Neutral Citation Number: [2019] EWHC 1516 (Ch)

Case No: CR-2017-007339

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

CHANCERY DIVISION

IN THE MATTER OF ONE BLACKFRIARS LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice, Rolls Building
Fetter Lane, London EC4A 1NL
Date: 18 June 2019

Before :

John Kimbell QC
(sitting as a Deputy Judge of the High Court)

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Between :

(1) ADRIAN CHARLES HYDE **Applicants**
(2) KEVIN ANTHONY MURPHY
(AS JOINT LIQUIDATORS OF ONE BLACKFRIARS LIMITED)

- and -

(1) ANTONY DAVID NYGATE
(IN HIS CAPACITY AS REPRESENTATIVE OF THE ESTATE OF JAMES JOSEPH BANNON, FORMER JOINT ADMINISTRATOR OF ONE BLACKFRIARS LIMITED APPOINTED UNDER CPR 19.8(1))
(2) SARAH MEGAN RAYMENT

(AS FORMER JOINT ADMINISTRATORS OF ONE BLACKFRIARS LIMITED)

Respondents

Simon Davenport QC and Tom Poole (instructed by **Humphries Kerstetter LLP**) for the **Applicants**
Justin Fenwick QC and Ben Smiley (instructed by **Mayer Brown International LLP**) for the **Respondents**

Hearing date: 24 May 2019

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand not shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

A. Introduction

1. This is an application by the joint liquidators (the '**JLs**') of One Blackfriars Ltd ('**the Company**') to amend their claim against the former Administrators of the Company (the '**FAs**'). The First Respondent is the representative of the estate of Mr Bannon, who was the joint administrator of the Company along with the Second Respondent. Mr Bannon died on 12 May 2018.

2. An earlier application to amend the Particulars of Claim was made at a case management conference on 9 November 2018. That application was unsuccessful for the reasons set out in my judgment [2018] EWHC 3267(Ch) of 28 November 2018.

3. This application to amend is made under an application notice issued on 8 April 2019. It is accompanied by a draft amended particulars of claim ('**DAPOC**').

4. Many of the amendments are not objected to by the FAs. I was provided with a helpful table identifying the amendments to which objection was taken (in whole or in part) and which were consented to. The proposed amendments to paragraphs 4, 5, 6, 10-12, 16(1), 26,41, 44-46A, 47-49, 50-53, 54(1)-(4), 55, 56, 57 and the Prayer are not opposed.

5. Between the last application and this application disclosure has taken place based on the existing pleadings. This has clearly informed some of the amendments. The FAs have a few outstanding complaints about some of the amendments they have consented to. These have been set out in correspondence and they have reserved their right to serve Part 18 requests but I am satisfied that it is appropriate to grant permission for the unopposed amendments pursuant to CPR 17.1(2)(b).

6. The amendments which are opposed by the FAs are those which set out a case that the FAs were negligent in failing to pursue a rescue of the Company as a going concern under paragraph 3(1)(a) of Schedule B1 to the Insolvency Act 1986 ('**Objective 1'**).

7. Paragraph 55C of the DAPOC pleads that:

> *"Expert evidence will show that … the Company would have secured a joint venture partner and the finance necessary to continue to trade until completion of the Site"*.

8. Paragraph 55E pleads that the loss arising from the negligent failure to pursue Objective 1 is £250 million. This may be contrasted with the more modest claim in the current Particulars of Claim ('**POC**') which is in following terms:

> *"53. ... The Respondents' breaches as aforesaid resulted in the sale of the Site at substantially below the best price reasonably obtainable.*
>
> *54. The Applicants say that this price was at least £115,000,000 so that the Company (and by it the creditors) sustained a loss of at least £37,600,000 or such other sum as the Court may find"*

9. The FAs did not seek to resist the amendments which relate to the Objective 1 claim in on the ground that they did not have reasonable prospects of success.

10. The FAs object to all the amendments which relate to the Objective 1 claim on two grounds:

(1) The Objective 1 claim is a "new claim" with the meaning of Section 35 (1) of the Limitation Act 1980 and it involves a new cause of action which does not satisfy the condition in Section 35(5) and CPR 17.4 i.e. that it arises out of the same facts or substantially the same facts as are already in issue.

(2) As a matter of general discretion permission should not be granted. The FAs rely on prejudice and the lateness of the application.

11. The JLs accept that if the Objective 1 claim is a new claim which does not meet the requirements of Section 35 of the Limitation Act 1980 and CPR 17.4, then it is statute barred. They do not seek to obtain permission in the form referred to in Mastercard Inc & Others v Deutsche Bahn AG [2017] EWCA Civ 272 at [3] i.e. to introduce a non-statue barred version of the Objective 1 claim without the benefit of 'relation back'.

12. The JLs' application is thus an all or nothing application.

B. Evidence

13. The JLs relied on two witness statements by Toby Starr, the first dated 8 April 2019 ('**Starr 1**') and the second dated 14 May 2019 ('**Starr 2**'). Mr Starr is a solicitor and partner in the firm of Humphries Kerstetter LLP ('**HK**'). The JLs also relied on a witness statement of Adrian Hyde dated 8 April 2019.

14. The FAs relied on a witness statement by Mr Oulton dated 2 May 2019. Mr Oulton is a solicitor at Mayer Brown International LLP ('**MBI**').

C. Statutory context

15. Central to this application is paragraph 3 of Schedule B1 to the Insolvency Act 1986 (the "**IA 1986**"), which provides as follows (with additions in [ ] for the purpose of this Judgment):

> *"(1) The administrator of a company must perform his functions with the objective of—*
> *(a) rescuing the company as a going concern* ["**Objective 1**"], *or*
> *(b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration)* ["**Objective 2**"], *or*
> *(c) realising property in order to make a distribution to one or more secured or preferential creditors* ["**Objective 3**"].
>
> *(2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interests of the company's creditors as a whole.*
>
> *(3) The administrator must perform his functions with the objective specified in sub-paragraph (1)(a) unless he thinks either –*
>
> *(a) that it is not reasonably practicable to achieve that objective, or*
>
> *(b) that the objective specified in sub-paragraph (1)(b) would achieve a better result for the company's creditors as a whole.*
>
> *(4) The administrator may perform his functions with the objective specified in sub-paragraph (1)(c) only if –*
>
> *(a) he thinks that it is not reasonably practicable to achieve either of the objectives specified in sub-paragraph (1)(a) and (b), and*
>
> *(b) he does not unnecessarily harm the interests of the creditors of the company as a whole."*

16. Mr Davenport QC, who appeared on behalf of the JLs, submitted that paragraph 3 of Schedule B1 to the IA 1986 is structured as a hierarchy of objectives with Objective 1 as the paramount objective. Paragraph 3(3) is sufficient to demonstrate, he says, that Parliament clearly intended to prioritize the rescue of the company, or at least its

business, over piecemeal realization of the company's assets for the benefit of secured creditors. Mr Fenwick QC, who appeared for the FAs, did not dispute this.

17. Mr Davenport also submits (and I accept) that the power to pursue the 'lower priority' objectives is made available to the administrator only if an appropriate combination of the conditions listed in subparagraphs (3)(a) and (b), and (4)(a) and (b) are satisfied.

18. Mr Davenport emphasised that the alleged failure of the FAs to obtain a proper valuation of the Site has been at the heart of the claim from the outset. He says that this fundamental criticism of the FAs is a common component to a claim that they failed to pursue Objective 1 and the existing claim in the POC. I accept what Mr Davenport says. However, for companies in administration with a single asset to develop and sell, the choice between Objective 1 and Objective 3 is stark. They are diametrically opposed and mutually exclusive objectives.

