintiffs succeeding in its claim against the Defendant. If put on the alternative basis of striking out the claims brought by them, I would need to be satisfied that each of those claims is "*bound to fail*". I have not overlooked the Application pursuant to rule 37, but it really adds nothing to what has already been said. However one looks at it, the hurdle that the Defendant has to surmount to succeed on its Application is a high one and, in my judgment, it has failed to do so.

31. In order to ascertain what is alleged against the Defendant by each of the nine Plaintiffs, I must construe the Cause (and also the *Replique*) as a whole to identify the case pleaded against the Defendant. In the opening paragraphs of the Cause, reference is made to the First Plaintiff, as the incorporated cell company, and to the other Defendants being incorporated cells, with the Defendant having been appointed as auditor of each of those entities. The fact that the Defendant was appointed as auditor under the same arrangements to other entities, which are not parties to these proceedings does not, in my opinion, assist the Defendant. Any

of the nine Plaintiffs who have instituted these proceedings could, no doubt for a variety of reasons, have chosen not to have done so. However, they have each chosen to sue the Defendant and their causes of action are interwoven with those of the other Plaintiffs into this single pleading. The linkage between the First Plaintiff and its cells is spelt out in paragraph 5 of the Cause. Because of setting out that linkage in that fashion, I believe it is just about permissible to plead the remainder of the case in the general terms used.

32. Paragraph 58 of the Cause pleads to duties owed by reference to the Defendant's "*appointment as auditor of the Company and the Cells*". I accept that such an appointment must be regarded as founded in contract, even if that is not spelt out. Either way, the Defendant accepts that the duties pleaded arose from contract and/or in tort. If the Defendant regards the Cause as lacking particularity in this respect, its remedy is to seek further information in respect of what has been pleaded. What the Cause does do, however, is to plead the existence of the duty in respect of each of the nine Plaintiffs concerned.

33. In relation to the breaches of duty alleged, paragraph 59 of the Cause refers to there being material misstatements in the financial statements of the cells, ie, not in respect of the First Plaintiff, with paragraph 61 then containing a general allegation of breach in respect of the planning of the audit in relation to all the Plaintiffs. In the absence of any concession that this allegation does not extend to each of the nine Plaintiffs concerned, for present purposes I can properly regard it as being an allegation of breach that each of those nine Plaintiffs wishes to pursue against the Defendant. On the basis that that duty of care has been advanced as a result of the appointment of the Defendant as auditor of each of the Plaintiffs, as acknowledged, in particular, at paragraph 58.2 of the Defences, the pleading is not so deficient as to disclose no cause of action on behalf of these Plaintiffs.

34. On causation, having regard to the pleadings as they stand and not engaging in any form of mini-trial, which could only take place with the benefit of more evidence than has been adduced thus far, paragraph 65 of the Cause also addresses the alleged failure of the Defendant to comply with its duty in respect of all Plaintiffs. Indeed, at para. 65(b) there is express reference to the timing of the audit in respect of the Nineteenth Defendant. In those circumstances, I am satisfied that the Cause manages to plead a case, albeit in general terms, on behalf of each of the Plaintiffs. As I have said, if the Defendant wishes to have clarification, that can properly be dealt with by requesting it or seeking an order pursuant to rule 60 of the 2007 Rules.

35. The nearest the Defendant got to persuading me that its Application should be granted was in respect of paragraph 67. The further information provided under cover of Advocate Richardson's letter of 4 June 2013 was identified by Advocate McGuffin as being the catalyst for this Application. However, I take the view that it was premature to have launched this Application before asking Advocate Richardson on behalf of the Plaintiffs to explain what this further information in relation to pleaded loss meant in respect of those Plaintiffs which have apparently suffered no quantifiable loss. The absence of any communication prior to making the Application was commented on in Advocate Richardson's letter of 17 June 2013, yet never properly resolved by either side. It would, I suspect, have been a simple enough step to have proposed to flesh out the pleading in paragraph 67 to have clarified the position of those Plaintiffs. Instead, both sides have rather dug their heels in and forced the issue through to the hearing of this Application. I do not regard that approach as entirely consistent with rule 1(4) of the 2007 Rules ("*The parties are required to help the Court to further the overriding objective*"). I am left with the impression that this particular procedural battle should have been capable of being resolved through common sense agreement. The words of Mummery LJ at para. 12 of *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661 offer sound guidance:

> "*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 risk of injustice.*"

Applications to the Court should only need to be made when the parties have been unable to resolve any differences through discussions, whether on correspondence or face to face.

36. Because the cases on behalf of the nine Plaintiffs mentioned in the Application are not, in my judgment, bad in law, and can properly be put into better order through amendment of the pleadings, this Application is dismissed. Although there is clearly more substance to the specific losses claimed on behalf of the other Plaintiffs, I cannot regard the allegations made against the Defendant on behalf of these nine Plaintiffs as being fanciful. Instead, using the styles described in *Swain v Hillman* [2001] 1 All ER 91 and *E D & F Man Liquid Products v Patel* [2003] EWCA Civ 472, they appear to me to be realistic, carrying some degree of conviction, even if they might only result in nominal damages. As a consequence of that conclusion, in respect of the summary judgment element of the Application, I do not need to consider whether there is any other compelling reason why the case should not be disposed of at trial.

37. Although the nine Plaintiffs in question have successfully resisted this Application, I would encourage Advocate Richardson, if he is so minded, to take steps to amend the Plaintiffs' pleadings to address any allegations the Defendant has that they continue to be defective. In that regard, I have borne in mind the passage in para. 3.4.2 of the English *Civil Procedure Rules*:

> "*Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (In Soo-Kim v Youg [2011] EWHC 1781 (QB)).*"

It would assist the efficient progression of this action if this type of matter could be dealt with by agreement of the parties but, if that proves impossible, the Court stands ready to determine any further appropriate procedural applications.

38. Costs in respect of this Application are reserved, at least until the case management conference.

