

JERSEY / JUDGMENT

Banks v Sanne [2020] JRC 172A (28 August 2020)

[2020] JRC 172A

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judgment

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Introduction

1. The factual background to this action is described in detail in the previous

judgment

Banks v Sanne Holdings Limited and another

[2019] JRC 222A . 2. This judgment sets out the reasons for my decisions in respect of two
summons issued by the plaintiff in the above matter. The first summons was issued 7 th
May, 2020 and, as a result of considerable correspondence between the parties on the
topic of the scope of the defendants' electronic discovery, sought an order that the
defendants add a number of additional search terms to their electronic discovery ("the
Discovery Summons"). 3. The second summons was issued after the Discovery Summons
on the 5 th June, 2020. The summons sought an order that certain amendments be allowed
to the order of justice. In essence, the amendments sought to restate or clarify the salient
dates for the calculation of the purported damages claimed by the plaintiff ("the
Amendment Summons"). It will be more convenient to deal with the Amendment
Summons first. Amendment Summons The Plaintiff's submissions 4. On the 1 st July, 2020,
the plaintiff filed a skeleton argument in support of both summons and a further
addendum skeleton argument on the 17 th July, 2020. Both of these documents were
predominantly focused on the issue of the discovery. However, the plaintiff highlighted

that the application for the amendment was driven by a belief that the defendants were seeking to limit their discovery obligations by adopting an unreasonable and narrow interpretation of paragraph 152 of the order of justice. 5. Paragraph 152 of the order of justice states (with proposed amendments underlined) as follows:- "152. Rather, HIL and Mr Banks would have required SHL to act lawfully through the proper exercise of HIL's 68% voting rights. HIL would have provided SHL with and/ or otherwise assisted/ facilitated the necessary financial assistance to properly account for the Ivegill2010 Transaction and, at the same time, maintain a healthy profit figure for the 2010 year required to attract investment in the short term. As a result, HIL would have retained its investment and interests in SHL until, as had always been intended in previous years, it sold on its interest to a third party investor in 2012. Further and alternatively, HIL would have successfully negotiated a materially better deal for its interest as a result of saving SHL from its financial and accounting irregularities. For the avoidance of doubt, any such "materially better deal" includes but is not limited to the retention of HIL's interest and a sale of that interest at any point after 2012 and up to and including the IPO in 2015." 6. In support of the application, Advocate Sharp referred the Court to the observation of Master Thompson on the Court's policy on the acceptance of applications for leave to amend in *Crociani v Crociani*

[2015] JRC 177 at paragraph 3:- "...generally the approach is that the Court will allow such amendments which are necessary to enable the Court to determine the real issues in dispute, provided that no party to the action would thereby be unavoidably prejudiced and as long as the amendments show an arguable claim, i.e. one that is not capable of being struck out." 7. In addition, Advocate Sharp drew the attention of the Court to the answers to the requests for further information which the plaintiff had served on the defendants on the 1 st July, 2020. In particular, the plaintiff relied on the following responses:- "Paragraph 152 of the order of justice already pleads that HIL would have either (a) retained its interest and then sold it to a third party investor in 2012 or (b) alternatively would have obtained a better deal. Whether HIL decided to realise all or part of its full voting control and major equity interests by way of orderly sale and as a fully informed vendor in 2012 or during the period of 2012/15, it would have obtained a higher consideration/sum than was obtained as a consequence of the 2011 HIL Transaction as pleaded as paragraph 101 of the Order of justice, which was not an orderly sale or on an informed let alone fully informed basis as was required - that is what is meant by a "better deal." 8. In the submission of the plaintiff, there were only two logical outcomes of the facts pleaded in the order of justice; namely that had the defendants acted appropriately in regard to the manner in which they portrayed the inaccurate accounts of the Sanne Holdings Limited ("SHL"), either the plaintiff would have been able to negotiate more favourable terms for his interest or the plaintiff would have retained that interest beyond 2012 and possibly up to the IPO which took place in 2015. In both alternatives, the plaintiff argued that he would have received a materially better deal than the one he was forced to take. 9. In addition, Advocate Sharp took the court to part of the affidavit sworn by the plaintiff on the 7 th May,