19. This can be illustrated by the following comments made by Snowden J in Davey v Money [2018] 766 (Ch) about the alleged failure by the administrators in that case to pursue Objective 1 in respect of a company called Angel House Developments Limited ('AHDL' in the passage below). His comments in my judgment apply equally well to the Company in this case:

> 283. *Before considering the specific complaints in this regard, it is worth identifying clearly what Ms. Davey's case in relation to Objective 1 would have to amount to. The concept of rescuing a company as a going concern is not achieved by successfully realising all of its assets so that distributions of surplus monies can be made to shareholders after paying creditors in full. It connotes the retention of all or a material part of the business of the company together with the restoration of the solvency of the company so that the company can properly continue to trade as a going concern.*
>
> 284. *AHDL was essentially a one-asset company, whose business entirely depended upon owning and managing Angel House. The concept of rescuing AHDL as a going concern would necessarily preclude selling Angel House. As a practical matter there was, moreover, simply no question of achieving Objective 1 by improving trading performance to such an extent that AHDL could generate sufficient cash internally to pay off all its creditors (including Dunbar) or by persuading the creditors (including Dunbar) to agree to waive a substantial proportion of their debts so as to restore the company to solvency. The only way in which Objective 1 could have been achieved was by finding a person or persons willing to recapitalise or refinance AHDL with new money so as to enable the existing debt owed to Dunbar, administration expenses and the unsecured creditors to be paid without selling Angel House.* (my emphasis)

20. The FAs point out by way of a prefatory comment that it is now over eight years since they reported to creditors on 7 December 2010 that in their view the Paragraph 3(1)(c) objective was the only one which was reasonably practicable for them to pursue and that from 7 December 2010 until the exchange of contracts for the sale of the Site on 19 October 2011, Objective 3 was in fact the only objective pursued by the FAs. In these circumstances, they say it is highly surprising that it should have taken over eight years for a fully pleaded case based on a negligent failure to pursue Objective 1 to emerge.

21. The JLs for their part prefaced their submissions by pointing out that when they first suggested amending the POC to add an Objective 1 claim, the FAs consented 'in principle' and then invited the JLs to submit a draft pleading without mentioning any potential objection based on limitation.

22. Whilst these submissions might have an impact on discretion or costs, they are not relevant to the matters of law under the Limitation Act 1980 which I have to decide.

D. Procedural Background

23. The procedural background to this application can be summarised as follows.

23.1 The FAs were appointed on 14 October 2010.

23.2 On 7 December 2010, the FAs declared that Objective 3 was the only one which was reasonably practicable for them to pursue.

23.3 On 19 October 2011, contracts were exchanged for the sale of the Site to St George South London Limited ('**SGSL**').

23.4 The sale completed on 16 December 2011.

23.5 The JLs were appointed in March 2016.

23.6 Pre-action disclosure was given by the FAs in May and July 2016.

23.7 On 4 May 2017, HK sent a Letter of Claim to the FAs. This contained an allegation of failure to rescue the Company as a going concern, at paragraph 90(xxii) in the following terms: "*they failed to consider seriously the proposals*

put forward by both Mirax ('**Mirax**') *and Resolution Property Advisers Ltd* ('**Resolution**') *of repaying the creditors of the Company in order to ensure the Company's return to its shareholders as a going concern."*

23.8 MBI responded on behalf of the FAs in a letter dated 8 September 2017. This included a response to the allegation that there had been a failure to give the proposals of Mirax and Resolution due consideration.

23.9 These proceedings were commenced by the filing of an IA 1986 Application Notice on 3 October 2017.

23.10 The first draft Particulars of Claim were served on 15 January 2018.

23.11 The first hearing of the application took place on 31 January 2018 before Registrar Kyriakides. Directions were given.

23.12 On 29 March 2018, an expert report of Mr Laughton was served by HK on behalf of the JL's in support of the application.

23.13 On 24 April 2018, William Trower QC, sitting as Deputy High Court Judge, granted permission for the application to proceed and directed (at the invitation of the JLs) that a Particulars of Claim be filed and served substantially in the form served in draft by the JLs on 29 March 2018.

23.14 On 1 May 2018, the JLs served the POC.

23.15 Mr Bannon died on 12 May 2018.

23.16 On 29 June 2018, the FAs' Defence was served.

23.17 On 4 July 2018, the FAs served a Part 18 Request.

23.18 On 10 August 2018, the JLs served their Reply. The Reply referred to the possibility of potential refinancing and/or a build out of the Site in accordance with Objective 1 in paragraphs 17(2) and 18(2).

23.19 On 31 August 2018, the JLs served their response to the FAs' Part 18 Request. Response 20 said this:

> *"Because the Respondents did not obtain a valuation they failed to consider whether the site could be refinanced and/or built out in accordance with [Objective 1]".*

23.20 On 23 October 2018, in the course of a discussion in correspondence about the content of the draft List of Issues for the CMC, the JLs served a draft Amended Particulars of Claim which included at paragraph 42(1) an allegation that the FAs were negligent in failing to pursue a corporate rescue. It was said in correspondence by HK that the corporate rescue claim would be the JLs' "*primary case*" at trial.

23.21 On 7 November 2018, the JLs served a revised draft Amended Particulars of Claim.

23.22 On 8 November 2018, MBI confirmed that the FAs consented "*in principle*" to the corporate rescue amendment but pointed out that it was bound to fail because no case on causation and loss was pleaded which corresponded to the corporate rescue case. No point was taken by the FAs on limitation.

23.23 There was a CMC on 9 November 2018. The JLs' application to amend was refused. The order made set out a procedural timetable, including disclosure by 1 February 2019 and witness statements by 12 April 2019. Permission was granted for expert evidence in four fields: insolvency practice, property valuation, planning, and property sales and marketing. It was directed that the trial be listed in a window commencing on 1 June 2020 with a time estimate of 5 weeks.

23.24 A revised draft APOC was provided to the FAs on 28 February 2019 but with the figures relating to the quantum for the Objective 1 claim left blank. The final and complete version of the draft APOC with all relevant figures was provided on 14 March 2019.

23.25 By letter of 22 March 2019, the FAs made clear that they did not consent to the Objective 1 claim on the grounds of limitation and discretion. The letter also made clear that the FAs did not seek at that stage to resist the amendments on the ground that they did not have a reasonable prospect of success.

23.26 The current amendment application was therefore issued by the JLs on 8 April 2019.

23.27 The parties have consented to the stay of all other procedural directions given at the CMC (including exchange of witness statements, which ought to have taken place on 12 April 2019), pending the outcome of this application.

D. Legal principles

24. Section 35 of the Limitation Act 1980 ("**LA 1980**") provides in relevant part:

> *"(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—*
> *(a)in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and*
> *(b)in the case of any other new claim, on the same date as the original action.*
> *(2) In this section a new claim means …any claim involving either—*
> *(a)the addition or substitution of a new cause of action…*
> *(3)Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, … to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim….*
> *(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.*
> *(5) The conditions referred to in subsection (4) above are the following—*
> *(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action;…"*

25. CPR 17.4 provides in relevant part:

> *"(1) This rule applies where –*
> *(a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and*
> *(b) a period of limitation has expired under –*
> *(i) the Limitation Act 1980…*
> *(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."*

26. It was common ground that there was a four-stage test for the Court to apply when determining whether to grant permission for the disputed amendments. This is derived from Ballinger v Mercer [2014] 1 WLR 3597 at [15] and Diamandis v Willis [2015] EWHC 312 (Ch):

    26.1 **Q1**. Is it reasonably arguable that the opposed amendments are outside the applicable limitation period? If the answer is yes, go to Q2. If the answer is no, then the amendment falls to be considered under CPR 17.1(2)(b) (**Stage 1**).

    26.2 **Q2**. Do the proposed amendments seek to add or substitute a new cause of action? If the answer is yes, go to Q3; if the answer is no, then the amendment falls to be considered under CPR 17.1(2)(b) (**Stage 2**).

    26.3 **Q3**. Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim? If not, the Court has no discretion to permit the amendment (**Stage 3**).

    26.4 **Q4**. If the answer to Q3 is yes the Court has a discretion to allow the amendment. (**Stage 4**).

The issues

27. The first stage is not in issue in this application so the live questions in this case are:

    27.1 Do the proposed amendments constitute a new cause of action? (**Stage 2**)

    27.2 If so, does it arise out of the same or substantially the same facts as are already in issue in the existing claim? (**Stage 3**)

    27.3 If so, should the Court give permission as a matter of discretion? (**Stage 4**)

28. In relation to these questions, the parties referred me to no less than 35 authorities, which together occupied two lever arch files and many more unreported authorities. The existence of some of the unreported decisions is marked only by means of a footnote or precis in *McGee on Limitation*.

