

JERSEY / JUDGMENT

Carmichael v Alderton [2024]

JRC 036 (14 February 2024)

[2024] JRC 036

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judgment

the MASTER:

Introduction

1. This is my judgment in relation to an application by the Defendant for permission to re-amend her Answer and Counterclaim, to rely upon additional expert evidence and to extend the date for filing expert evidence.

Background

2. The Plaintiff is the widow of the late Mark Carmichael, who died in 2008. Mr Carmichael was the founder and owner of Alba Power Limited ("APL") which specialised in gas turbine engineering services. On his death, the Plaintiff became the sole, ultimate beneficial owner of APL. The Defendant is the administratrix of the estate of her late father, Terrence Alderton, who was a director of APL. 3. The Plaintiff alleges that in October 2016, she loaned Mr Alderton the sum of £700,000 pursuant to a written agreement, negotiated by her advisor Gordon Angus, on terms that provided it was interest-free, unsecured and " repayable by agreement between the Plaintiff and Mr Alderton ". Following Mr Alderton's death in June 2020, the Plaintiff requested repayment of the loan. It was not repaid, and proceedings were instituted in May 2022. 4. Those proceedings are defended on the basis that amongst other things, there has been no agreement between the parties as to any repayment and in the absence of such an agreement, the loan does not fall due. Further or alternatively, it is alleged that the Plaintiff has waived her right to claim repayment of the loan. The Defendant also brings a set off and/or a Counterclaim for £445,000 which she alleges is due to the estate following an agreement to pay Mr Alderton a percentage of the sale proceeds of APL. 5. The matter came before Master Thompson in October 2022 (reported at Carmichael v Alderton [2022] JRC 232) when, pursuant to RCR 6/17(5), he ordered the Defendant to produce all documents filed with the Probate Registry and referred to in the Defendant's Rejoinder. 6. Subsequently, the Defendant issued two summonses, the second of which was an application for permission to amend her Rejoinder to allege that the loan was a sham.

That summons was adjourned sine die by a consent order dated 9 November 2022. 7. In August 2023, directions were given permitting firstly, the Plaintiff to amend her Particulars of Claim to reflect what she alleges is the inconsistency between the Defendant's pleaded case and the documents she submitted for probate. Directions were also given in relation to consequential pleadings, and to progress the matter to trial. In particular, the Court ordered that: (i) the parties have permission to rely upon expert evidence in relation to English inheritance tax and English probate law; (ii) witness statements and expert reports were to be exchanged by 5pm on 29 December 2023, and (iii) the matter should be relisted for further directions in January 2024, and a date was fixed for 15 January 2024. 8. Amended pleadings were filed by the parties in August and September 2023 but no allegation of sham was pleaded by the Defendant. 9. On Friday 22 December 2023, by an email timed at 21:03 in the evening, during the Christmas weekend and 3 working days before the deadline ordered for exchange of witness statements and expert reports, the Defendant emailed a draft summons to the court and the Plaintiff's Advocate which sought: (i) permission to amend the Defendant's Amended Answer and Counterclaim by filing a Re-Amended Answer and Counterclaim; (ii) directions for consequential pleadings to be filed; (iii) permission for the parties to rely upon expert evidence in relation to English tax law; and (iv) an extension of time for the filing of witness statements and expert evidence. 10. That summons was subsequently listed to be heard on 5 February 2024 after the previously-scheduled directions hearing. 11. At that directions hearing on 15 January 2024, Advocate Brown for the Defendant presented the Court with something of a *fait accompli* in that she informed the Court that not only had the Defendant not exchanged witness statements and expert evidence contrary to the directions of the Court, but her client had in fact decided not even to obtain such evidence given that: (i) the possibility of an application to amend had been a live consideration since the last hearing on 21 August 2023; and (ii) in her submission, it would have been contrary to the Overriding Objective for the Defendant to incur the costs of preparing such evidence in circumstances where it would have to be revisited if the contemplated amendments were allowed. 12. Having heard submissions from the parties, I ordered that witness statements be exchanged by 4pm on 29 January 2024, that a date be fixed for trial (namely 22 July 2024 for 1 week) and all other directions be adjourned to 5 February 2024. The Case Centre freeze date, which was the date by which the Court required the parties' documents to be uploaded for the hearing on 5 February 2024, was also expressly extended by the Court to 5pm on 29 January 2024. 13. The parties agreed to delay exchange of witness statements to 5pm on 29 January 2024, which coincided with the case freeze date. Neither party contacted the Court to inform it of the variation to the timetable or to ascertain whether the freeze date might be extended. In the event, the Plaintiff uploaded a Skeleton Argument, witness statements and other documents to Case Centre but no documents were uploaded by the Defendant. By email dated 1 February 2024, and timed at 11.31pm at night, the Defendant sought an extension of the case freeze date. Variations to Court Orders 14. RC Practice Direction 17/05 provides, amongst other things, that: "19. It is essential that any party who wishes to vary a direction takes steps to do so as soon as soon

