Neutral Citation Number: [2019] EWCA Civ 204

Case No: A4/2017/2212

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE MERCANTILE COURT,
QUEEN'S BENCH DIVISION
His Honour Judge Waksman
LM-2016-000083

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2019

Before:

LORD JUSTICE HAMBLEN
LADY JUSTICE ASPLIN
and
MR JUSTICE NUGEE

- -

Between:

Elite Property Holdings Ltd & Another	**Appellants**
- and -	
Barclays Bank PLC	**Respondent**

- -
- -

Mr John Brisby QC and **Mr Alexander Cook** (instructed by **Kyriakides & Braier**) for the **Appellants**
Mr Andrew Mitchell QC and **Mr Ian Bergson** (instructed by **Dentons UK and Middle East LLP**) for the **Respondent**

Hearing dates: 29th-30th January 2019

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Approved Judgment

Lady Justice Asplin:

1. This is an appeal against the order of HHJ Waksman QC (as he then was) sitting in the London Mercantile Court, dated 21 July 2017, by which he dismissed the Appellants' application to amend their Particulars of Claim and for the avoidance of doubt, ordered that the original claims for damages for conspiracy to injure by unlawful means and/or unlawful interference in the Appellants' trade or business were struck out. The Appellants had sought to amend those claims against the Respondent, Barclays Bank plc (the "Bank").

2. The proceedings were commenced on 20 November 2015 and relate to various interest rate hedging products ("IRHPs") entered into by the Appellants with the Bank. The Appellants' first two claims were for mis-selling of the IRHPs (the "advice claim") and for breach of duty by the Bank when conducting its review of their sale (the "review claim"). By an order of 20 December 2016 HHJ Bird struck out both the advice and the review claims. He also ordered that if the conspiracy claims were to be pursued, they should be pleaded out fully and properly particularised, in substitution for those claims as they stood and that if the Bank did not consent to the amendments, an application to amend should be filed and served. It is that part of HHJ Bird's order which gave rise to the application for permission to amend which was dismissed by HHJ Waksman QC.

3. The claims for unlawful interference and conspiracy with a predominant intention to injure are no longer pursued. Accordingly, this appeal is concerned solely with HHJ Waksman QC's decision to refuse permission to amend in relation to the claim for conspiracy to use unlawful means. It is also important to be clear that the appeal is concerned with the form of the draft before the Judge and not a further draft amended pleading which was produced on appeal and was ultimately described by Mr Brisby QC and Mr Cook, on behalf of the appellants, as a "forensic tool". It was substantially different from the draft in relation to which permission to amend was originally sought and refused. I should add that Mr Brisby and Mr Cook were not instructed in relation to the application and did not appear before the Judge.

Factual Background

4. I take the essential facts from HHJ Waksman QC's judgment. The First Appellant, Elite Property Holdings Limited ("Elite") and the Second Appellant, Decolace Properties Limited ("Decolace") are companies registered in the British Virgin Islands. Both companies had a number of loan agreements with the Bank which were secured over properties in Essex and London, including three care homes for the elderly, owned by Elite and operated by an associated company, Health and Home Limited ("H&H"). H&H also provided a guarantee for the Elite loans and by way of further security for the Bank, a debenture over its assets.

5. The Bank sold five IRHPs to the Appellants between 2006 and 2010. Three structured collars were entered into between October 2006 and July 2008, two by Elite and one by Decolace, in connection with loan facilities granted by the Bank, totalling about £7.5 million. Having entered into the structured collars, Elite and Decolace subsequently complained that they had been mis-sold. As a result, the collars were terminated in August and September 2010 and the Bank provided facilities to pay the related break costs. At the same time, Elite and Decolace each entered into an interest rate swap with

the Bank and on 11 August 2010, they entered into a settlement agreement with the Bank, the details of which are not relevant for these purposes.

6. In August 2012 the Bank made an agreement with the Financial Services Authority, (the "FSA") (now the Financial Conduct Authority (the "FCA")) to conduct a review into its sale of IRHPs and provide appropriate redress where necessary (the "FCA Agreement"). Under the FCA Agreement the Bank was required, amongst other things, to carry out a review of past sales of IRHPs, identify customers who did not meet the "sophisticated customer" criteria, ask them if they wanted a review, carry out the review, and, if a breach of a regulatory requirement had occurred, determine the matter, and, if relevant, provide appropriate redress.

7. The Bank gave an undertaking to the FCA in relation to the review which was at Annex A to the FCA Agreement. Amongst other things, the Bank stated that it would treat its complainants fairly and that it would prioritise any customers who were in financial difficulty. Importantly, it also stated that:

> ". . . except in exceptional circumstances, such as for example where this is necessary to preserve value in the Customer's business, [the Bank] will not foreclose on, or adversely vary, existing lending facilities (without giving prior notice to the Customer and obtaining their prior consent) until [the Bank] has issued a final redress determination…"

8. Annex A also required the Bank to comply with the terms of a statutory notice issued by the FCA which contained provisions in relation to the role of the "Skilled Person" who was "to provide an independent review of all aspects of the proactive redress exercise and past business review . . . as well as independent oversight of the application of that approach" (see paragraph 5) and an "independent oversight of the Firm's [Bank's] approach to the undertaking it has given in relation to not foreclosing on Customers or adversely varying their existing lending facilities . . ." (see paragraph 7). In addition, the Skilled Person was required to "assess and ensure the appropriateness of . . . the Firm's approach to the undertaking it has given in relation to foreclosure, . . . and in any case where the firm proposes to rely on exceptional circumstances . . . the application of that approach, prior to the [Bank] taking any steps to foreclose. . .." (see paragraph 14). Further, paragraph 15 states that:

> "In particular, in any case where the Firm proposes to foreclose on a Customer . . . the Skilled Person will review the case to confirm that there are exceptional circumstances."