29. I derived most assistance from (a) two recent decisions of the Court of Appeal namely: Mastercard v Deutsche Bahn AG [2017] EWCA Civ 272 and Samba Financial Group v Byers and Others [2019] EWCA Civ 416 and (b) Diamandis v Willis [2015] EWHC

312 (Ch) which helpfully draws together and accurately summarises the main Court of Appeal decisions prior to Mastercard and Samba.

30. The four points which I derive from Mastercard are as follows:

30.1 Whether a new claim arises out of the same or substantially the same facts as an existing claim is not a matter of discretion or case management but is a substantive question of law which depends on analysis and evaluation to obtain the correct answer [35] & [36].

30.2 Care needs to be taken with Goode v Martin [2001] EWCA Civ 1559. An important feature of that case is that in order to make out her newly formulated claim, the claimant did not need to plead any additional facts beyond those already in the defence [42].

30.3 Differences in the nature and scope of counterfactual matters between an existing claim and a new claim can amount to a substantial difference for the purpose of Stage 2 as defined above [46].

30.4 An applicant may not generally rely on new facts pleaded in a Reply as being facts already in issue for the purpose of Stage 2 as defined above [64].

31. I reject Mr Davenport's submission that Mastercard is a case which ought to be regarded as being confined to the specialist world of competition law. The four points I have identified above seem to me to be of general application.

32. As to the Samba case, I take the following four points from it:

32.1 It is of critical importance to carry out a careful comparative evaluation of the scope and nature of the facts in issue in the existing claim and the facts alleged in the new claim [49].

32.2 If on evaluation, the new claim is of an entirely different character from the existing claim, the threshold for permission will not be met. Broadly similar allegations, implicitly made or understood will not do [50].

32.3 In the vast majority of cases, what is 'in issue" in an existing claim will usually be determined by examination of the pleadings alone. It will be the primary, and probably the only, source of material for deciding the question [52].

32.4 A fact which the other party may or may not need to plead or respond to is not a fact already "in issue" in the original claim. It is important to recall what was said about the policy underlying Section 35 of the Limitation Act by Hobhouse LJ in Lloyds Bank v Rogers [1997] TLR 154:

> *"The policy of the section was that if factual issues were in any event going to be litigated between the parties, the parties should be able to rely on any cause of action which substantially arises from those facts." (emphasis added by Floyd LJ)* [57]

33. The helpful assistance on the content of Stages 2 and 3 from Diamandis which I set out below has to be read in light of Mastercard and Samba:

Stage 2

"[48] *As regards Stage 2 ('new cause of action') from the recent analysis of the authorities by Longmore LJ in Berezovsky v Abramovich §§59 to 69, the following principles arise:*

(1) The "cause of action" is that combination of facts which gives rise to a legal right; (it is the "factual situation" rather than a form of action used as a convenient description of a particular category of factual situation: Lloyds Bank v Rogers at 85F and Aldi Stores at §21).

(2) Where a claim is based on a breach of duty, whether arising in contract or tort, the question whether an amendment pleads a new cause of action requires comparison of the unamended and amended pleading to determine (a) whether a different duty is pleaded (b) whether the breaches pleaded differ substantially and (c) where appropriate the nature and extent of the damage of which complaint is made: Darlington at 370C-D and see also Berezovsky §59. (Where it is the same duty and same breach, new or different loss will not be new cause of action. But where it is a different duty or a different breach, then it is likely to be a new cause of action).

(3) The cause of action is every fact which is material to be proved to entitle the claimant to succeed. Only those facts which are material to be proved are to be taken into account; the pleading of unnecessary allegations or the addition of further instances does not amount to a distinct cause of action. At this stage, the selection of the material facts to define the cause of action must be made at the highest level of abstraction. Berezovsky §60 citing Cooke v Gill (1873) LR 8 CP 107 and Paragon Finance.

(4) In identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading: Berezovsky §§61 and 62

(5) The addition or substitution of a new loss is by no means necessarily the addition of a new cause of action: Berezovsky §64 and Aldi §26 . Nor is the addition

of a new remedy, particularly where the amendment does not add to the "factual situation" already pleaded: Lloyds Bank v Rogers per Auld LJ at 85K.

Stage 3

[49] *As regards stage 3 ("arising out of the same or substantially the same facts") a number of points emerge, particularly from Ballinger at §§34 to 38*

(1) "Same or substantially the same" is not synonymous with "similar".

(2) Whilst in borderline cases, the answer to this question is or may be substantially a "matter of impression", in others, it must be a question of analysis: Ballinger §§35 and 36.

(3) The purpose of the requirement at Stage 3 is to avoid placing the defendant in a position where he will be obliged, after the expiration of the limitation period, to investigate facts and obtain evidence of matters completely outside the ambit of and unrelated to the facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.

(4) It is thus necessary to consider the extent to which the defendants would be required to embark upon an investigation of facts which they would not previously have been concerned to investigate: Ballinger §38. At Stage 3 the court is concerned at a much less abstract level than at Stage 2; it is a matter of considering the whole range of facts which are likely to be adduced at trial: Finlan at §§56 and 57 citing Smith v Henniker-Major at §96.

(5) Finally, in considering what the relevant facts are in the original pleading a material consideration are the factual matters raised in the defence: see Berezovsky §73 and Goode v Martin [2002] 1 WLR 1828 where the Court of Appeal interpreted CPR 17.4(2) so as to produce a just result where an amendment involved the introduction of no new facts. There the facts in question had been raised in the defence, though not in the original statement of claim."

E. Is the Objective 1 claim a new claim for limitation purposes? (Stage 2)

(i) Is there a different approach for amendments to claims under the IA 1986?

34. Mr Davenport's first submission is that he is entitled to rely on a special and more generous amendment rule which applies to insolvency proceedings. He submits that because claims brought pursuant to paragraph 75 of Schedule B1 to the IA 1986 are commenced by means of application notice and accompanying evidence, the Stage 2 enquiry is not confined to comparing the unamended pleading with the draft amended pleading. He says that the Court may look back to the application notice and the

evidence served in support of the application for the purposes of Section 35 of the Limitation Act 1980.

35. I have no hesitation in rejecting Mr Davenport's submission. He was unable to point to any support for his submission in any specialist textbook, commentary or case law.

36. I accept Mr Fenwick's submission that the applicable principle in all proceedings is that described by Jackson LJ in Chandra v Brooke North [2013] EWCA Civ 1559 at [92]:

> *"…[O]nce the claimant serves particulars of claim on a defendant, he pins his colours to the mast as against that defendant. Particulars of claim are normally narrower in their scope than the original claim form. Those particulars then constitute the ongoing claim against that defendant. If the claimant applies to amend as against that defendant, what the court has to do is to compare the original particulars of claim with the proposed amendments. If the claimant is seeking to add a new claim after expiry of the limitation period, he cannot escape from the tentacles of section 35(3) to (5) of the 1980 Act by relying upon the broad wording contained in his original claim form"*

37. The Chandra case of course involved an ordinary Part 7 claim but I can see no reason for treating Part 8 claims or claims under paragraph 75 of Schedule B1 to the IA 1986 any differently. True it is that some insolvency and Part 8 proceedings may proceed to a final hearing without any pleadings at all being served. However, where pleadings have been served and a party wishes to amend them to add a claim which is said to be statute barred, what is being said in Chandra is that the court dealing with that application should not be required to refer back to the originating process. That principle it seems to me must apply whether the originating process is a Part 7 claim form, a Part 8 claim form or an Insolvency Act Application Notice.

38. Furthermore, Mr Davenport did not seek to persuade me that the following was an inaccurate statement of the true position:

> "*Para 75 merely creates a procedural framework in which any breaches of duty or other misfeasance has to be proved in the usual way and pursuant to the normal rules of duty, breach, causation and loss* – see Totty and Moss Insolvency C2-21".

39. For those reasons I reject his submission. The ordinary rule in Chandra applies.

(ii) Would the suggested special test make any difference in this case?

40. Even if Mr Davenport had persuaded me that his special Insolvency Proceedings rule should be applied, it would not in my judgment make any difference in this case in any event.