as possible and in particular before any time limit for compliance with the direction has expired.

20. Any such application shall be accompanied by an appropriate written summary and submissions setting out what steps have been taken to adhere to the timetable set, why the previous directions have not been complied with, what variation is sought and its impact on any directions previously given.
21. Before seeking a variation a party should endeavour to agree the variation with all other parties to the dispute.
22. In the absence of agreement the application should be made in sufficient time to permit the other parties to respond to the application including filing any written summary or submissions a party wishes to rely on..." 15. In this case, 3 working days before the date set for exchange witness statements and expert evidence, and without any prior warning, or written explanation, the Defendant gave notice of her intention to issue a summons seeking permission to amend her pleadings and to vary the Court-imposed timetable. In my

judgment:

- (i) such conduct is a breach of paragraphs 19, 20 and 22 of RC Practice Direction 17/05; (ii) the explanation advanced by the Defendant does not withstand scrutiny given that the Defendant's actions caused the Plaintiff to suffer the very same consequences that the Defendant alleged were contrary to the Overriding Objective; and (iii) the timing of the Defendant's application and the absence of any written explanation either then, or now, evidences a clear disregard for the Orders of the Court, its Practice Directions and the Overriding Objective. 16. It is not for parties to choose which directions of the Court a party will, or will not, comply with. The Court makes orders, and it expects them to be met. Failing to comply with such orders not only has the potential to inhibit the Court's power to manage cases in accordance with the Overriding Objective but invariably increases the costs of, and time taken by, litigation. It is not an approach that can, or will be, tolerated and parties engaging in such conduct should not expect leniency from the Court. 17. Having exchanged witness statements, the Defendant failed to comply with the case freeze date. Such dates are imposed by the Court to manage the various cases listed before it efficiently and in accordance with the Overriding Objective. Compliance with such dates ensures, amongst other things, not only that the parties are aware of the material that each is to rely upon, but also that the Court has sufficient time to read the material filed. A case freeze date is no lesser an order of the Court and if a party wishes to vary a freeze date, they should engage with the Court at the earliest opportunity and do so in accordance with the provisions of RC Practice Direction 17/05. A failure so to do may lead to hearings being vacated, delayed and/or other proportionate sanctions. 18. In this case, the late filing of the material did not, in fact, impact the Court or the Plaintiff and I extended the freeze date. Identifying Amendments to Pleadings 19. The Royal Court Rules do not prescribe any particular format for illustrating amendments to pleadings, albeit that the practice that has