9. Returning to the chronology, on 2 November 2012 and again on 30 January 2013 the Bank sent "reservation of rights" letters to Elite in respect of its breach of cashflow to debt ratios, which formed part of the loan facilities. Thereafter, on 7 May 2013, HMRC made a demand on H&H of approximately £700,000 in respect of unpaid Corporation Tax. A winding up petition was issued on 20 May 2013.

10. In the meantime, on 18 May, H&H and Elite agreed to transfer the care home business to another associated company, Health and Home (Essex) Limited, ("HHE") and stated that the new operator of the homes would be "unencumbered by the tax liability". Despite the fact that under the terms of Elite's loan agreements the Bank's consent to the transfer was necessary, it was not sought. The Judge found that the Bank was not

informed until 29 May 2013, a conclusion which Mr Brisby QC, on behalf of Elite and Decolace, disputes. At a meeting on 24 June 2013, Mr Stavrinides, who is believed to be the ultimate beneficial owner of both Elite and Decolace and was an authorised signatory for both companies, offered the Bank a replacement debenture from HHE.

11. In any event, in the light of these matters and earlier defaults, including the breach of cashflow to debt requirements, the Bank decided to evaluate the group's financial position and it commissioned a report from BDO. BDO was appointed pursuant to a joint retainer by the Bank and H&H. In the course of the production of a report, BDO's drafts were considered and commented upon by H&H and attention was drawn to the review being conducted in relation to the IRHPs. It was stated that:

> "…Although there are no firm assurances but it could very well be proved that we are entitled to a refund of this amount. Two of the loans totalling £1 million are for financing breakage costs. The overall cost to the group is approximately £2 million."

In the light of that a further draft was produced and ultimately signed off by Mr Stavrinides on behalf of H&H.

12. On 24 July 2013, the Bank's Interest Rate Hedging Resolution team wrote to Decolace and to Elite stating that they had determined that both companies met the criteria of "non-sophisticated customer" and, accordingly, they were automatically eligible for redress in relation to the sale of the structured collars. They were invited to take part in an impartial fact-finding process regarding the sales of the products, which was described as important in determining what redress would be offered.

13. On 2 August 2013, H&H submitted a proposal for a company voluntary arrangement ("CVA") stating that H&H was unable to pay its debts as they fell due and on 14 August 2013, the Bank wrote to Elite stating, amongst other things:

> "On 20 May 2013 a winding up petition was presented…Also, on 2 August 2013, H&H submitted a proposal for a Company voluntary arrangement…The letter also identified, under the heading 'Breaches', the sale (the transfer of assets) having been completed without the Bank's prior consent, the winding up petition and the CVA proposal."

The Bank reserved all of its rights and remedies in relation to the breaches including, but not limited to, issuing formal demand and commencing enforcement action against Elite, or any other person in accordance with the terms of any security. In the same letter, under the heading "Interest Rate Hedging Profit Review," it stated:

> "As you will be aware the Bank has provided an undertaking to the [FCA]… that it will not foreclose, [etc], except in exceptional circumstances. This undertaking applies to the Facilities. We confirm that this reservation of rights is without prejudice to Elite's right…to be included in the Bank's ongoing interest rate swaps review…"

14. In anticipation of the possible need to take enforcement action, the Bank drafted an initial escalation request dated 5 August 2013, addressed to KPMG, the appointed Skilled Person, seeking confirmation that there were "exceptional circumstances". It

mentioned all the various facilities and stated that there was a request to appoint BDO as administrators over H&H and following the appointment, if the administrators thought it necessary, the appointment of a Law of Property Act ("LPA") receiver over the nursing homes. Reference was also made to the winding up petition, the proposed CVA and that the director (Mr Stavrinides) was on holiday. Under the "exceptional circumstances" heading H&H was described and it was stated that:

> "Whilst the directors have purported to transfer assets (held by Elite Property Holdings Limited) to a new company whose banking is with the Bank of Cyprus, (outside of the Bank's security network, without our consent) the licences still sit with Health and Home Limited and therefore if the company goes into liquidation their licence will be revoked resulting in the nursing home being shut down which will leave vulnerable people at risk.
>
> The Bank's appointment of administrators will enable the nursing homes to continue to trade (with the intention of eventually achieving a going concern sale) and prevent the residents from being subjected to a distressing move which may have a severe detrimental effect to the residents [*sic.*] health and well being [*sic.*]."