2020 which was filed in support of the Discovery Summons. At paragraph 36, the plaintiff stated:- "Whilst HIL may have sold its valuable interests in Sanne onto private equity in 2012, dependent on the true figures, nature of the deals/offers available at the time HIL may have decided to continue as an investor until the 2015 IPO. That is obvious." 10. In essence, the plaintiff argued that it logically flowed from the original wording of paragraph 152 of the order of justice that successfully negotiating a materially better deal must have included the retention of the interest in the SHL beyond the Inflexion deal in 2012 and up to the time of the IPO in 2015. The proposed amendments to the order of justice did not broaden the parameters of the claim but merely clarified what already existed in the original pleading. 11. In the view of the plaintiff, the application could not be characterised as being late so as to impose greater restrictions of the principles to be applied by the court. Discovery had yet to be completed and further directions were planned and needed to guide the matter to trial. Advocate Sharp submitted that it was difficult to see why the answer would need revisiting as a result of the amendments being sought given that it already firmly denied all of the relevant parts of the order of justice. He relied on the decision in *Pender v CGH (Jersey) Limited* and others

[2020] JRC 109 (a case of alleged unfair prejudice where the complainant was naturally at a disadvantage regarding the available information evidencing the value of the company from which he had been removed). He asserted that perhaps it would be prudent to delay any amendments to the answer until further particularisation of the order of justice (if any should be required) had taken place after discovery has been completed. Defendants' submissions 12. The defendants filed a skeleton argument dated 1st July, 2020 specifically in relation to the Amendment Summons. The defendants opposed the application primarily on the basis that amendments should only be allowed when the case that they plead had a genuine prospect of success, something that the defendants asserted was not the case in these circumstances. Advocate Kelleher submitted that the amendments did not cross the threshold because the amended pleadings revealed a "loss of chance" claim (namely that Hunters Investment Limited ("HIL") would have disposed of its interest in the SHL at a later date than it actually did) without having sufficiently particularised the same or having pleaded the numerous "counterfactuals" that existed. 13. In addition, as a result of the manner in which the order of justice is proposed to be amended, the defendants were incapable of being able to understand the full details of the case that has been laid against them. Therefore they are unable to meaningfully plead an Answer to that case. 14. Advocate Kelleher argued that it went against the intention of the overriding objective for the plaintiff not to be required to provide a full explanation as to why he was attempting to materially change the landscape of his case on quantum (by extending matters past the 2012 date expressly pleaded in the order of justice) at a point when the defendants are relatively close to completing what had been a substantial and costly discovery exercise. 15. Advocate Kelleher took the court to the case of *Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd*

- [2010] EWCA Civ 1335 and to paragraph 12 where the Court of Appeal stated:- "...every case must be pleaded in sufficient detail to enable the other party to understand the case it has to meet. If a party seeking to amend is unable or unwilling to provide proper particulars of any allegation, it is not right to require the other party to deal with it as best he can". 16. The defendants also relied on the case of *Trico v Buckingham*
- [2019] JRC 163 and to the dicta of the Master of the Royal Court which stated that the Court should more closely reflect the approach taken in the courts in England on the topic of amendments to pleadings and should emphasise the need to have regard to the principles enshrined within the overriding objective. 17. Advocate Kelleher submitted that in cases which involved a "loss of chance" claim where, which by their nature inherently involve a hypothetical question about what might have come to pass if salient actions had not taken place, the court was required to assess the question on the balance of probabilities. In contrast, in cases where the loss of chance is dependent upon the actions of a third party to the proceedings, the court's approach is different. The court is required to be satisfied that the claimant has a "real and substantial" chance of securing a benefit. In order to reach this conclusion, the court must make an assessment on the prospects of success and award damages (where appropriate) on a percentage basis. This is referred to as the "counterfactual". The court considers what would have happened had the facts of the case played out differently. This can include multiple hypothetical actions by third parties where the court is obliged to make successive percentage discounts to reach a final percentage figure of the damages claimed. As Ashworth J worded it in *Hall v Meyrick*
- [1957] 2QB 455 at 471:- "The more the contingencies, the lower the chance or opportunity of which the plaintiff was deprived". 18. Advocate Kelleher advanced that the claim brought by the plaintiff was a "loss of chance" claim where the "chance" was the possibility that the plaintiff would have been able to convince the other beneficial owners of HIL (upon discovery of the accounting irregularities in the accounts) to have behaved differently in the negotiations that took place between HIL and SHL. He asserted that the plaintiff's pleaded case was that HIL could have been persuaded to either:- (i) retain its shareholding in SHL, provide the necessary financial support to SHL to enable it to properly account for the 2010 Ivegill Transaction and subsequently sell its interest in the SHL to a third party investor in 2012; or (ii) negotiate a better deal for HIL's interest in the SHL. 19. The defendants submitted that the plain meaning of the phrase "materially better deal" in the plaintiff's order of justice was in comparison with the terms that were achieved in 2011 when HIL exchanged its voting and non-voting ordinary shareholdings for 12% redeemable preference shares. It could not have meant what the plaintiff now argues, namely that the "materially better deal" was always referencing all options up to and including the IPO in 2015. 20. Advocate Kelleher supported this position on the interpretation by referring the court to the wording of the order of justice and specifically to paragraphs 152, 157 and 160. In its pre-amended form, the salient parts of the paragraphs state:- 152. Rather, HIL and Mr Banks would have required SHL to act lawfully through the proper exercise of HIL's 68% voting rights. HIL would have provided SHL with