been adopted in this Court is that, unless otherwise ordered: (i) amended pleadings should show both the original text and the amendments; (ii) those amendments should be marked in a colour; (iii) amendments and deletions made on the same occasion should be marked in the same colour; and (iv) amendments and deletions made on different occasions should be marked in different colours. 20. In order to ensure consistency across cases, unless otherwise impractical or otherwise ordered, parties should use the colour scheme traditionally used in the English Courts for successive amendments namely (1) red, (2) green, (3) violet and (4) yellow. 21. In some cases, it may be more practicable for amendments to be identified by reference to a numerical code but the principle remains, that unless otherwise ordered, it should be clear on the face of the pleading as what is an amendment, a re-amendment, a re-re-amendment or a subsequent amendment. 22. That differentiation between amendments and re-amendments is particularly important in relation to subsequent applications to amend where the Court is being invited to consider specific amendments in the context of an already-amended document. However, in this case, the draft Re-Amended Answer and Counterclaim attached to the Defendant's summons highlights all the amendments made to the original Answer and Counterclaim with additions marked in blue and double underlined and deletions struck out in red but does not differentiate between those amendments already made (with permission) and those in respect of which the Defendant now seeks permission. This has caused additional work for the Plaintiff in identifying the four substantive amendments that are the subject of this application. Given my comments above, that difficulty should not arise again in future. Discussion 23. The principles in relation to amendments are well known and were set out by Birt Deputy Bailiff, in *Cunningham v Cunningham*

[2009] JLR 227 and succinctly summarised by Clyde-Smith Commissioner in *Financial Technology Ventures II (Q) LP and Ors v ETFs Capital Limited and Tuckwell*

[2020] JRC 152 (at paragraph 11) as follows: "(i) The general position is that all matters in dispute between parties should be resolved so far as possible before the Court at trial. Leave to amend should, therefore, be given if there is no prejudice to the other side which cannot be compensated for by costs (at paragraph 15). (ii) Amendments will not be permitted which infringe the rules of pleading or introduce a claim which is so hopeless that it would be liable to be struck out (at paragraph 19). (iii) More stringent considerations apply where an application to amend is late (at paragraph 17) and if (and only if) the Court considers that an amendment is 'late' it may then consider (at paragraph 21): (a) why the amendment material could not have been pleaded earlier; (b) the strength of the new case; (c) whether and why an adjournment ought to be granted; (d) how to remedy any adverse effects attendant upon the amendment being granted; and (e) why the balance of justice favours the party seeking to amend at a late stage." 24. The first issue which arises for determination between the parties is as to whether the application to amend is a late application such that the more stringent considerations apply. In *Trico v Buckingham*

- [2019] JRC 163 , Master Thompson cited with approval and adopted the principles summarised by Mrs Justice Carr DBE in the English decision of *Quah Su-Ling v Goldman Sachs International*
- [2015] EWHC 759 (Comm) where she held that: "c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept; d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;" 25. The Plaintiff submits that the application to amend is made late on the basis that: (i) the application was made 3 working days before the date set for exchange of witness statements and after pleadings had already been amended and discovery had occurred; and (ii) the nature of the proposed amendments is such that if permitted, factual and expert evidence will need to be revisited and this will put additional burdens on the parties in the run up to trial. 26. The Defendant disagrees. She submits that whilst the application may have been made after the time when the Court would have liked it to have been made, it is not late in the sense used in the previous decisions given that: (i) no trial date was fixed when the application was brought; (ii) although a trial date has now been fixed, there is sufficient time between now and trial for the amendments to be addressed without impacting the trial date; and (iii) the mere fact that the application also includes an application to vary an existing direction does not make it late. 27. In my judgment: (i) this is not a very late application in the terms described in other cases; (ii) the fact that the application also includes an application to vary directions previously given, does not necessarily make it late or very late; (iii) the application could, and should, have been made sooner given that the issue of sham was first raised in October 2022, and these amendments have apparently been under consideration since August 2023, but of itself in relation to this case, delay does not make the application late; (iv) there is no evidence or other written explanation as to why the application was been made when it was and the Court can therefore only assess lateness objectively; (v) the amendments themselves are limited in number and scope; (vi) given that the amendments, and any consequential directions, can be accommodated in the existing procedural timetable and by the parties, this is not a late application. 28. Where an application is not late, subject to the Overriding Objective, the general principle is that all matters in dispute between the parties should be resolved. Leave to amend should therefore be granted provided that there is no prejudice suffered by the other side that cannot be compensated for in costs and the amendments do not infringe the rules of pleadings or introduce a claim which is so hopeless that it would be struck out. The Proposed Amendments 29. These proceedings relate to an alleged loan and I adopt the analysis of Birt Commissioner, In the matter of the Will of Mrs G (Deceased)