The detriment to the Bank was the trading value of the three nursing homes, which would be destroyed, reducing the overall security by £3.5 million, based on existing valuation reports that had not been updated. The potential for reputational damage to Barclays if the residents were forced to relocate was also referred to. In fact, the request was not pursued because the Bank decided to await the outcome of the proposed CVA.

15. On 28 August 2013, HMRC rejected the CVA and the Bank was notified that the intention was to place H&H into a creditors' voluntary liquidation, with a meeting scheduled for 12 September. In addition, on 29 August 2013 the Bank became aware that Decolace had been struck off the BVI Companies Register in May 2012, and on 4 September 2013 it learned that Elite had been similarly struck off in November 2012. It is contended that the Bank was aware of the latter striking off before this date.

16. The Bank made a renewed escalation request to KPMG as Skilled Person on 9 September 2013. The details of the "situation" were much as before. However, it now stated that the Bank wanted to be able to appoint BDO as administrators and LPA receivers, over Decolace and Elite, without waiting to see if the administrators considered that LPA receivers were appropriate. It was stated that the dividends and all the profits of H&H were being withdrawn resulting in liquidity shortfalls which had led to the sums due to HMRC. Other matters were also updated. It was also stated that the adjourned hearing of the winding up petition was due to take place on 16 September. In relation to the transfer of assets, the Bank stated its belief that the motivation was to avoid creditor action and may have been at an undervalue. It was also stated that it "reduces the Bank's security interest in the nursing home as the Bank no longer benefits from security. The matter has been referred to our internal fraud department." Reference was also made to the specialist care for dementia patients and that rehousing patients would not be straightforward.

17. The exceptional circumstances related to the administration of H&H, the winding up petition, the transfer of assets, that an administration would enable the nursing home to

trade with the intention eventually of achieving a going concern sale and preventing the residents from being subjected to unplanned rehousing at short notice, and that the administrators would have authority to investigate the sale of the business. It was stated that Mr Stavrinides had been avoiding contact and had not responded appropriately. It was also stated that BDO anticipated securing a licence to operate the nursing home. Reference was also made to the fact that both companies had been struck off, and that LPA receivers would allow collection of rent and continuance of landlord's responsibilities, and would enable the sale of the nursing homes. Reference was also made to reputational risk and it was stated that the position was urgent because of the creditors' meeting on 12 September 2013.

18. The escalation request was granted. KPMG commented that:

> ". . . As Health and Home does not have an IRHP, we consider it falls out of scope of the exceptional circumstances procedures. In respect of [Decolace] and [Elite], as both have been struck off… it is arguable that they also both fall out of scope. However, we confirm that in our opinion the Bank's proposed action is consistent with the decision-making approach the Bank has set out in respect of exceptional circumstances."

KPMG also recorded that:

> ". . . You acknowledge that any decision taken, or not taken adversely, to vary or foreclose is yours alone [the Bank's] and that KPMG has not been, and will not be participating in the Bank's decision-making. The Bank has agreed that it will not convey to the customer any contrary impression."

The date of final sanction was given as 11 September 2013.

19. In the meantime, a meeting with Mr Stavrinides had been proposed for 9 September 2013, and it is common ground that prior to 8 September, the Bank had not told him that it had discovered that Elite and Decolace had been struck off the Companies Register. The meeting took place. However, on 10 September 2013 the Bank made formal demand on Elite and Decolace, and on 11 September it commenced enforcement action by appointing administrators over H&H, which was followed by the appointment of LPA receivers over the assets on 13 September 2013. By 14 September 2013 the Bank had confirmation that both Elite and Decolace had been restored to the Companies Register in the British Virgin Islands. As a result, the Bank withdrew its formal demand made against Decolace and thus no enforcement action was taken against that company.

20. In the meantime, both Elite and Decolace had taken part in the fact-finding process concerning the IRHPs. On 28 November and 11 December 2013, the Bank wrote to Elite and Decolace respectively, agreeing to suspend the payments under the interest rate swaps. On 2 June 2014 the Bank made an offer of redress to Decolace and one to Elite on 5 June 2014. The initial offers, which included an element in respect of consequential loss, were refused. Mr Stavrinides then submitted a separate consequential loss claim in the review on 6 August 2014. The Bank then made a revised redress offer which was concerned solely with the sale of the IRHPs and did not include compensation for consequential losses. Those revised offers were accepted and on 29

November 2014 both companies entered into a release agreement with the Bank (the "2014 Releases"). I will refer to the details of the 2014 Releases in more detail below.

21. As I have already mentioned, HHJ Bird dismissed the advice and review claims. He did so because he held that they had been compromised by the 2010 settlement agreement and 2014 Releases, the Claimants/Appellants having accepted that the claims were so barred unless they could be said to fall within the definition of "consequential loss" set out in the "Customer Guidance on Consequential Losses". Permission to appeal other aspects of that decision was refused by this court in a full, reasoned judgment of Flaux LJ with whom Lindblom LJ agreed, the full citation of which is *Elite Property Holdings Ltd and Decolace Properties Ltd v Barclays Bank plc* [2018] EWCA Civ 1688, [2018] 2 BCLC 460.