and/ or otherwise assisted/ facilitated the necessary financial assistance to properly account for the Ivegill2010 Transaction and, at the same time, maintain a healthy profit figure for the 2010 year required to attract investment in the short term. As a result, HIL would have retained its investment and interests in SHL until, as had always been intended in previous years, it sold on its interest to a third party investor in 2012. Further and alternatively, HIL would have successfully negotiated a materially better deal for its interest as a result of saving SHL from its financial and accounting irregularities. 157. In assessing the true value of the losses suffered in this regard, full disclosure by SHL of the negotiations and representations leading up to the Inflexion transaction in 2012, and the transactional documentation will be required." 160. It follows that the damages sought, reflecting Mr Banks 16% interest in HIL, are: (a) 16% of the true value of HIL's shareholding in SHL and STCL in 2012: estimated at in the region of £6.4 million but to be assessed; (b) 16% of the lost dividends 2009-2012: to be assessed..." 21. In the submission of the defendants, there was no reference to the 2015 IPO within these salient paragraphs. Indeed, there were only two references to the 2015 IPO in the whole of the 41 page pleading (at paragraph 17 in the chronology and at paragraph 159 when employed as a starting point to generate an appropriate multiplier to apply to the Inflexion purchase in 2012). In Advocate Kelleher's submission, there was nothing to suggest that "materially better deal" could or should be inferred to extend the quantum window to capture the 2015 IPO. The defendants argued that the plaintiff was retro-engineering this interpretation argument to include matters up to the IPO in 2015 in order to justify his claims for further and far reaching discovery during this additional period (2012 to 2015). 22. In light of these submissions, Advocate Kelleher objected to the amendments for the following reasons. First, he asserted that the amended order of justice failed to plead any material facts in relation to the counterfactuals. As these were essential elements of the plaintiff's claim, they must be included in the pleading. If the plaintiff was going to be allowed to amend his pleading to expand the "loss of chance" window to include the 2015 IPO, the plaintiff needed to plead, inter alia, how HIL would not have sold to an investor in 2012 and where the funds would have been obtained from in order to finance the business expansion that lead to the IPO in 2015. These elements needed to be pleaded in a manner which allowed the defendants to answer the case put to them. It cannot be appropriate for the plaintiff to simply offer to respond to requests for further information as and when they are put to him. 23. Second, where there is inadequate pleading, it makes it impossible for the defendant to know what issues and documents are relevant to the claim and therefore liable to be disclosed in discovery during the period 2012 to 2015. Advocate Kelleher gave the example that, by way of paragraph 157 of the amended order of justice, the plaintiff now seeks all transactional documents in relation to the IPO in 2015. However, on the face of the pleading, the defendants cannot discern why those documents might be relevant to the case being advanced. 24. Third, rather counter-intuitively, the more counterfactuals that exist and therefore the more things that consequently would not have happened, the less relevant what happened after the 2012 Inflexion deal becomes. In the view of the defendants there were a great number of counterfactuals which would drastically reduce

the percentage likelihood of a claim resulting in a payment even if the plaintiff were able to satisfy a court that there had been a breach of contract or fiduciary duty. 25. Fourth, Advocate Kelleher drew the court's attention to the case of *Allied Maples Group Ltd. v Simmons and Simmons (a Firm)*