[2017] JRC 090 where he held that: "42. A loan of money is an agreement between two people by which the borrower receives money from the lender and assumes an obligation to repay the money in accordance with the terms of the agreement. 43. In *Selby-v-Romeril*

[1996] JLR 210, the requirements for a valid contract under Jersey law were established. The relevant part of the headnote to that case reads: "Accordingly, it could now be stated that there were four requirements for the creation of a valid contract in Jersey; (a) the consent of the party undertaking an obligation; (b) his legal capacity to enter into a contract; (c) an 'objet' or subject matter of the contract; and (d) a legitimate 'cause', or reason for the obligation to be performed....." 30. The Plaintiff pleads at paragraph 2.4 of the Amended Order of Justice that: "...the Plaintiff agreed to advance an interest-free, unsecured loan in the amount of GBP700,000 to Mr Alderton (the Loan). The detailed terms of the Loan are particularised in section 3 below." 31. In section 3 of the Amended Order of Justice, the Plaintiff pleads the terms (at paragraph 3.2), the offer letter and the acceptance letter (at paragraphs 3.4 and 3.5), and that: "3.6 The Loan was formally documented in an undated agreement executed by each of the Plaintiff and Mr Alderton (the Loan Agreement). The Loan Agreement is governed by Jersey law. 3.7 The Plaintiff advanced the sum of GBP700,000 to Mr Alderton on 11 October 2016 pursuant to the Loan Agreement." 32. In response, the Defendant pleads that: "4. It is admitted that the Plaintiff agreed to advance an interest-free, unsecured loan in the amount of £700,000 to Mr Alderton. The Plaintiff wrote to Mr Alderton (albeit such letter is undated) confirming that she was "willing to advance a sum of £700,000 to [Mr Alderton] by way of an interest free personal loan to assist [Mr Alderton] with property financing". In that letter the Plaintiff states that Mr Alderton was "principally responsible for the success of Alba ...", Mr Alderton replied directly to this letter (albeit such letter is also undated) confirming his acceptance of the proposal to advance the Loan." 33. Insofar as Section 3 is concerned, the Defendant pleads that: "9. Paragraph 3.2 is admitted in so far as an agreement was concluded between the Plaintiff and Mr Alderton. It is averred that the terms of that agreement were as follows: (i) The Plaintiff will lend to Mr Alderton £700,000 (the "Borrowing"); (ii) The Borrowing would be interest free; (iii) The Borrowing would be unsecured; (iv) The Borrowing would be for an indefinite period and could be extended or repaid by the mutual agreement of the Plaintiff and Mr Alderton; and (v) The agreement was subject to the Law of Jersey. 10. No admission is made as to whether or not the terms were "highly favourable" or if they were "highly favourable" whom those terms favoured. It is averred that this is the bargain that was made between the Plaintiff and Mr Alderton (the "Bargain"). 11... 12. Paragraphs 3.4 -5 are admitted. The Defendant avers that the letters referenced also detail that the Loan was advanced for the purpose of property financing.