41. In their Insolvency Act Application Notice issued on 3 October 2017, the JLs sought the following remedy:

> *"A declaration that in negotiating and effecting the sale of the development site 1-16 Blackfriars Road, London, SE1 in December 2011, the Respondents acted negligently and/or in breach of trust and/or in breach of fiduciary duty and/or in breach of their equitable duty of care and/or in breach of statutory duty and/or were otherwise misfeasant within the meaning of paragraph 75(3) of Schedule B1 of the Act"* (my emphasis)

42. The natural reading of the above passage is that all breaches of duty relied upon arise from the way *the sale* of the site *in December 2011* was negotiated and conducted rather than arising from the decision taken a year earlier in December 2010 to pursue Objective 3 (rather than Objective 1 or 2). The two gerunds 'negotiating' and 'effecting' are both clearly intended to be read as attaching to the noun 'sale' which is itself qualified by a definite rather than indefinite article and a date.

43. The application notice goes on to say that the Applicants will rely on evidence to be filed and served no less than 4 days before the date fixed for the hearing and that they will seek an order at the first hearing that "*particulars of claim and defence are to be delivered in accordance with Rule 12.11*". The first hearing date was fixed for 31 January 2018.

44. On 15 January 2018, the JLs filed and served a short witness statement by Adrian Hyde which exhibited a draft Particulars of Claim. The clear intention of proceeding in this way was, it seems to me, that the JLs wished to set out the nature and scope of their allegations in a formal document.

45. I would make the following observations on the structure and content of the draft Particulars of Claim (all of which apply with equal force to the POC served subsequently on 1 May 2018):

    45.1 It pleaded the decision of 7 December 2010 that Objective 1 was not going to be pursued in narrative section B.

45.2 The appointment of CBRE was pleaded in its own section C, suggesting that their role was likely to be the source of a complaint (as indeed is the case).

45.3 There then follows a section D entitled 'The Bidding Process' which listed a series of events culminating in the alleged sale at an undervalue itself.

45.4 The FAs' statutory duties are accurately pleaded in paragraph 30. All three statutory objectives are referred to.

45.5 The very next heading in the pleading for section G is "*Sale at an Undervalue*". The pleading is simple, concise and direct:

> "*The Site was sold for less than the price at which it could reasonably have been sold. On the date of Sale the Site could reasonably have been sold for a price of at least £115 million".*

Paragraph 36 then gives further particulars in support of the sale at an undervalue case.

45.6 The next section of the pleading, section H, is headed "*Breaches of Duty by the Respondents*". Paragraph 38 pleads that the FAs were "*negligent in their conduct of the administration and the sale of the Site as follows*." This is clearly somewhat wider than the application notice. The breaches are then pleaded under six sub-headings:

45.6.1 The Respondents failed to obtain a valuation of the Site;

45.6.2 The Respondents concluded that they should exercise their functions as joint administrators with the objective of achieving the objective specified in paragraph 3(1)(c) of Schedule B1 to the IA 1986;

45.6.3 The Respondents appointed CBRE as sole agents with conduct of the sale;

45.6.4 The Respondents failed to vary planning consent;

45.6.5 The Respondents failed to ensure the Site was appropriately marketed;

45.6.6 The Respondents failed to ensure an appropriate bidding process.

45.7 The last section of the pleading before the Prayer, headed "Causation and Loss" pleads:

> *"By reason of the Respondents' breaches of duty set out above, the Company sustained loss and damage. The Respondents' breaches resulted in the sale of the Site at substantially below the best price reasonably obtainable".*

46. The particulars of breach of duty set out in paragraph 45.6.3 - 6 listed above self-evidently exclusively support a sale of the Site at an undervalue case.

47. The only two parts of section H of the pleading where one might conceivably find a pleading of negligent failure to pursue Objective 1 are those referred to in paragraph 45.6.1 - 2 above.

48. As to the first of these (failure to obtain a proper valuation), it is perfectly conceivable that one of the potential results of failing to obtain a proper valuation at the outset is that the FAs failed thereby to realise that the Company had an asset which could be used to refinance the Company. However, that is not the way the case is pleaded. In paragraph 39 the JLs plead four specific results, all of which are confined to the negligent pursuit of Objective 3 by effecting a sale (at an undervalue).

49. As to the second (the decision to pursue only Objective 3), Mr Davenport is right to submit that by pleading that the FAs were negligent in concluding that Objective 3 was the only result which could be achieved the JLs opened the door to a potential plea that they ought to have concluded that Objective 1 was a realistic and achievable aim. However, this is not what the pleading in fact does. Paragraph 42 is the key paragraph which was clearly intended to define the scope of this part of the JLs' case on breach of duty. It states (with emphasis added):

> *"42. The Respondents were negligent in concluding that only the objective specified in paragraph 3(1)(c) of Schedule B1 could be achieved* ***in that****:*
>
> *(1) They reached this conclusion without having obtained any valuation of the Site.* ***Had a valuation been obtained, this would have indicated that the objective specified in paragraph 3(1)(b) of Schedule B1 could have been achieved****, since the value of the site was sufficient to achieve a distribution to creditors other than first-ranking secured creditors;*
>
> *(2) They failed to review or reconsider their conclusion that only the objective specified in paragraph 3(1)(c) of Schedule B could be achieved when:*

> *(a) The valuations provided to them (as referred to in paragraph 36 above) indicated that a sale could be achieved at a price at which a distribution to creditors other than first-ranking secured creditors could be achieved; and*
>
> *(b) The bids that were in fact received, and in particular the initial bid from Sellar, indicated that the value attributed to the Site by CBRE was significantly below the price that might reasonably be obtained."*

50. There is in my judgment not the slightest hint anywhere in paragraph 42 (or 43) that the JLs were suggesting that the FAs were negligent in failing to conclude that Objective 1 could not be pursued. The words "in that" limit the scope of the alleged breach in clear terms. If a case was going to be made that Objective 1 ought to have been pursued but was not, paragraph 42 is where one would have expected to find it. It is simply not there.

51. Mr Davenport is, in my judgment, correct to submit that the JLs' case as set out in the draft Particulars of Claim supplied before the first hearing is not a simple sale at an undervalue case. It makes a whole series of complaints about how the administration was conducted from the very beginning, including a failure to obtain a proper valuation and a poor choice of agents. It also pleads that Objective 2 could and ought to have been pursued. What it does not do in my judgment is plead a case of a breach of duty in failing to pursue Objective 1, still less one which sounds in a corresponding pleaded case of loss and damage.

52. It follows that even if Mr Davenport is right that it is permissible to go back to the Application Notice and the evidence served with it to check whether an Objective 1 claim has already been made, his case that the Objective 1 claim was in issue, in my judgment, fails because no such claim was advanced at that stage.

53. An objective reader of the Application Notice, Mr Hyde's witness statement and the draft Particulars of Claim could in my judgment only reach one conclusion which is that the claim advanced by the JLs is an Objective 2 and 3 case in which what is being alleged is that the FAs could and should have realised more from the sale of the Site for the creditors of the Company. No objective reader could possibly conclude that a claim was being advanced that the FAs had negligently failed to pursue Objective 1, still less that had they done so a corporate rescue would have succeeded.

54. Finally, Mr Davenport submits that the court may have regard to the expert evidence served before the hearing of the permission application. He relies, in particular, on

paragraph 2.8 in the draft report of Mr Laughton served on 29 March 2018. In that paragraph, Mr Laughton says this:

> *"The expert valuation evidence of Mr Peter Clarke (instructed by Humphries Kerstetter LLP) is that the property was worth in the region of £115million in October 2010. That evidence, on which I base my assumption that a valuation in the region of £115m would have been available to a reasonably skilled insolvency practitioner shortly have his appointment as administrator, supports my view that a reasonably skilled practitioner would seek to pursue objective (a), rescuing the company as a going concern, in the circumstances of the Company" (emphasis added)*

55. Objective 1 is referred to again as a reasonable option in paragraphs 3.4, 3.5 and 3.6 of Mr Laughton's draft report. In paragraphs 7.2 and 7.3 Mr Laughton suggests that a reasonably skilled insolvency practitioner ought to have explored "*twin solvent solution and realisation tracks*" before criticising the FAs again in paragraphs 8.7 and 9.1 for failing to explore and/or maintain focus on a "solvent solution".