[1995] 1WLR 1602 and to the principle that a claimant was only entitled to succeed on a "loss of chance" claim where it could show that there was a "real and substantial" chance that the third party would act in the hypothetical manner that the counterfactual required. Where there are multiple counterfactuals in play (as the defendants asserted here), achieving the minimal threshold of "real and substantial" chance was very much at risk. This meant that there was a genuine possibility that the claim would not and could not be successful when including hypothetical events post 2012. 26. In conclusion, Advocate Kelleher submitted that the application to amend should not be granted because :- (i) The plaintiff had failed to adequately explain why the matters had not been pleaded earlier. (ii) The strength of the new case, for the reasons set out above, had not been substantiated. (iii) There would be substantial adverse consequences for the defendants were the application to be successful. Irrespective of any previous demands from the plaintiff for financial information between 2012 and 2015, on the basis of the pleaded case, these were not within scope for the purposes of the discovery process. The defendant had spent a considerable amount of time in undertaking the discovery process and had identified a very large number of documents. Having to revisit the process to include matters between 2012 and 2015 would, in the view of the defendants be disproportional and extremely costly. 27. On the issue of the case of *Pender*, Advocate Kelleher suggested that this might be best described as a red herring. The *Pender* case involved an application under Article 141 of the Companies (Jersey) Law 1991 in regard to an unfair prejudice on a minority shareholder. It cannot be utilised to justify an argument that the plaintiff could not provide all the necessary particulars on quantum because the defendants held all the relevant evidence between 2012 and 2015. This case was not an unfair prejudice case but rather a claim for damages flowing from an alleged breach of fiduciary duty and contract. Rather than trawl through the financial information belonging to SHL to find the most advantageous moment to declare a hypothetical disposal of HIL's interest in the SHL, the plaintiff must nail his colours to the mast and choose a date for the valuation of his claim. Plaintiff's Reply 28. Advocate Sharp submitted that this application was not intended to be a mini trial requiring an intricate analysis of the merits of the case in order to conclude whether the proposed amendments should be allowed. He asserted that what was clear was that SHL's balance sheet was insolvent following on from Ivegill the transaction in 2010. In the plaintiff's view, had that information been known, and that SHL lacked the funds to lawfully account for the new 10% preference shares issued to Ivegill it is highly unlikely that a company like HIL, beneficially owned by a number of locally qualified lawyers, would have allowed the breaches of the Companies (Jersey) Law 1991 by the SHL to continue or to have condoned it by continuing with the deal being proposed at that time. 29. Advocate Sharp argued that had the accounts irregularities been known, it was

clear that the logical options available at the time would have been to renegotiate the deal, hold on to the interest in SHL until the Inflexion deal in 2012 or continue to retain the shareholding until the IPO in 2015. Discovery Summons Plaintiff's Submissions 30. Advocate Sharp submitted that the cause of the Discovery Summons was the defendants' failure to comply with Practice Direction RC17/08. Contrary to the requirement in RC17/08, the defendants commenced their electronic discovery and then informed the plaintiff (by letter dated 20 March 2020) of the methodology that they were employing. When the plaintiff requested wider search terms, the defendants declined. The plaintiff's position was therefore that he was concerned that the breadth of the searches being undertaken were not sufficiently wide enough to cover the matters in dispute between the salient dates. 31. In addition, Advocate Sharp explained to the court that the defendants had disclosed that, despite having retained back up tapes of the electronic communications between 2003 and 2009, for reasons not yet understood, the tapes for the period of 2005 to 2006 had been destroyed. In the view of the plaintiff, these dates were crucial as it covered the period when the purported contractual relationship between the parties was established. 32. Advocate Sharp acknowledged that the defendants had employed a technology assisted software tool to undertake the recognition of salient and discoverable documentation pertinent to the claim. However, the plaintiff considered that based on the affidavits provided by the defendants describing the methodology utilised in this process, the search terms employed were too narrow. This would lead to substantial gaps in the discovery process, specifically in the issue of quantum and value of the company. Particularly concerning for the Plaintiff was the narrow search terms used in the "teaching" process for the software. These had been disclosed by the defendants in an exhibit to an affidavit of Advocate Hoare who had been part of the team overseeing discovery for the defendants. This appeared to show only 11 search terms. Three related to SHL and HIL and four related to a single person (Mr Tom Van Oss). The plaintiff was therefore concerned that such a narrow "training" process would naturally lead to too restrictive a sweep of the documents held by the defendant. 33. The plaintiff had identified a number of search terms that he wished the court to order that the defendants ought to apply in the discovery process. These were broken down into groups in the skeleton argument and in the plaintiff's affidavit and I apply those groupings for the sake of convenience in this

judgment.

- a) Deloitte/Partners and staff at Deloitte London/2015 IPO Prospectus 34. Advocate Sharp submitted that as the defendants had agreed a search date range up to and including 1 st April, 2015 (the date of the IPO), it was inappropriate that their searches do not include anything relating to Deloitte London (who were heavily involved with the IPO). Deloitte London had issued a report in 2015 for the IPO Prospectus that had featured a correction of the 2012 SHL accounts by approximately £13 million in respect of the preference shares issued in both the Ivegill 2010 transaction and the HIL 2011 transaction. The answer filed by