13. Paragraphs 3.6-3.7 are admitted." (Emphasis Added) 34. By way of a Reply, the Plaintiff admitted " The first sentence and subparagraphs (i) to (v) of paragraph 9" . 35. Accordingly, on the basis of the current pleadings, the parties are agreed that provided there was an objective meeting of minds sufficient to meet the requirement of consent (following *Hore v Valmorbida* [2022] JRC 202), the Plaintiff agreed to lend Mr Alderton £700,000, on agreed terms, and she did in fact pay the monies. 36. The issue between the parties arises at paragraphs 14 and 15 of the Amended Answer where having agreed that " there was no further agreement between the Plaintiff and the Defendant pursuant to the Loan Agreement for the repayment of the Loan ", the Defendant pleads that: "15. For a repayment obligation to be triggered the agreement requires both parties to reach a 'mutual agreement'. Following the death of Mr Alderton that means the Plaintiff and the Defendant need to reach a 'mutual agreement'. As per the pleaded case of the Plaintiff and pursuant to the admission of the Defendant in that regard, there has been no such 'mutual agreement', or any agreement since the payment of the Sale Remuneration. It follows that the Borrowing is not repayable by the Defendant. Pursuant to the fourth clause the Loan was made for an indefinite period and so it was agreed between the parties that in the absence of explicit agreement the Borrowing would never be repayable pursuant to the terms of the agreement." 37. The Plaintiff denies this paragraph in her Amended Reply and pleads that an obligation to repay arose on the death of Mr Alderton, alternatively that a term should be implied to that effect (paragraph 2.9 of the Amended Reply). By way of Amended Rejoinder, the Defendant denies that any obligation to repay arises on death or that any term should be implied requiring repayment on death (paragraph 11 of the Amended Rejoinder). 38. Against that background, I consider below the first and third proposed amendments, and the second and fourth proposed amendments. The First and Third Proposed Amendments 39. The first of the proposed amendments seeks to insert a footnote alongside the word " Loan " in the last line of paragraph 4 of the Amended Answer in the following terms: "It is noted that the Defendant does not accept that the Loan is - as a matter of fact or law - a loan. However, the terminology is used for ease of reference." 40. The fact that the proposed amendment is by way of a footnote is odd. Footnotes tend to complicate and obscure. Ordinarily they have no place in a pleading, unless it is to identify amendments by reference to a numerical code. If substantive footnotes in pleadings are inappropriate, substantive amendments by way of footnotes are even more so and should not be used. 41. The Defendant submits that this is not a substantive amendment; it merely articulates the position that the Court cannot automatically assume that all of the elements in a loan exist in an arrangement simply because a party chooses to call that arrangement " a Loan " (capitalised) in its pleading and thereafter uses it as a defined term or a form of shorthand. 42. That is not however what this amendment pleads. It pleads, indirectly by way of the phrase " It is noted ", that the Defendant does not admit that any contract between the parties was one of loan, on the basis of unparticularised fact or law, and without identifying which. 43. In my judgment, the proposed amendment: (i) is unclear

and insufficiently particularised; (ii) is inconsistent with both the admissions and the averments made in the Answer, namely that Mr Alderton received money from the Plaintiff on agreed terms, including a term that it would be repaid " by the mutual agreement of the Plaintiff and Mr Alderton ", and which together satisfy the constituent elements of a loan as set out in In the matter of the Will of Mrs G (Deceased) ; and (iii) offends the rules of pleadings such that permission should be refused. 44. The third proposed amendment is linked to the first proposed amendment. It seeks to insert a new paragraph 42 in the following terms: "42. Alternatively, if contrary to the Answer herein, the Defendant is found liable to the Plaintiff under the Bargain, the Defendant avers that the Bargain does not comprise the whole of the agreement between the Plaintiff and Mr Alderton such that it was agreed and intended that Mr Alderton would never repay any amount of the Loan and that, in effect, the Loan was a sham such that it was intended to lead relevant third parties - including HMRC - to believe that no gift had been made when, in fact, the amount in question had all the characteristics of, and was intended to be, a gift." 45. The Defendant submits that this is nothing more than pleading her case in the alternative, which she is, of course, entitled to do. There is nothing unusual in a party pleading that a particular arrangement is a gift, and if the Court finds against them, to allege that it is a loan on particular terms; or indeed, vice versa. 46. However, that is not what has been pleaded. The proposed amendment is a conditional plea which only arises once the Court has determined the claim and found " that the Defendant is liable to the Plaintiff under the Bargain ", which capitalised word refers to the terms agreed between the parties and particularised at paragraph 9 of the Amended Answer. The proposed amendment therefore only applies if the Court finds that there is a loan, and that it is repayable now. Accordingly: (i) under the terms of the current pleadings, the Defendant admits unconditionally that there was a loan which she alleges, on the facts, is not yet repayable; but (ii) pursuant to the third amendment, were the Court to determine that the (admitted) loan is repayable now, the Defendant seeks to resile from the unconditional admissions and allege that firstly the loan is a gift, and secondly, that the Jersey-law governed loan documents are a sham. 47. The proposed allegation of sham is an allegation of dishonesty against the Plaintiff and the late Mr Alderton. It must therefore be pleaded distinctly and sufficiently, in accordance with *Patel v JTC Trust Company Limited*