56. The sections I have referred to from Mr Laughton's draft report undoubtedly provide an evidence base which could have supported a pleaded case that the FAs were in breach of their duties by failing to pursue Objective 1 either as the sole objective or as part of a twin track strategy.

57. However, on the same day that the JLs served Mr Laughton's draft report, the JLs also served what Mr Davenport referred to at the permission hearing as an "augmented" Particulars of Claim. At the permission hearing on 13 April 2018, Mr Davenport took the judge through the changes and explained that he was seeking 7 days in which to serve a final version of the document.

58. At the end of the hearing, he was given permission to serve a Particulars of Claim "*materially in the form of the draft*" provided at the hearing. I have a version of the pleading with the changes made on 28 March 2018 marked in red and those made on 1 May 2018 marked in green. This colour coded document was provided as part of the exhibit to Mr Oulton's witness statement.

59. The problem for Mr Davenport is that even if he were permitted to refer back to Mr Laughton's draft report served just before the permission hearing, the views expressed in paragraphs 3.4, 3.5, 3.6, 7.2, 7.3, 8.7 and 9.1 of that report about how a reasonably skilled insolvency practitioner would have focussed on a corporate rescue in the

circumstances of this case do not assist him because those points were not incorporated in either the draft Particulars of Claim served on 29 March 2018 or the final version served on 1 May 2018. The breaches of duty pleaded remained as described above.

60. In my judgment, in these circumstances the FAs were entitled to ignore those sections of Mr Laughton's draft report which were not reflected in the draft Particulars of Claim. The JLs pinned their colours to the mast by pleading an Objective 2 and 3 claim notwithstanding that they had evidence available to them which would have permitted an alternative claim to be advanced that it was negligent of the FAs to have failed to focus on and pursue Objective 1.

61. For all those reasons, even if I were to apply the wider test suggested by Mr Davenport, he has failed to persuade me that his Objective 1 claim was part of the JLs' claim at the time permission was applied for and granted no matter how wide the permissible net of enquiry is cast.

(iii) Is the Objective 1 claim a new claim (on the standard analysis)?

62. I turn now to the standard approach to the stage 2 question. Mr Davenport submits that if I am against him on his insolvency proceedings argument, I should apply paragraph 48(2) in Diamandis v Willis, namely:

> *"Where a claim is based on a breach of duty, whether arising in contract or tort, the question whether an amendment pleads a new cause of action requires comparison of the unamended and amended pleading to determine (a) whether a different duty is pleaded (b) whether the breaches pleaded differ substantially and (c) where appropriate the nature and extent of the damage of which complaint is made: Darlington at 370C-D and see also Berezovsky §59. (Where it is the same duty and same breach, new or different loss will not be new cause of action. But where it is a different duty or a different breach, then it is likely to be a new cause of action)."*

63. He makes five points in support of his submission that the Objective 1 claim does not constitute a new cause of action because:

63.1 The JLs' case has always been about the FAs' duty to select the purpose of the administration. When they selected Objective 3, by necessity they did not select Objective 1.

63.2 On proper analysis, the breach of Objective 3 (sale at an undervalue claim) and the Objective 1 claim constitute a "composite claim" rather than separate causes of action: Stock v London Underground [1999] (CA) 30 July 1999 WL 478034.

63.3 The Objective 1 claim shares the same essential features as the Objective 3 claim, including paragraphs 8, 16-18, 26, 30, 41, 42(1) and 44(1) of the POC.

63.4 The Objective 1 claim does not involve pleading a new breach of duty.

63.5 Although the amendments seek to introduce a new basis for calculating loss, this does not make the Objective 1 claim a new claim.

64. In response, Mr Fenwick submits:

64.1 The proposed amendments, in particular paragraphs 40A to 43C of DAPOC plead a significantly different and expanded case on breach of duty.

64.2 Paragraphs 55A – G of DAPOC plead a wholly new case on causation and loss.

64.3 These two facts taken together amount to a material change to the "essential features of the factual basis" of the claim to use the language of David Richards J. in Revenue and Customs Commission v Begum [2010] EWHC 1799 (Ch)

64.4 Therefore the Objective 1 amendments plainly constitute a new claim.

65. I accept Mr Fenwick's submissions.

66. A comparison of paragraphs 35, 38, 42 and 55 in the existing pleading with paragraphs 35, 38, 40C, 42, 42A, 55 and 55A-G (as set out in the Table attached to this judgment as an Annex) is sufficient in my judgment to demonstrate that the factual basis of the claims being advanced against the FAs is very significantly expanded in respect of both the alleged breaches of duty relied upon and the loss said to have been caused as a result. In particular,

66.1 The previous allegation that the FAs failed to obtain a proper valuation of the Site in POC paragraph 39 is replaced by a much broader allegation about failure to determine the appropriate administration strategy to pursue.

66.2 The allegations in paragraph 40B(1)(f) and (g) that the FAs ought to have at an early stage informed the Company's directors and shareholders that Objective

1 should be pursued and invited proposals to ensure the survival of the Company as a going concern are both completely new allegations.

66.3 The allegation in paragraph 40E(1) that the FAs closed their minds and/or failed to properly assess the prospects of achieving Objective 1 is a new allegation of breach of duty.

66.4 The essential counterfactual allegation in paragraph 55A-G that the Company could have been refinanced and continued to trade (or at least there was a realistic chance of doing so) is a completely new counterfactual case.

67. As to Mr Davenport's points:

67.1 It is in my judgment not entirely accurate to say that the JLs' case has always been about the FAs' duty to select the purpose of the administration. It is true that the statutory duty to choose is pleaded (and admitted) and that the FAs are criticised for only pursuing Objective 3. However, the alleged negligence relating to the choice of objective which the JLs chose to plead in paragraph 42 of the POC is entirely different to the case that they now wish to advance.

67.2 The fact that when the FAs selected Objective 3, they by necessity did not select Objective 1 is true but this flows inexorably from the statutory hierarchy of objectives referred to above. It is not something which assists the JLs in this application.

67.3 I disagree that a claim of failing to pursue Objective 1 and negligently pursing Objective 3 is a 'composite claim' as described in Stock. The use of the phrase "composite claim" in Stock appears to have been rather fact specific. The context was not that of amendment and limitation. The issue was whether a payment in was in satisfaction of a cause of action or only part of a cause of action. In any event, in Stock the claim was that an episode of negligent tunnelling had caused physical damage to a studio and to a house in the same ownership. Pill LJ held as follows:

> *"In determining whether there is a single cause of action, or more than one cause of action, the fact that the physical damage complained of was all caused by the same breach of duty, negligent tunnelling, is in my view, a very important factor and in this, no real distinction can be drawn*

> *between the mechanisms by which the different acts of physical damage were caused.*
>
> *While they are dramatically different in size and nature, the different money claims made in this case are no more than heads of damage arising from the same claim. They constitute a composite claim and are not separate causes of action"* (emphasis added)

67.4 I do not consider that it is helpful or accurate to compare the act of tunnelling in Stock to the process of conducting the administration in this case. To the extent that it is of any value to look for analogies in the facts of decided cases, I consider that Mr Fenwick is correct to submit that this case is closer to that in JJ Coughlan v Charterhouse (Accountants) LLP, (unrep.) 20 December 2016. In that case Mr Robin Hollington QC considered a professional negligence claim against accountants in respect of tax planning advice. He held at [18] that:

> *"The Claimants may be relying upon the already pleaded duty of care but they are introducing a significant new respect, based on wide ranging new factual issues, in which the Defendant acted in breach of that duty. And the re-amendment also entails a significant change to the way in which damages are claimed because it is now alleged that, as opposed to the previously pleaded case that they would have done nothing, the Claimants would have entered into one of the alternative schemes."*

In other words, the new breach of duty introduced a new counterfactual case which sounded in a different loss. The same applies in my judgment to the present case.