the defendants asserted that the errors in the 2010 SHL accounts in respect to the 10% preference shares issued to Ivegill were there by innocent error. As the plaintiff does not accept this and rather pleaded in his reply that this was a deliberate act by the defendants, the matter is in dispute and therefore anything held by the parties pertinent to the issue is prima facie discoverable. 35. Moreover, Advocate Sharp submitted that as the defendants must have been aware of the accounting errors when preparing the prospectus for the IPO, there must also have been substantial discussion between Deloitte London and SHL's board. It therefore followed that when the defendants chose to make a complaint to the Law Society in 2018 regarding the allegations being made by the plaintiff, the defendants were aware that the complaint was made on the basis of false statements. As the plaintiff wished, and was entitled, to open his case at trial on the assertion that the defendants made a malicious complaint against him to stifle his claim, Advocate Sharp argued that these matters are in dispute and documents evidencing the facts of the case should be reviewed and disclosed. b) Advocate Jeffrey/Mike Jeffrey/ M Jeffrey/ Carey Olsen/10% preference/pref shares / 12% preference/pref shares 36. The plaintiff submitted that Advocate Jeffery had a meeting with the management of Sanne in May 2011 during which the defendants were advised that the proposed process of issuing new preference shares was unlawful. That meeting was important because the misstated SHL 2010 accounts were signed after the meeting took place. The court was advised that the position of the defendants in respect of this meeting was one of non-admission rather than denial. Advocate Sharp argued that the defendants should be including Advocate Jeffrey and the matters pertaining to that meeting in the search words. In the view of the plaintiff this was a further example of salient evidence that would assist the court in deciding whether or not the actions of the defendants were innocent errors or deliberate acts. c) Budget 2010, Budget 2011, Budget 2012 and Budget 2013/ Forecast 2010, Forecast 2011, Forecast 2012/EBITDA 2010, 2011, 2012/Inflexion/Simon Turner/ Richard Swann/ Flor Kassai/Project Sartura/Capital restructure/Private Equity/ Refinancing/Management buy-out/MBO 37. Advocate Sharp submitted that his client's options, had the accounting inaccuracies been made known to him at the salient time, were either to have negotiated a better deal for his interest when they were sold or to have convinced the board of HIL not to sell at that point and have obtained a better price by retaining his interest up to the date of the IPO in 2015. He argued it was logical that his client should be entitled to have sight of the financial information for the period 2010 to 2015 so that he (and the expert witnesses) could properly understand the value of the SHL throughout that period. 38. In the view of the plaintiff, the defendants refusal to countenance a review of this material was concerning. The defendants must have known the value of the business during the period from 2010 to 2015 when EBITDA calculations would have to have been undertaken for both the Inflexion deal in 2012 and the IPO in 2015. Advocate Sharp asserted that the defendants' stance in seeking to keep the disclosure narrow was deliberate and intended to ensure that valuation of the SHL would be very difficult if not impossible to be carried out. d) Voting rights/Consus 39. The court was advised that Consus was a company formed by the defendants' directors in April 2009. Consus received some shares from Ivegill in March 2010. It held a central role in the factual

events leading to the transactions in 2010 and 2011 and the defendants had accepted that the company was linked to Sanne. The plaintiff argued this ought to be included in the search terms. Advocate Sharp submitted that through 2010 and into 2011 the Jersey Financial Services Commission and SHL's auditors were informed that HIL owned Consus. 40. In a final submission, Advocate Sharp sought to rebut the suggestion made by the defendants that the inclusion of those search words would substantially increase the number of hits and disproportionally increase the burden of completing their discovery obligations. He was critical of this argument for two

reasons.

First, he submitted that the evidence in support provided by the defendants was questionable. He argued that more accurate use of the search words would avoid unnecessary and unrelated hits and greatly reduce the number of relevant documents to be considered. 41. Second, Advocate Sharp submitted that this was a sizable claim and the defendants are a large international trust firm with a large external legal team supporting them. They ought to have been considering these searches when they started the process in March 2020. They clearly had the resources to complete the task should the Court order them to extend the search parameters now. The sum claimed is large, the pleadings are considerable and the case involved not only a serious claim but also a highly contested complaint to the Law Society. In this context, it could not be argued the extended discovery was disproportional. Defendants' Submissions 42. Advocate McCormick addressed the court on the technical process that the defendants had undertaken in discovery. He submitted to the Court that the assertions of the plaintiff regarding the need for further search words belied a misunderstanding of the nature of the automated and iterative discovery software being utilised by the defendants. Search words had long been recognised as being unwieldy blunt instruments which lead to considerable false positive hits - slowing the discovery process and increasing costs. The court was referred to the two affidavits of Advocate Hoare filed on behalf of the defendants. 43. The first affidavit set out in detail the process taken to utilise the technology - the investigation of the Mimecast software utilised by the defendants to store their electronic documents, the initial phase extraction and review (which were utilised to assist in the preparation of the defendants' answer), the second phase extraction during which no search words were employed but which led to 400,000 documents being identified, the use of the Brainspace classifier which identified documents relevant to the dispute, the review of the network drives and hardcopy documents, the second phase review, the cost of the restoring the data from the back up tapes and ultimately the redundancy of the use of search words when utilising this software. 44. The second affidavit focussed on the implications for the defendants should the amendments to the order of justice be permitted by the court. Here the court was advised that whilst the date range for the discovery was 26 th January, 2009 (as determined by the availability of data on the Mimecast software email repository) to 1 st April, 2015 (the date of the IPO), this did not mean that the defendants accepted that the IPO or the documents relating to it were within scope. In short, the amendments would require the defendants to undertake a fresh identification and harvesting process for the period post the Inflexion deal in 2012 and up to the