Proposed Amendments Before the Judge and the Judge's Decision

22. The Judge set out the proposed amendments before him at [45] of his judgment. For ease of reference, they are contained in the appendix to this judgment. In summary, it is pleaded at paragraph 40A that on about 4 September 2013, the Bank combined with BDO to enable the Bank to foreclose or adversely vary the Appellants' existing facilities, thereby inflicting intentional harm, and that the foreclosure and adverse variance of facilities implemented by the appointment of BDO as LPA Receivers amounted to unlawful means and resulted in unlawful interference in the Claimants'/Appellants' business. A series of events are then set out including the production of the report by BDO about the financial position of the Appellants, the categorisation of the Claimants as "non-sophisticated customers" for the purposes of the review of the sale of their IRHPs, rendering them automatically entitled to redress, an alleged failure to make reference to the redress in the BDO report, the undertaking given by the Bank to the FCA not to foreclose without a customer's consent except in exceptional circumstances, the striking off of the Appellants from the Companies Register in the British Virgin Islands and the meeting on 9 September 2013 at which the Appellants were informed of the intention to foreclose: see paragraphs 40B.8 – 40M.

23. It is then pleaded that the Bank used the absence of the Appellants from the Companies Register as an opportunity to join with BDO with the purpose of depriving the Appellants of the care home cash flow they needed to continue their business (paragraph 40N) and that there were no "exceptional circumstances" (paragraph 40O). Finally, at paragraph 40P it is pleaded that on or about or about 4 September 2013, Ms McDonald of the Bank combined with Mr Nygate of BDO, their mutual purpose being to deprive the Appellants of their source of cash and that it is to be inferred from the matters already pleaded that they intended to injure the Appellants and that the Bank acted in breach of its undertaking which amounted to unlawful means.

24. Returning to the judgment, having set out the test to be applied when determining whether permission to amend should be granted (about which there is no dispute or complaint) the Judge went on to address the factual matters which had been alleged at [49] – [58] of his judgment and then the various inferences and allegations made, which were said to support one or more of the new claims.

25. The Judge then conducted an analysis of the claims and concluded that the claim for conspiracy to use unlawful means must fail. See [84] – [89] of the judgment. In

summary, he did so on the basis that: the only unlawfulness relied upon was the alleged breach of the undertaking by the Bank to the FCA and he had held that there was no breach of that undertaking or any real prospect of establishing that there had been ([84] and [60] - [72] of the judgment); as there was no unlawfulness there could be no relevant intention to do an unlawful act and even if unlawfulness were arguable, there was no realistic basis for saying that the Bank or BDO intended to act in breach of the undertaking ([85] and [86] of the judgment); and the allegations of conspiracy were sparse ([87] – [88] of the judgment).

26. The Judge addressed the question of unlawfulness on the basis that it was arguable that a breach of the Bank's contractual obligation to the FCA not to enforce without exceptional circumstances could amount to unlawful means for the purposes of the tortious claim, albeit that he considered it to be highly questionable. In any event, he held that there could be "no serious argument that they [the circumstances] were not exceptional": see [59] of the judgment.

27. Furthermore, he concluded that it was a hopeless contention at paragraph 40F of the draft amended pleading that financial circumstances caused by the Bank's own failings in the sale of the IRHPs or its failure to prioritise its review of financial difficulties could not amount to exceptional circumstances, whether on the basis of an implied term or as matter of construction; see [61], [62] and [65]. He also considered the matters set out at paragraph 40O of the draft amended pleading, which were characterised as not being exceptional, being the striking off, the proposed CVA and the transfer of assets, were serious matters, the last of which he described as a "serious event of default". See [64] of the judgment.

28. Further, the Judge relied upon KPMG's approval (in its capacity as the Skilled Person) of the Bank's designation of exceptional circumstances which, absent bad faith, irrationality or perversity, he considered to be conclusive. See [66] and [67] of the judgment. In any event, he held that if he were wrong and KPMG's confirmation was not conclusive, it was at least "a most powerful factor" which "taken with my analysis of the exceptional circumstances, . . . negates any real prospect of showing at trial that there were no exceptional circumstances." See [68] of the judgment.

29. The Judge went on to consider a number of submissions which had been set out in Elite's skeleton at paragraph 35 but had not been pleaded in the draft amended pleading. He decided that: the alleged failure by the Bank to disclose to KPMG various matters in relation to the history of its relationship was immaterial; the point that BDO ought to have taken into account the potential substantial redress was for BDO; and the reference in the final escalation report to the Bank not having learnt of the striking off until 4 September when it learnt about Decolace on 29 August was also immaterial. See [69] and [70] of the judgment.

30. Accordingly, he concluded that "since there is no real prospect of showing no exceptional circumstances neither the wrongful interference claim, nor the conspiracy to use unlawful means claims can be made, because there was no unlawfulness to begin with." See [73] of the judgment.