[2023] JRC 152 , and Lord Millett's comments in *Three Rivers v Bank of England*

[2003] 2 AC 1 , where he held that: "There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved". 48. No such fact has been alleged or pleaded and the proposed amendment is inadequately pleaded. 49. In my judgment, the third proposed amendment is not a properly-pleaded, legitimate, alternative plea but rather a plea that is inconsistent with the unconditional admissions and averments already made by the Defendant. Further, insofar as it requires the Court to reach positive determination, namely that there is a loan and that it is repayable now, and then to reopen that determination to consider gift and/or sham, it is embarrassing and/or an abuse of process and liable to be struck out. Accordingly, I refuse permission for this

third amendment to be made. The Second and Fourth Proposed Amendments 50. The second proposed amendment is the insertion of a new paragraph 11 as follows: "11. It is averred that the Bargain - along with other elements of the arrangements between the Plaintiff and Mr Alderton - is such that making the payment pursuant to the Bargain (and the Plaintiff is required to prove that the payment was made pursuant to the Bargain) was believed by the Plaintiff, and her advisor, Mr Gordon Angus, to be the most tax efficient way that she could pay the Plaintiff. It is further averred that Mr Gordon Angus understood, or believed he understood, (i) that the amounts paid pursuant to the Bargain risked being treated as employment income of Mr Alderton for the purposes of UK income tax and (ii) that if UK income tax were payable and paid on that amount the Plaintiff would need to advance a larger sum - as well as pay UK income tax - to ensure the same amount was paid to Mr Alderton" (Emphasis Added) 51. Insofar as the Defendant seemingly puts the Plaintiff to proof of payment " pursuant to the Bargain " (the words underlined above) in my judgment, this is already subject to admissions by the Defendant at paragraphs 9, 10 and 13 of the Amended Answer. 52. The remainder of this proposed amendment concerns the alleged knowledge of the Plaintiff and/or her advisor and is designed to plead the material facts necessary for the fourth proposed amendment which is the insertion into the Amended Counterclaim of paragraphs 3 to 5 in the following terms: "3. The benefit of the Loan - whether (a) a Loan; (b) a gift disguised as a Loan; or (c) a gift - amounts to remuneration of Mr Alderton in the course of his employment as managing director of Alba Power Limited. As such he is subject to employee's national insurance contributions, and pay as you earn income tax in the UK pursuant to the UK Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"), section 554A et seq. This is because: Mr Alderton was (at the time of the Loan) an employee, or former employee, of Alba, there is an arrangement (the "relevant arrangement") to which Mr Alderton was a party, it is reasonable to suppose that, in essence, the relevant arrangement is (wholly or partly) a means of providing, or is otherwise concerned (wholly or partly) with the provision of. rewards or recognition or loans in connection with Mr Alderton's employment, or former employment, with Alba. In addition a relevant step is taken by the Plaintiff, and it is reasonable to suppose that, in essence, that relevant step was taken (wholly or partly) in pursuance of the relevant arrangement. The relevant step is the making of the Loan by the Plaintiff and it is within ITEPA, section 554C.

4. The effect of this is that pursuant to ITEPA, section 554Z2 the value of the relevant step is treated as employment income of Mr Alderton. This value is liable to be assessed to income tax and national insurance contributions by HMRC under SI 2003/2682 the Income Tax (Pay As You Earn) Regulations (the "PAYE Regulations"), regulation 80 and a decision under the Social Security (Transfer of functions, etc.) Act 1999 section 8. While certain of the amounts of income tax are primarily a liability of Alba pursuant to, the PAYE Regulations. Part 4. Chapter 1. the Defendant is potentially susceptible to charge in relation to these amounts pursuant to, inter alia, PAYE Regulations, Regulation 72.