IPO in 2015. There was a stark difference in the number of email messages stored in the period up to 2012 and the period post 2012. The affidavit stated that the former period holds just over 4.5 million emails and that later period approximately 8.1 million messages. 45. Advocate Kelleher submitted that on closer analysis of the claim as pleaded, the key period is relatively limited (being January 2010 to mid 2012). As such the discovery by the defendants should reflect the same. He argued that the claim was for a breach of fiduciary duty and contract and these were alleged to have commenced in December 2010 when the discussion between the SHL and HIL started in regard to the nature of HIL's shareholding in the SHL. The plaintiff asserted that an agreement was reached with the defendants that they would provide him with the necessary detailed financial information regarding the business. When he requested this information in the context of the restructuring proposals made by SHL, this was declined on the basis that the information was outside the scope of what had been agreed on an informal basis. The discussions continued for a period of time between the parties with the ultimate outcome that the restructuring took place. The plaintiff never accepted that decision to restructure. 46. The defendants asserted that the plaintiff's claim revolved around the financial effect of the deal that SHL struck with Ivegill Holdings Limited in 2010. It was alleged that the deal left SHL in a position of needing to make good a deficit in its accounts and therefore profits, which it would have usually distributed as dividends to HIL and others, were consequently retained by SHL. This led SHL to lie to HIL about the reasons for the need to restructure the company. Advocate Kelleher submitted that the plaintiff's position was that, had he been provided with the financial information that he had requested, he would have identified the irregularities and discerned the real reason behind the restructuring. In addition, he would have persuaded his fellow shareholders in HIL to decline the deal and retain their shareholding in the SHL, which in turn would have resulted in a better return under the 2012 Inflexion deal. 47. Advocate Kelleher told the court that whilst it is accepted that the 2010 accounts are materially inaccurate, the plaintiff's obsession with these accounts was misplaced since these accounts were not finalised until after HIL had agreed a deal with the SHL. Therefore, no one at HIL was aware of the accounting effect of the 2010 transaction with Ivegill until after the deal with HIL was completed. It followed that the misstated accounts could not form any part of the reasons for SHL seeking to negotiate a deal with HIL in regard to its shareholding. 48. In regard to the search words requested by the Plaintiff, Advocate Kelleher dealt with them in the same groups as delineated by the Plaintiff. a) Deloitte/Partners and staff at Deloitte London/2015 IPO Prospectus 49. Advocate Kelleher submitted that the request for these discovery terms was driven by a desire to reverse-engineer the evidence. Because the plaintiff wanted to open his case at trial by asserting that the defendants' position on the misstated accounts and their subsequent complaint to the Law Society were knowingly false, the plaintiff was trying to attach this allegation to the facts of the case. To achieve this, the plaintiff argued that because Deloitte London concluded that the 2010 accounts had been misstated (4 years after the Ivegill transaction in 2010 and the disclosure of the 2010 SHL accounts) this had probative value as to the state of knowledge of the defendants and their staff in 2010 and 2011. Furthermore, due to this view taken by Deloitte London in regard to the 2010 SHL accounts, the defendants' reply to the letter before action and the complaint to the Law Society must have been intentionally misleading. 50. In the view of the defendants, there