67.5 To point to some common facts underlying both the POC and DAPOC, as Mr Davenport does, does not in my judgment assist either. It would be surprising if there were none at all. To constitute a new claim for the purposes of the Stage 2 enquiry it is not necessary to show that the new claim had nothing at all in common with the old claim. All that is necessary is that it be distinctly different in its essential characteristics.

67.6 Here the nature and scope of the breach and the loss said to flow from the Objective 1 claim as set out in the DAPOC are in my judgment both distinctly different from the breaches and loss pleaded in the POC. This is not a case where

it can reasonably be argued that all that is being done is that new particulars of existing breaches are being provided or that a new head of loss and damage is simply being added to existing breaches.

F. Stage 3: Does the new claim arise out of the same or substantially the same facts?

68. In relation to the stage 3 enquiry, Mr Davenport makes five points in support of his submission that the new claim does arise out of the same or substantially the same facts as are already in issue. He submits as follows:

68.1 The question is not whether the facts to be proved are the same but whether the two matters arise out of the same facts, citing Auld J in Dickinson v Lowery (unrep.) 23 March 1990.

68.2 The court should focus on the 'foundational facts' of the claims.

68.3 The content of the FAs' defence is a material factor in this case because it pleads extensively to Objective 1. The FAs' own Part 18 Request shows they believed Objective 1 to be in play.

68.4 There is no (or no significant) forensic prejudice to the FAs because their decision-making process has already been captured, interrogated and pleaded in the Defence.

68.5 The Objective 1 claim will not require extensive new factual enquiries to be made. No further disclosure is expected or any further factual witnesses. The counterfactual part of the Objective 1 case can be dealt with by experts.

69. Mr Fenwick for the FAs submits as follows:

69.1 The Court should follow the guidance in Harland & Wolff Pension Trustees ltd v Aon Consulting Financial Services Ltd [2009] EWHC 1557 (Ch) at [66]-[68] which he summarised as follows:

69.1.1 The purpose of the limitation bar on amendments at Stage 3 is to protect defendants from having to investigate facts and obtain evidence of

matters unrelated to those which they could reasonably be assumed to have investigated for the purpose of defending the unamended claim;

69.1.2 In cases of factual complexity it is likely that an amendment would seek to plead new facts. However, that does not mean that a new claim does not arise out of substantially the same facts. It is a matter of impression, but must be derived from a reasoned assessment of relevant factors;

69.1.3 New facts are substantially the same as those already relied on if they comprise: (a) minor differences likely to be the subject of inquiry but do not involve any major investigation; and/or (b) differences merely collateral to the main substance of the new claim, proof of which would not necessarily be essential to its success.

69.2 The JLs have underestimated the additional factual investigation necessitated by the DAPOC:

69.2.1 The pleaded Objective 1 Claim in the DAPOC on causation and loss involves a wholly new factual investigation as to the possibility of financing and a joint venture partner, leading to the Site being developed by the Company itself, which is outside the scope of any investigation which could reasonably have been prompted by the POC.

69.2.2 The additional factual matters requiring investigation under the DAPOC include:

(a) The nature and viability of the steps which the FAs allegedly ought to have taken;

(b) The steps which were in fact taken (albeit unsuccessfully) to seek to arrange a "*solvent rescue*" of the Company;

(c) The availability and terms of a joint venture partnership, including the identity of the partners and the amount of equity required;

(d) The availability and terms of refinancing to repay the Company's creditors;

(e) The timing and practicability of repayment of the Company's secured debt;

(f) The availability and terms of finance necessary to develop the Site;

(g) The role, costs, practicability and timing of putting together the various financing/commercial transactions;

(h) More developed costs and timeframes in respect of the development of the Site, including regarding planning and construction;

(i) The value of the Site when completed, either as a whole or unit by unit.

69.3 In order to address the Objective 1 claim in the DAPOC further expert evidence will be required:

69.3.1 From the experts for which permission has already been given:

(a) The insolvency practitioner experts will need to assess the (newly expanded) relevant factual background, address the substantially amended/new allegations of breach, and opine on whether a reasonably competent administrator would have pursued Objective 1;

(b) The valuation expert will need to opine on what the present value of the Site to the Company would be, had it been developed and built out in the manner alleged;

(c) The scope of the evidence of the planning expert, in particular on the costs, timing and practicability of the planning permission which it is said would have been obtained and built out, would be widened; and

69.3.2 From additional experts on:

(d) Construction costs and timing – so that the cost, timeframe and practicability of the Company building out the Site could be determined; and

(e) Accountancy and taxation – so that matters such as the accounting treatment and cashflow implications of building out the development, the cost and impact of VAT and/or corporation tax in respect of each stage of the Objective 1 Claim can be taken into account.

69.4 Taken as a whole, the Objective 1 claim, far from arising out of the same or substantially the same facts, is an entirely new factual case on breach and an entirely new counterfactual case on loss and damage and the forensic prejudice of having to investigate is therefore great.

Analysis

70. Mr Davenport is right to remind me that at Stage 3 the court is not examining whether the facts to be proved are the same or not. To do that would be to repeat the stage 2 exercise of putting just the POC and the DAPOC side by side and comparing them.

71. At Stage 3, the enquiry is necessarily broader and less abstract than the Stage 2 enquiry. In particular, I accept Mr Davenport's submission that I need to look beyond the POC (and the DAPOC) to consider the Defence in order to ascertain what factual issues are already likely to arise at trial. If the new claim can be said to arise *substantially* from the same facts as are already in issue, then it ought to be allowed. This corresponds to Hobhouse LJ's dictum in Lloyd's Bank v Rogers which I have already cited:

> "[i]f factual issues [are] *in any event going to be litigated* between the parties, the parties should be able to rely on any cause of action which *substantially* arises from those facts" (my emphasis)

72. Save as a useful tag by which to be reminded of the difference between the nature of the enquiry at Stages 2 and 3, I did not gain much assistance from being taken to the precis of the unreported case of Dickinson v Lowery contained in paragraph 23.027 of *McGee on Limitation*. In the absence of a transcript or report of the decision all that it seems to me that can safely be said about that case is that Auld J must have come to the

conclusion on the evidence he was presented with that the third party claim which the Defendant wished to bring against the solicitor arose out of the same facts or substantially the same facts as the claim already made by the Claimant against the Defendant and the same solicitor. It does not appear to establish any new point of principle which assists me.

73. I am also not convinced that it is helpful to use the phrase "foundational facts" in the context of the Stage 3 enquiry. I am inclined to treat the phrase as a reminder to avoid being distracted by differences between the proposed claim and the existing issues in dispute which are only of peripheral importance. What I am enjoined to do is to carry out a "real evaluation of the new claim against the facts in issue in the old claim." (per McCombe LJ in Samba at [49]) and in doing so I should not be distracted by "differences merely collateral to the main substance of the new claim" (per Colman J in P&O Nedlloyd BV v Arab Metals Co [2005] 1 WLR 3733 at [42]).

74. The core of the Stage 3 test is very simple indeed. It is whether the new claim introduces new facts not already substantially in issue: Society of Lloyd's v Henderson [2008] 1 WLR 2255 [53]; Goode v Martin [2002] 1 WLR 1839 [42].

75. Mr Davenport placed a great deal of weight on the FAs' decision in their Defence to plead a positive case on the decision not to pursue Objective 1. He referred me to the following:

75.1 Paragraph 145.2 of the Defence in which it is pleaded that no proposals were made to the FAs "*for the rescue of the Company as a going concern*".

75.2 Paragraphs 145.3 and 147.1 in which it is said that the FAs "*continued to review the appropriate statutory purpose in light of changing circumstances*". It seems to me that it is fair to read this as being a positive case that from time to time throughout the administration the FAs reviewed whether or not Objective 1 might yet be pursued.