Grounds of Appeal and Respondent's Notice

31. The grounds of appeal which remain relevant are that the Judge was wrong in law to hold that:

(1) there was no serious argument that the circumstances were unexceptional and he should have held that there was a reasonable prospect of proving a breach of the undertaking to the FCA. In particular, he erred in holding that: (a) it was not arguable that there was an implied term in the loan or security agreements with the Bank that it would not cause the Appellants to breach those contracts; (b) it was not arguable that circumstances caused by the Bank could not amount to "exceptional circumstances"; (c) that Mr Stavrinides had stated that the Appellants were not in financial difficulties, and therefore it was not arguable that the Bank should have prioritised the Appellants in the review; (d) that it was not arguable that the Bank had used the Appellants' alleged inability to collect rents because they had been struck off the Companies Register in the British Virgin Islands as a ploy; and (e) that because KPMG as Skilled Person had approved the "exceptional circumstances" categorisation the Appellants had no reasonable prospect of proving that the circumstances were not exceptional or that the Bank intended to act unlawfully.

and

(2) the claim was precluded by the 2014 Releases.

32. By a Respondent's Notice, the Bank seeks to uphold the Judge's decision in relation to unlawful means conspiracy on the additional grounds that such a claim could not succeed in the light of the fact that the Bank had contractual rights to take enforcement action following the occurrence of "Events of Default" and that, in any event, as a matter of law, it is not open to the Appellants to rely upon an alleged breach of the contractual agreement between the Bank and the FCA as constituting unlawful means for the purposes of the tort.

Application to Adduce Fresh Evidence

33. By an application notice dated 19 November 2018, the Appellants sought to rely upon ten new documents for the purposes of the appeal. In the event, Mr Brisby did not make the application and we were only asked to look at three documents *de bene esse*, two of which were subject to the application. It had been conceded in correspondence that the new documents could, with reasonable diligence, have been deployed earlier in the proceedings and that they would not overcome the first limb of the test in *Ladd v Marshall* [1954] 1 WLR 1489. However, it was stated that the more generous approach adopted in *Tajik Aluminium Plant v Ermatov & Ors* [2008] EWCA Civ 54, which was an appeal in relation to an interlocutory application, should be applied.

34. The documents to which we were taken which were also the subject of the application were: the Register of Mortgages, Charges and Encumbrances in relation to Elite as at October 2006, showing that Elite had given an all monies and liabilities charge to the Bank amongst other things over the goodwill of the businesses at each of the care homes; and a licence agreement between Elite and H&H dated 13 March 2001 which applied to all of the care homes, by which H&H was appointed to run the care home business at a named home and any others which might be acquired. It was stated that Elite retained the right to sell the business including goodwill on giving six months'

notice and it was stated that the agreement would terminate on H&H becoming insolvent.

35. First, it seems to me that although the appeal is from an interlocutory order, there is nothing in the background to this matter or the history of the litigation which would make it appropriate to adopt a more generous approach than that which would otherwise apply. This is not a case, for example, in which an urgent application was made and documentation was inevitably obtained piecemeal. The proceedings were commenced in November 2015 and the application which came before HHJ Waksman QC was made in July 2017, HHJ Bird having pointed out that the conspiracy claims were not adequately pleaded in December 2016.

36. Second, having considered the matter in the light of the overriding objective, in my judgment, it would not be appropriate to exercise the discretion in order to enable reliance upon the two documents to which I have referred. Although the principles enunciated in *Ladd v Marshall* are no longer determinative, they are highly persuasive. It is conceded that the documents could have been obtained with reasonable diligence and deployed before the Judge. Secondly, I do not consider them to be such that they would have an important influence on the result of the case. Furthermore, if they were admitted they might also require further evidence in response from the Bank.

37. I should add that the same is true in relation to a document which Mr Brisby handed up, which his client has obtained from BDO as a result of a request under date protection legislation, in relation to which Mr Brisby accepted that a request could have been made earlier. We were not informed about when the request had actually been made or when the document was received. In any event, the document was dated 9 September 2013 and was a memorandum from BDO addressed to the Bank. It was so heavily redacted that it was difficult to gain much from it. However, it included reference to:

    (i) the director [Mr Stavrinides] having maintained that the goodwill in the businesses was an asset of Elite and that therefore, consent of the Bank was not required in relation to the transfer of assets;

    (ii) Elite and Decolace being struck off the register in the British Virgin Islands creating a situation where the directors cannot trade or manage the businesses including the collection of rent; and

    (iii) "directors unable to deal with affairs or assets of [the] Elite until restored to the Registry" and a similar statement in relation to Decolace.

38. Mr Brisby submits that it shows that BDO must have known that the circumstances were not sufficient to be "exceptional" and that, accordingly, the Bank was not entitled to obtain confirmation from KPMG that it could proceed with enforcement despite the terms of the Undertaking to the FCA. He says that it makes it clear that there is a lot more to come out.

39. In this regard I agree with Mr Mitchell on behalf of the Bank, that even if the document was only obtained after the hearing before the Judge (which is unclear) it does not support the Appellants' case that there is a real prospect of showing that the BDO and the Bank agreed that the Bank should behave unlawfully. It seems to me, therefore, that it has been produced at the eleventh hour with no real explanation as to why it could

not have been produced before the Judge, would be unlikely to have an important influence on the result of the appeal and overall in the light of the overriding objective, including the finality of litigation, it is inappropriate to give permission to rely upon it.