was no probative value in this information. It would be improper and disproportionate to order the defendants to search for documents that are clearly irrelevant to the claim as originally pleaded. b) Advocate Jeffrey/Mike Jeffrey/ M Jeffrey/ Carey Olsen/10% preference/pref shares / 12% preference/pref shares 51. Advocate Kelleher submitted that whilst his clients have not admitted the facts regarding Advocate Jeffrey, they recognise that these are matters upon which they must provide relevant discovery and he advised the court that he anticipated these matters would be included in the discovery process being undertaken. 52. Likewise, the issue of 10% and 12% preference shares are patently part of the factual matrix of the claim and would be included in the discovery process undertaken by the defendants. c) Budget 2010, Budget 2011, Budget 2012 and Budget 2013/Forecast 2010, Forecast 2011, Forecast 2012/EBITDA 2010, 2011, 2012/Inflexion/ Simon Turner/ Richard Swann/ Flor Kassai/Project Sartura/Capital restructure/Private Equity/ Refinancing/Management buy-out/MBO 53. In short, Advocate Kelleher submitted that these terms were related to the quantification of the damages sought and a closer analysis of the quantum claimed in the order of justice would justify the denial of these as additional search terms. 54. The court was asked to review the prayer of the order of justice. Of the 5 limbs of damages sought, three related to wasted costs, the return of lost monies that should have been paid to the plaintiff and punitive and exemplary damages. These plainly did not relate to the material that the plaintiff sought to be disclosed. 55. Advocate Kelleher argued that the original wording of the order of justice focused on the true value of HIL's shareholding in the SHL in 2012. The defendants accept that disclosure (up to that date in 2012) of financial data relevant to the business which an expert would require to provide a valuation was material and would be provided as part of the ongoing disclosure process. However, it would not be proportional for the defendants to produce all financial data during that time. The requests are too broad and appeared to have had little thought given to narrowing them appropriately. 56. Advocate Kelleher submitted the plaintiff was now trying to widen the scope by insisting that the salient time period is up to and including the IPO in 2015. This was at odds with the pleaded case of a valuation at the time of the Inflexion deal in 2012. The defendants argued that that evidence from 2012 to 2015 cannot be relevant to the valuation in 2012. d) Voting rights/Consus 57. Advocate Kelleher contended that whilst the order of justice made little reference to Consus Limited and what was included appeared to be of little importance to the claim, his clients considered the relevant documents relating to Consus were discoverable and would be provided under the discovery process being undertaken presently. As to the issue of voting rights, he submitted that there was nothing in the submissions of the plaintiff to explain the relevance of this as a search term. e) David/David Banks/DB/DJB/Beverley Lacey/Beverley Banks/STC/STCL/Crill Canavan Investments Limited/CCIL/MRE/IHL/AIB/Allied Irish Bank/Geoff Crill/G Crill/Geoff/Nuno/NMSC/N Costa/ Carol/C Canavan/CEC 58. Advocate Kelleher explained that in general terms his clients had no issue with the relevance of the named parties under this head and the defendants were content that relevant documentation would be discovered and disclosed under the discovery process presently being undertaken. Decision on Amendment Summons 59. I remind myself that the starting point for the application to amend pleadings is Royal Court Rule 6/12 which states:- "(1) The Court may at any stage of the proceedings allow a plaintiff to amend his or her claim, or any party to amend his or her pleading, on such terms as to costs or otherwise as may be just. (2) Any

party may at any stage of the proceedings amend his or her pleadings with the consent of the other parties." 60. The manner in which the court should exercise that power to grant leave has developed considerably. In *Crociani v Crociani* [2015] JRC177, the Master both identified the basic principle applicable to applications for leave to amend at the time and also highlighted the difference that the court would take when the application was reasonably characterised as being "late". I pause at this point to confirm that I do not characterise this application for leave to amend as "late" so as to require the court to engage more strenuous tests before leave be granted. 61. At paragraph 3 of the judgment, the Master states:- "...generally the approach is that the Court will allow such amendments which are necessary to enable the Court to determine the real issues in dispute, provided that no party to the action would thereby be unavoidably prejudiced and as long as the amendments show an arguable claim, i.e. one that is not capable of being struck out ...". 62. However, in *Trico v Buckingham*