76. Mr Davenport also referred me to Requests 20 and 21 from the FAs' own Part 18 Request dated 4 July 2018 and to the JLs' Responses dated 31 August 2018:

> *"Under paragraphs 42 and 43*
>
> *Request*

> *20. Do the Applicants accept that the Respondents were entitled to think that it was not reasonably practicable to achieve the purpose specified in paragraph 3(1)(a)?*
>
> *21. Accordingly, are these allegations premised purely on the case that the Respondents should have pursued the purpose specified in paragraph 3(1)(b), rather than that specified in paragraph 3(1)(c)?*
>
> *Response*
>
> *20. This is not a request for further information in relation to the Applicant's pleaded case. It is nevertheless clear from the Particulars of Claim and the Reply that the answer is no.*
>
> *21. No. The breach as pleaded in paragraph 42 of the Particulars of Claim is that the Respondents were negligent and acted in breach of duty in concluding that the only objective which could be pursued was paragraph 3(1)(c) of the Schedule. Because the Respondents did not obtain a valuation they failed to consider whether the site could be refinanced and/or built out in accordance with their primary statutory objective. The Applicants also refer to paragraphs (3) and 17(2) of the Reply"*

77. Request 20 seems to me to be an attempt to elicit an admission rather than a request that the JLs provide any further particulars of their case. Request 21 is clearly wider and is asking whether the FAs' case is confined to a failure to pursue Objective 2 or not. However, in my judgment, all that one really derives from the Response to Request 20 is that insofar as the FAs considered Objective 1 and decided it was not feasible to pursue it, the JLs do not admit that they were entitled to reach this conclusion. It is no more than a non-admission in those limited terms.

78. What one derives from the first and second sentences in the Response to Request 21 is that the JLs' allegations of breach of duty are not purely premised on a failure to pursue Objective 2 rather than 3. The third and fourth sentences seek to import into the Particulars of Claim a positive allegation of a failure to consider Objective 1 and that there was sufficient equity to fund a build-out of the Site.

79. However, for the reasons given in Mastercard at [64], it is not permissible to use a Reply as a Trojan Horse to smuggle in a new claim which is not pleaded in the Particulars of Claim as a means to assert that the point is already in issue in the proceedings for the purposes of an application to amend. In my view, the same applies to Response 21 above which seeks to incorporate factual allegations made for the first time in the Reply.

80. However, even if I am wrong about that and I am entitled to treat the allegations referred to in the second and fourth sentence of Response 21 as being allegations already in issue and I set these alongside the FAs' own positive averments in paragraph 145 of the Defence, in my judgment the JLs still fall a long way short of demonstrating that the new Objective 1 claim arises out of substantially the same facts as are already in issue for the following reasons:

80.1 The allegation in paragraph 145.2 is a limited allegation of fact about the receipt of proposals (which incidentally is not addressed in the Reply save by the general non-admission in paragraph 1). It does not assist the JLs in this application.

80.2 The allegations in paragraphs 145.3 and 147.1 that the FAs "*continued to review the appropriate statutory purpose in light of changing circumstances*" is very general and does not put anything of substance in issue so as to assist the JLs in this application.

80.3 Both Response 21 of the Part 18 Request and paragraphs 17 (2) and (3) of the Reply merely add an alleged consequence of not obtaining a correct valuation. They do not in terms plead or set out a proper factual basis for a case that the FAs were negligent for failing to pursue Objective 1.

81. The Objective 1 claim as pleaded in the DAPOC in my judgment involves the addition of a plethora of new factual allegations to the existing issues in the claim, including, in particular, the following:

81.1 Shortly after appointment, the FAs had reason to believe that the value of the Site was such that Objective 1 should be pursued (DAPOC para. 40B(1)(f)).

81.2 The FAs improperly closed their minds to or failed to assess the prospects of achieving Objective 1 (DAPOC para. 40E (1)).

81.3 The Company could have refinanced and continued to trade (DAPOC para. 55A).

81.4 As at 14 October 2010 and at all material times thereafter the Company could and would have achieved a funded rescue (DAPOC para 35 and 55B).

81.5 The Company could have completed the planned development of the Site by mid-2017 and would have built the project in a similar manner as was in fact done by SGSL (DAPOC para. 55D).

81.6 As a result of the FAs' failure to pursue Objective 1, the Company has suffered a loss of £250 million (DAPOC para. 55E).

82. I accept Mr Davenport's submission that there are areas of overlap between the new claim which the JLs wish to make and the existing issues:

82.1 The Objective 1 claim obviously arises out of the same administration.

82.2 The new claim covers the same time period as the existing claim. The existing claim makes allegations of errors occurring from the very beginning (e.g. in the failure to obtain a proper valuation and the terms on which the agents CBRE were appointed).

82.3 The failure to obtain a proper valuation of the Site is a key component in both claims.

82.4 Some of the bidders in the existing claim such as Mirax and Resolution feature in the proposed Objective 1 claim.

83. I also accept that each and every step in the administration has been documented and is available for interrogation in the FAs' disclosure.

84. However, in my judgment, there is no getting away from the fact that the Objective 1 claim is fundamentally different in character to the existing claim. It is premised on a failure by the FAs to pursue a completely different statutory objective to those in issue in the existing claim. The existing issues for trial are concerned with an alleged failure to pursue Objective 2 at all and a failure to Objective 3 competently. The whole thrust of the present claim is that a series of mistakes and errors (including in relation to the appointment of CBRE, the conduct of the bidding process, the failure to explore the possibility of planning consent) led to the sale of the Site at an undervalue. The Objective 1 claim, by contrast, not only involves a completely new breach of duty but also necessarily requires a completely new counterfactual case of loss and damage which involves a complex interaction of corporate finance, construction costing and

timelines, commercial broking, the marketing and sales of completed units and tax, none of which is currently in issue.

85. I accept Mr Fenwick's submission that the JLs' new counterfactual case on causation loss and damage would not only involve extensive further expert investigation in the areas which he identified but more importantly for the purposes of this application would require the FAs to conduct wide ranging factual investigations on the matters set out in paragraph 69.2.2 above, none of which are issues on the basis of the POC.

86. In my judgment, this is not a borderline case where it might be said to be permissible to fall back on an assessment based on 'impression'. A comparison between the material facts of the new Objective 1 claim and the facts in issue in the existing pleadings, is in my judgment capable of demonstrating clearly that the new claim does not arise out of anything like the same or substantially the same facts as are already in issue.

87. The conclusion is no different even if, contrary to my understanding of the present law, it were permissible to treat what is pleaded in the Reply and the Response to Requests 20 and 21 in the Part 18 Request as being 'in issue' in the present proceedings. Those additional statements of case, in my judgement, provided a small gesture or hint of the direction that the full DAPOC eventually took. They do not affect the overall analysis because: (a) they are limited in factual scope (compared with the full DAPOC) and (b) in the absence of an allegation that the FAs had been negligent in failing to pursue Objective 1 and a properly pleaded corresponding case of loss and damage arising from that alleged failure, the complaints made in the Reply and the Response to the Part 18 Request took the JLs' case nowhere.

G. Conclusion

88. For these reasons, my conclusion is that insofar as the amendments for which the Applicants seek permission set out a claim that the Respondents acted in breach of duty by failing to pursue the objective set out in paragraph 3(1)(a) of Schedule B1 to the IA 1986, the court has no discretion to allow them because the conditions of Section 35 of the Limitation Act 1980 and CPR 17.4(2) are not met.

89. In light of my conclusion, I do not consider it is appropriate to consider how I would have exercised the discretion under CPR 17.1(2) which I have found is not available to

me. I have only dealt in this Judgment with amendments which are part of the Objective 1 claim. If there are any proposed amendments which are independent of proposed Objective 1 claim, I will deal with those under CPR 17.1(2) in the ordinary way if agreement cannot be reached between the parties.