Test to be Applied – Amendment of Pleadings

40. There was no dispute about the test to be applied in the circumstances of this case. The dispute was whether the Judge had applied it properly or whether he had fallen into error by conducting a mini trial. In any event, it is important to bear in mind that the overriding objective applies and the question of whether permission to amend should be given must be considered in the light of the need to conduct litigation fairly and justly and at proportionate cost.

41. For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a *prima facie* case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No3)* [2003] 2 AC 1.

42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon. With that test in mind, I turn to the grounds of appeal.

The 2014 Releases

43. As Mr Mitchell QC, on behalf of the Bank, pointed out, if the tortious claim in unlawful means conspiracy falls within the ambit of the 2014 Releases, the appeal must be dismissed because the only claim in the amended pleading before the Judge which is now pursued can have no real prospect of success. Accordingly, I turn to the 2014 Releases first.

44. It was agreed that the 2014 Releases must be construed in accordance with the principles in *Arnold v Britton* [2015] AC 1619. Those principles were endorsed by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] AC 1173. As Lord Hodge explained at [10] of his judgment, the court must ascertain the objective meaning of the language which the parties have used and in doing so "must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning." He also reiterated the principle that the interpretation of contracts is a unitary exercise, stated that the process is an iterative one and added at [12]:

> "To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and

> the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

45. The context in which the 2014 Releases were signed was that the Bank was part way through its review in relation to the Appellants' IRHPs. It had made an offer of redress which had been rejected by Elite and Decolace insofar as it included consequential loss and the Bank was considering a separate and detailed claim for consequential loss which had been submitted by Mr Stavrinides under the review process on 6 August 2014. The Appellants then asked for payment of the basic redress and as a result, the Revised Review Offers were made. Those offers and the 2014 Releases were contained in a standard form document entitled "Revised Redress Offer Acceptance Form" which had been drafted for the purposes of the review process. The 2014 Releases were signed on 28 November 2014 as part of the acceptance of those offers. Thereafter, by a letter dated 19 December 2014, the Bank rejected the claim for consequential losses under the review procedure on the basis that it had not been established that the "Factual Test" had been met. Further correspondence ensued between Mr Stavrinides and the Bank and ultimately, the Bank referred him to the services of the Financial Ombudsman.

46. By clause 1, the directors of the Company (Elite and Decolace where relevant) confirmed that "following the review of the sale by Barclays [the Bank] of the above IRHPs, the Company accepts the Revised Redress Offer . . .". The relevant part of clause 2 is as follows:

> "2. We, as directors of the Company agree that the acceptance of the Revised Redress Offer made by the Bank is subject to the following terms:
>
> (a) The Revised Redress Offer and receipt of the Redress Payment is in full and final settlement by the Company of all Claims (as defined below), including costs, expenses or damages, (excluding for consequential loss as defined in the Bank's 'Customer Guide on Consequential Losses') and any court costs awarded in relation to any action to pursue damages for consequential loss, in any way connected to the sale of the IRHPs, however such Claims arise. For the purpose of this Form, "Claims" means all complaints, claims and causes of action in any way connected to the sale of the IRHPs, except in respect of any action necessary to pursue damages for consequential loss only and any further cash redress which may be due to the Company as a result of such claims.
>
> . . ."

Further, by clause 3 the directors acting on behalf of the Company acknowledged that clause 2(a) would take effect upon receipt of the Redress Payment. It is not in dispute that a Redress Payment was received by both Elite and Decolace. "Consequential loss" was defined in the Bank's "Customer Guide on Consequential Losses" in the following manner:

> "unlike losses which may be expected as a result of the mis-sale of an IRHP to anybody (for example payments made under the IRHP) consequential losses are losses suffered as a knock-on effect of the mis-

> sale and are specific to a customer because of their own particular circumstances."

47. Mr Brisby QC on behalf of the Appellants submits first that the claim for unlawful means conspiracy as formulated in the proposed draft amendments does not fall within the definition of "Claims" for the purposes of the 2014 Releases because it does not arise from the sale of the IRHPs but from the Bank's decision to take enforcement action against the Appellants in breach of the undertaking given to the FSA/FCA. He says that the fact that the mis-selling provides the background to the tortious claim does not mean that those claims are "connected to the sale of the IRHPs". The mis-selling is not an element of the cause of action itself. He also submits that the *contra proferentem* rule applies and accordingly, that to the extent that there is any ambiguity, clause 2(a) must be construed against the Bank.

48. If he is wrong about that and the claim for unlawful means conspiracy falls within the definition of "Claims" in clause 2(a), he says that the claim falls within the exception for claims for damages for consequential losses. He submits that "knock-on effect" in the definition of 'consequential loss' should be construed widely, the ultimate cause of the losses claimed, being the mis-sale of the IRHPs. Furthermore, he says that it would be unreasonable if that were not the case. He went as far as to submit that a position akin to an estoppel by convention arose because at the same time as the 2014 Releases were signed, the Bank was considering the application for consequential loss which had been submitted under the review process on behalf of Elite and Decolace in August 2014. Such an allegation is not pleaded and was not foreshadowed in the Appellants' skeleton and supplemental skeleton for the purposes of this appeal.