[2019] JRC163, the Master advanced the position having reviewed the position in similar cases in England. I am therefore guided by the words of the Court at paragraph 38 where it states:- "38. In my judgment, the approach now taken in England should be reflected in this jurisdiction and therefore greater emphasis should be given to the overriding objective compared to the approach taken in *MacFirisigh* and other decisions in Jersey. I stress however this is a change of emphasis rather than a marked departure from the previous approach because some of the factors in *MacFirisigh* overlap with those now relied upon before the English Court. Nevertheless that change of emphasis giving greater emphasis to the overriding objective is one that in the future I consider should be taken in this jurisdiction." 63. An initial review of the proposed amendments might lead one to suppose that, as they are small in number and short in length, it would be difficult to see why allowing the same might infringe upon the principles enunciated above. In essence, the amendments are seeking to expressly confirm that the damages sought in the plaintiff's case should encompass events beyond the Inflexion deal in 2012 and include matters up to the IPO in 2015. The plaintiff argued that this is little more than clarifying what was already capable of being discerned, or at least inferred, from the original pleadings or from the contents of the answer to the request for further information. 64. However, having considered the pleadings filed and the submissions made by both parties, I am not satisfied by the plaintiff's assertion that it should have been clear and obvious to the defendants that the "materially better deal" included potentially retaining the shareholding in the SHL up to the IPO in 2015. It follows that I am equally not satisfied that these amendments constitute mere clarifications as opposed to substantial extensions to the parameters of the quantum claimed and the discovery sought. 65. Notwithstanding the comments above, it does not necessarily follow that the plaintiff should be denied leave to file amendments to the order of justice. If the plaintiff is of the view that his order of justice needs to be amended so as to ensure that all matters between the parties are fully adjudicated upon by the trial court, then it is right and proper that he should be entitled to apply for leave. However, it is equally appropriate that such amendments are sufficiently particularised so that the defendants are fully able to understand the nature of the claim

against them and capable of pleading an answer in response. 66. I find the arguments of Advocate Kelleher on the issue of the counterfactuals to be persuasive. The plaintiff should have recognised that on his pleaded claim, in order to achieve an award of damages for "loss of chance" based upon the retention of his interests in the SHL until the IPO in 2015, he needed to identify a number of hypothetical actions taken by third parties between 2012 and 2015 and particularise what these actions would have been and why they would or would not have occurred. Without the inclusion of such detail, the defendants are left incapable of knowing what it is that they are being asked to rebut and incapable of pleading to the same. 67. Having regard to the dicta of the English Court of Appeal in *Habibson*, I conclude that the amendments are insufficiently pleaded in their present wording and I decline to grant leave. To do otherwise would be to invite further interlocutory applications by the defendants for clarification of the counterfactuals at play in this case which in turn would increase the costs and delay the progress of the proceedings, both of which are contrary to the intentions of the overriding objective. I should make clear that this decision has been made entirely on the basis of the amendments placed before me on this occasion. Should the plaintiff wish to renew an application for leave to amend in a more particularised form, that application will be judged on its merits alone. Decision on Discovery Summons 68. During the course of the hearing, I raised the issue of whether or not the issue of the Discovery Summons ought to be delayed until after the discovery lists had been exchanged and inspected. The reason I did so was that it was clear that a proportion of the difficulty that the plaintiff envisaged may have been caused by a misunderstanding of the nature of the technology assisted discovery process being utilised by the defendants. 69. Of the five groups of documents and search terms that the plaintiff identified in his affidavit, the defendants were of the view that three of those would be entirely covered by the present discovery process. Further, the defendants submitted that the other two (being those focused on Deloitte London post 2012 and financial information post 2012) were intrinsically linked to the proposed amendments to the order of justice which I have denied. 70. What was clear from the available evidence is that the introduction of the proposed search words would add a considerable burden to the defendant's discovery obligation. That could be wasted time and costs if, as the defendants assert, the additional words will not assist the process being undertaken. 71. The exchange of affidavits of discovery is due to be completed by the parties on 11 th September, 2020 with inspection to take place by 8 th October, 2020 with a follow up directions hearing to be heard not before 22 nd October, 2020. I conclude that given that the defendants' discovery will be capable of inspection by the plaintiff in near course, the correct path to take to avoid unnecessary delay and wasted costs is to adjourn the determination of the Discovery Summons to allow the parties to undertake inspection. If after having inspected the defendants' discovery, the plaintiff remains of the view that there are specific gaps in the discovery, he may revert to the court to renew his application or seek further disclosure orders. Costs 72. I have declined the plaintiff's application for leave to amend in the present format and I have done so for many of the reasons asserted by the defendants. It follows that the defendants can rightly be

characterised as "winners" in that summons and as such I order that the plaintiff should pay the defendants' reasonable costs of the Amendment Summons on the standard basis, such sum to be taxed if not agreed. 73. In respect to the Discovery Summons, as the court had adjourned the determination of that summons until after the inspection of discovery has taken place, I also adjourn the issue of costs on that summons with either party at liberty to renew an application for costs after inspection has taken place if necessary.

Authorities: Banks v Sanne Holdings Limited and another

[2019] JRC 222A . Crociani v Crociani

[2015] JRC177. Trico v Buckingham

[2019] JRC163. Pender v CGH (Jersey) Limited and others

[2020] JRC 109 . Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd

[2010] EWCA Civ 1335 . Hall v Meyrick [1957] 2QB 455 at 471. Allied Maples Group Ltd. v Simmons and Simmons (a Firm)

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