ANNEX

Particulars of Claim	Draft Amended Particulars of Claim
G. Sale at Undervalue 35. The Site was sold for a price of £77.4m on 16 December 2011. The Site was sold for less than the price at which it could reasonably have been sold. On the date of sale, the Site could reasonably have been sold for a price of at least £115m. The Applicants will adduce expert valuation evidence in support of the value of the Site.	**G. Sale ~~at Undervalue~~ of the Site** 35. The Site was sold for a price of £77.4m on 16 December 2011. The Site was sold for less than the price at which it could reasonably have been sold and in circumstances where it was reasonably practicable to achieve a solvent rescue of the Company. On the date of sale, the Site could reasonably have been sold for a price of at least £115m before accounting for any potential planning uplift. The Applicants will adduce expert valuation evidence in support of the value of the Site and in support of their case on overage provisions and conditional contracts.
38. The Respondents were negligent and acted in breach of their fiduciary and statutory duties in their conduct of the administration and the sale of the Site as follows: *(i) **The Respondents failed to obtain a valuation of the Site***	38. The Respondents were negligent and acted in breach of their fiduciary and statutory duties in their conduct of the administration and the sale of the Site as follows: *(i) **The Respondents failed to ~~obtain a valuation of the Site~~ gather and analyse sufficient information in order to determine the appropriate administration strategy to pursue***
[No corresponding para]	*(ii) **The Respondents failed to explore and pursue a solvent recovery of the Company*** 40C. As at the outset of the Administration, or in any event very shortly thereafter, it was known to the Respondents, or should have been known to them and was obvious and apparent, that: (a) the directors and shareholders of the Company desired at all times to rescue the Company as a going concern by refinancing and securing the finance necessary to continue to trade until completion of the Site; (b) such action was the best possible outcome for the Company and its creditors, given that it would result in the Syndicate (and other creditors) being paid, and would also leave the Company with its assets intact and available for

	profitable development or exploitation.
42. The Respondents were negligent, acted in breach of their fiduciary duties (as set out in paragraph 34(1) above) and in breach of their statutory duties under paragraph 3 of Schedule B1 of the Act in concluding that only the objective specified in paragraph 3(1)(c) of Schedule B1 could be achieved in that:	42. The Respondents were negligent, acted in breach of their fiduciary duties ~~(as set out in paragraph 34(1) above)~~ and in breach of their statutory duties under paragraph 3 of Schedule B1 of the Act in ~~concluding~~ stating that only ~~the objective specified in paragraph~~ Objective 3 ~~(1)(c) of Schedule B1~~ could be achieved. The Applicants repeat and adopt the allegations of breach of duty at paragraphs 40C to 40E above. 42A. Further, the Respondents acted in breach of the aforesaid duties in that:
(1) They reached this conclusion without having obtained any valuation of the Site. Had a valuation been obtained this would have indicated that the objective specified in paragraph 3(1)(b) of Schedule B1 could be achieved, since the value of the site was sufficient to achieve a distribution to creditors other than the first-ranking secured creditors;	(1) ~~They reached this conclusion~~ they determined, or continued to determine, to pursue Objective 3 without having obtained ~~any~~ a reliable independent valuation of the Site. Had such a valuation been obtained this would have indicated that ~~the objective specified in paragraph 3(1)(b) of Schedule B1~~ Objective 1 or Objective 2 could be achieved, since the value of the ~~s~~Site was sufficient either to seek to rescue the Company as a going concern or to achieve a distribution to creditors other than the first-ranking secured creditors; (2) they worded the Administrators' Proposals in such a way as to avoid convening a creditors' meeting and in so doing avoided having a discussion of their proposed administration strategy and more particularly the proposed sale of the Site with the Company's creditors; (3) they published in the Administrators' Proposals that only Objective 3 could be achieved, thereby informing the market that the Respondents considered the Site was worth less than the published secured debt of £89 million with the result that they prejudiced the Company's ability to achieve Objective 2; (4) the Respondents failed to make any reference in the Administrators' Proposals to cash balances held in the Company's bank accounts;

(2) They failed to review or reconsider their conclusion that only the objective specified in paragraph 3(1)(c) of Schedule B1 could be achieved when: (a) The valuations provided to them (referred to in paragraph **Error! Reference source not found.** above), indicated that a sale could be achieved at a price at which a distribution to creditors other than the first-ranking secured creditors could be achieved; and (b) The bids that were in fact received, and in particular the initial bid from Sellar, indicated that the value attributed to the Site by CBRE was significantly below the price that might reasonably be obtained.	(5) ~~T~~they failed to review or reconsider their conclusion that only ~~the objective specified in paragraph 3(1)(c) of Schedule B1~~ Objective 3 could be achieved when: (a) ~~T~~the valuations provided to them (referred to in paragraph 36 above), and the indication of value contained in the red-book valuation prepared by Montagu Evans indicated that a sale could be achieved at a price at which a distribution to creditors other than the first-ranking secured creditors could be achieved; and (b) ~~T~~the bids that were in fact received, and in particular the initial bid from Sellar, indicated that the value attributed to the Site by CBRE was significantly below the price that might reasonably be obtained.

I. Causation and Loss	**I. Causation and Loss**
55. By reason of the Respondents' breaches of duty set out above, the Company sustained loss and damage. The Respondents' breaches resulted in the sale of the Site at substantially below the best price reasonably obtainable.	55. By reason of the Respondents' breaches of duty set out above, the Company sustained the following loss and damage. ~~The Respondents' breaches resulted in the sale of the Site at substantially below the best price reasonably obtainable.~~
	Loss and damage arising from the manner in which the Respondents conducted the Administration and their failure to pursue Objective 1
[No paragraphs corresponding to 55A - G]	55A. It is averred that the Company has suffered loss and damage as a result of the breaches of duty set out above at paragraphs 40A to 43C and 50, on the following footing: (c) if the Respondents had not committed those breaches, then the Company would have been able to refinance and continue to trade until completion of the Site ('a **Funded Rescue**'); or (d) there was a realistic chance that the Company could have achieved a Funded Rescue, which chance was lost by reason of the Respondents' said breaches.
56. The Applicants say that this price was at least £115,000,000, so that the Company (and by it the creditors) sustained a loss of at least £37,600,000 or such other sum as the Court may find.	55B. In these respects, and without prejudice to the generality of the foregoing, it is averred that as at 14 October 2010, and at all material times thereafter, the Company could and would (given the chance) have achieved a Funded Rescue as set out below (the following being an illustration of what the Company could have achieved).
	55C. The Applicants' expert evidence will show that, on the basis of the existing Consent, the Company would have secured a joint venture partner and the finance necessary to continue to trade until completion of the Site, as follows: (1) financiers to provide senior and mezzanine debt and equity as detailed below; (2) potential financiers including, amongst others: BNP Paribas, Citigroup, Lloyds Banking Group, HSBC plc, or Deutsche Postbank as senior lender; and Pramerica, Maslow Capital, Och Ziff Capital Management, Longbow or Alpha

	Capital as mezzanine lender and equity provider; (3) costs requiring finance as follows: (a) an approximate development cost of £260 million; (b) £70 million to repay secured lending; (c) £2 million to repay unsecured creditors; (4) financing assumptions include: (a) senior debt available, as part of an overall funding package, to 60% LTV; (b) mezzanine finance arranged to take the LTV to 70%; (c) equity available as required above 70% LTV - on primary assumption as to £50 million equity in the Site, that was c.4% of remaining 30% requirement; (d) cost of senior debt would be 6%p.a; (e) mezzanine finance would be priced at 12%; (f) the cost to the Company of the additional equity required on an assumption of £50 million surplus equity in the site would have reflected a 100% return on that equity investment; (5) the Formby 2010 debenture postponed and the senior lender able to assume that any new debt advanced would rank ahead of the Formby 2010 debenture and that it could take advantage of the whole valuation surplus in its calculations; (6) the use of a commercial broker to bring financiers together would see the deal achieved in 6 months, completing by the end of June 2011; (7) revised planning would have been sought and achieved that would have maximised the amount of residential use available; (8) an estimated planning application period of 12 months, construction period of 36 months and marketing period of 24 months. 55D. If the above had taken place, the Company would have completed the planned development at the Site. It would likely have done so by mid-2017. It would have built the project in a similar manner as was in fact done by St George. 55E. Accordingly, the Applicants' expert evidence will show that:

	(1) the Company has suffered loss and damage which it calculates or estimates at £250 million (this being the difference in value between the sale proceeds achieved and the present value to the Company of the Site as built as set out above); or (2) the Company has suffered loss and damage in the form of the lost chance of generating the value set out at paragraph 55E(1) above. 55F. Accordingly, the Applicants seek an order of the Court pursuant to paragraph 75(4) of Schedule B1 to the Act that the Respondents pay to the Applicants as joint liquidators of the Company compensation of £250 million on the basis set out above. 55G. Alternatively, the Respondents are liable to pay equitable compensation in the sum of £250 million.