49. It seems to me that the definition of "Claims" in clause 2(a) viewed in the context of the Revised Redress Offer as a whole and clause 2(a) in particular, and in the light of its relevant factual context, is extremely wide and is sufficient to include the claim of unlawful means conspiracy. "Claims" are defined to include "all complaints, claims and causes of action in any way connected to the sale of the IRHPs" (emphasis added). The language used is broad and unambiguous and it seems to me to be inescapable that it is sufficiently wide to include the claim as pleaded in the proposed amended pleading which contains numerous references to the sale of the IRHPs and their effects upon the Appellants.

50. There is no reason to restrict the meaning of "Claims' to matters arising solely from advice or misrepresentations arising directly from the sale of an IRHP which, in effect, is what Mr Brisby proposes. The unlawful means relied upon in the draft amended pleading is an alleged breach of the undertaking to the FCA which only applied to customers who had been sold an IRHP that met the criteria specified in the FCA Agreement. As the Bank explains in its skeleton, it follows that there would be no case of unlawful means but for the sale of the IRHPs. It seems to me, therefore, that the claim contained in the proposed amended pleading falls within the wide definition of "Claims" and that the Judge's conclusion in this regard (which was *obiter*) is unassailable.

51. Does such a claim, nevertheless, fall within the exception in clause 2(a)? This argument was not before the Judge and was first raised in the Appellants' supplemental skeleton. It was argued however, before HHJ Bird in relation to the advice and review claims and

he decided in that context that those claims did not fall within the exception in the 2014 Releases in relation to claims for consequential loss.

52. In my judgment, taking into account the language used, the factual context, the Revised Redress Offer as a whole, clause 2(a) in particular and the definition of "consequential loss" for the purposes of that sub-clause, it is clear that the exclusion in relation to consequential loss does not include the losses arising from the unlawful means conspiracy claim. Consequential losses are defined as "losses suffered as a knock-on effect of the mis-sale and are specific to a customer because of their own particular circumstances." It seems to me that the alleged losses suffered as a result of the purported unlawful means conspiracy are not a knock-on effect of the mis-sale of the IRHPs. They are an alleged knock-on effect of the alleged failure of the Bank to fulfil its undertaking to the FCA and accordingly, to conduct the review properly. That is the very nature of the alleged unlawful means relied upon. The language used is narrower than that used in the definition of "Claims".

53. Furthermore, such an interpretation makes commercial sense in the context of clause 2(a) itself. It does not affect the review in relation to consequential losses which were a knock-on effect of the mis-sale itself, which was actually being conducted and which was rejected. Nor would it preclude a claim for such damages if it were pursued in court. However, wider and different claims based upon duties which were different from those arising from the mis-sale itself, are barred.

54. It follows, therefore, that I do not consider that there was anything in Mr Brisby's submission that such a construction would be unfair and that the subsequent conduct of the parties would give rise to something akin to an estoppel by convention. There was nothing to prevent the Appellants from pursuing the review in relation to consequential loss arising as a knock-on effect of the mis-sale which was already being conducted or in bringing an action for such loss. In fact, the Bank continued to consider that claim before rejecting it in December 2014. There was no evidence before the Judge or before us of an agreement or conduct which might form the basis for an estoppel to which Mr Brisby alluded nor of a representation upon which the Appellants might seek to rely. The Bank continued with its review of the consequential loss claim and rejected it on a factual basis.

55. It follows, therefore, that in my judgment, as the Judge found at [91] – [94] of the judgment, the unlawful means conspiracy claim contained in the draft amendments before the Judge is caught by the terms of the 2014 Releases and as a result, has no real prospect of success. Accordingly, I would dismiss the appeal on this ground.

Missing Elements of the Tort of Unlawful Means Conspiracy

56. Mr Mitchell also submitted that, in any event, the Appeal must fail because fundamental elements of the tort of unlawful means conspiracy are absent from the draft amended pleading and from the evidence which was before the Judge and therefore the Judge was correct to refuse permission to amend. It is not disputed that for the purposes of the unlawful means conspiracy, two or more persons must combine/agree to act in an unlawful manner: *JSC BTA Bank v Ablyazov & Anr (No. 14)* [2018] 2 WLR 1125 per Lord Sumption and Lord Lloyd-Jones JJSC at [9] (with whom Lords Mance, Hodge and Briggs agreed). They must also intend to injure the third party.