5. The quantum of such amounts cannot currently be determined because it will be necessary to calculate the interest on such income as well as determine whether or not HMRC will seek to apply penalties and this requires not only careful calculation by an accountant but also the confirmation of HMRC" 53. According to Advocate Brown, this tortuous wording is the product of the words used in the Income Tax (Earnings and Pensions) Act 2003 which is an English statute. 54. The thrust of these proposed amendments is to plead that: (i) the Plaintiff and her advisor, Mr Angus, were aware that there might be tax consequences for Mr Alderton as a result of receiving the loan; (ii) whilst the agreed amount of the loan was £700,000, that was the net amount after tax; (iii) to the extent that the Defendant (as opposed to APL) is liable for as-yet-unquantified amounts of income tax, penalties and interest in respect of the loan, these amounts should be set off against any monies owing to the Plaintiff on the basis that the Plaintiff allegedly agreed to meet the tax due. 55. The Plaintiff objects to these amendments on the grounds that: (i) they are insufficiently particularised and/or fail to plead the foreign law aspects properly; and (ii) they cause prejudice to the Plaintiff in a manner that cannot be compensated in costs. 56. The proposed second and fourth amendments are convoluted and not entirely satisfactory given that even if the loan were to have been for a net amount, they fail to plead any basis for setting off penalties and interest against the Plaintiff. However, as is frequently noted, pleading is an art, not a science, and it is not for the Court to assist a party to plead their case. In my judgment, there is nothing in the proposed second and fourth amendments which contradicts matters pleaded previously or otherwise offends the rules of pleading. 57. The Plaintiff further alleges that she will suffer prejudice as a result of having to deal with these amendments and the related evidence at such a late stage in the proceedings and in particular, by having her attention diverted from trial preparation. In my judgment, any such prejudice will be minimal and/or can be compensated in costs. 58. Accordingly, I allow the second and fourth proposed amendments. Additional Expert Evidence 59. The Defendant seeks permission to rely on evidence from an expert in English tax in relation to the second and fourth amendments. 60. In my judgment, this is a nuanced question of case management pursuant to the Overriding Objective: (i) on the one hand: (a) the Court will not need expert evidence to determine whether the agreed amount of the loan was expressed in net or gross terms and/or whether penalties and/or interest should be taken into account when determining any net amount; these will be matters to be determined on the basis of the oral evidence of the parties; and (b) there will be a significant amount of work involving not only the parties, but also HMRC, to calculate the exact amount of income tax, penalties and interest due and this will put the parties to significant expense; (ii) on the other, it might assist the Court to have before it, evidence in relation to: (a) the amount of income tax and national insurance potentially due in relation to the arrangement without taking account of penalties and interest; (b) the basis of the plea that " the Defendant is potentially susceptible to charge " and/or the likelihood of such a charge being made against the Defendant in circumstances where APL remains a going concern and/or at all; and (iii) the current amount of any such potential charge against the Defendant, ignoring interest and penalties. 61. In my judgment, the latter approach is appropriate and can be accommodated between now and trial. Accordingly, I give the

parties permission to rely upon expert evidence in relation to income tax to address the points set out in paragraph 60(ii) above only. Authorities Royal Court Rules 2004 Practice direction RC 17/05 Carmichael v Alderton

[2022] JRC 232 . Cunningham v Cunningham

[2009] JLR 227 . Financial Technology Ventures II (Q) LP and Ors v ETFS Capital Limited and Tuckwell

[2020] JRC 152 . Trico v Buckingham

[2019] JRC 163 . Quah Su-Ling v Goldman Sachs International

[2015] EWHC 759 (Comm) . In the matter of the Will of Mrs G (Deceased)

[2017] JRC 090 . Hore v Valmorbida

[2022] JRC 202 . Patel v JTC Trust Company Limited

[2023] JRC 152 . Three Rivers v Bank of England

[2003] 2 AC 1 . Page Last Updated: 21 Feb 2024 Back to top About JLIB Accessibility Contacts Copyright Disclaimer Feedback Privacy policy Site map This website is not compatible with your web browser. You should install a newer browser . If you live in Jersey and need help upgrading call the States of Jersey web team on 440099. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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