57. The Judge concluded that there was no relevant intention and that the allegation of the actual conspiracy was sparse. He addressed those matters in the following way:

> "84. This plea must fail, first, because the only unlawfulness relied upon is the breach of the undertaking, but I have held that there was no breach and no real prospect of establishing that there was a breach.
>
> 85. But moreover there is no relevant intention either. If there was no unlawfulness there could be no intention to do an unlawful act, and even if there was arguable unlawfulness there is no realistic basis for saying that the Bank and BDO intended to act in breach of the undertaking. If they did, the last thing the Bank would do would be to seek the appropriate sanction from KPMG, with the obvious risk that if KPMG refused to escalate the request the Bank's intentions to enforce, in breach of the undertaking, would be found out. None of this adds up at all.
>
> …
>
> 87. Further, the allegation of the actual conspiracy is itself sparse. It is true that in conspiracy claims it is often hard to find direct evidence of the actual agreement made between the conspirators, hence the use of inferences. But here the allegation is that the agreement was made on or about 4th September between Ms McDonald of the Bank and Mr Nygate of BDO. But all that happened on 4th September was the Bank learning of the striking off of the companies. So the suggestion seems to be that this triggered the conspiracy, which had not been presaged or prepared in any way beforehand. Furthermore it is necessary to ask what acts were then done in furtherance of this conspiracy.
>
> 88. Reference is made to the delay in telling Mr Stavrinides about the striking off, but the fact is that he was told. It is not as if the striking off was the only event of default relied upon as against Elite. The other events of default, which were themselves substantial, had already happened. It is not suggested that the Bank provoked those earlier events of default in bad faith. For example, to cause HMRC to make a tax demand or to cause HHE to make the transfer of assets. As there were other defaults, the notion that the Bank may have deliberately not told Mr Stavrinides about the striking off does not make any difference. The only event that happened subsequent to the date of the alleged conspiracy was the application for the escalation of the request and then enforcement. So this is a very odd conspiracy plea indeed, because effectively everything the conspirators set out to do would already have happened."

58. On the facts of this case, Mr Mitchell submitted that it was necessary to show that there was a real prospect of showing that BDO and the Bank agreed that the Bank would breach the undertaking and accordingly, that it was agreed that the Bank would obtain the approval of KPMG as Skilled Person to enforcement on the basis of exceptional circumstances, unlawfully and with an intention to injure the Appellants. Mr Mitchell

submits that there is no evidence that BDO was aware of the undertaking and the Appellants have, and had, no real prospect of showing a combination or agreement between the Bank and BDO that the Bank would act unlawfully. He also says that there is no material or pleading in relation to an intention to injure the Appellants.

59. Mr Brisby accepts that it is necessary to show that BDO and the Bank combined to do something unlawful and that the only references to such a combination in the draft amended pleading, such as they are, are at paragraphs 40A and 40P which refer to a 'combination' on or about 4 September 2013. He also accepted that there was no allegation in the draft amended pleading that BDO was involved in producing the escalation report for submission to KPMG, which he now submits was misleading. However, he says that before disclosure it is very difficult to show BDO's involvement. In the meantime, he relies upon three matters: BDO's presence at the meeting of 24 June 2013 evidenced in a letter of 12 August 2013 from the Bank to the Appellants, H&H and others in which the circumstances, the matters concerning the Bank and the "Proposed Way Forward", were set out; the fact that BDO knew that the Appellants had been struck off the register in the British Virgin Islands; and the fact that Mr Nygate of BDO was present at the meeting which took place between Mr Stavrinides and the Bank on 9 September 2013. He submits, therefore, that because they were not appointed immediately, it can be inferred that BDO knew that KPMG's approval was necessary, and further, that it can be inferred that BDO knew that exceptional circumstances did not exist, that consideration had been paid for the transfer of assets from H&H to HHE and that the Bank retained its security.

60. It seems to me that the Judge was entitled to come to the conclusion he did in relation to intention and conspiracy and that Mr Mitchell is right in his submissions. There is no allegation of an agreement to do an unlawful act in the amended draft pleading, nor is there a real prospect of showing that BDO conspired/agreed that KMPG's imprimatur should be obtained by unlawful means. These are essential elements of the proposed cause of action. Furthermore, it seems to me that Mr Nygate's presence at the meetings on 24 June 2013 (which is not referred to in the draft amended pleading), at which the Bank's concerns, including the winding up petition and the transfer of assets, were discussed, his presence at the meeting on 9 September 2013 immediately before the Bank made a formal demand and took enforcement action and his knowledge of the position in relation to the striking off in the British Virgin Islands cannot give rise to a real prospect of success in this regard. As the Judge pointed out at [88] of his judgment, in the light of the serious events of default which had already occurred, the alleged conspiracy on or about 4 September 2013 is a very strange one.

61. Accordingly, were it necessary, I would also reaffirm the Judge's decision and dismiss the appeal on this ground.

Exceptional Circumstances

62. We were also addressed at some length in relation to whether there were exceptional circumstances which warranted the foreclosure (Ground of Appeal (1)(b)), whether the Judge was right to conclude upon the evidence that even if KMPG's approval was not conclusive, it was at least "a most powerful factor" which, when taken with his analysis of the exceptional circumstances, negated any real prospect of showing at trial that there were no exceptional circumstances (see the judgment at [68] and Ground of Appeal

1(e)) and despite the fact that it was not pleaded, whether KMPG had been misled by the Bank's escalation report.

63. In relation to whether there were exceptional circumstances, Mr Brisby criticised the Judge's approach at [64] of the judgment in particular. The Judge rejected the reasons why the circumstances were said to be not exceptional which were set out at paragraph 40O of the proposed draft amended pleading in the following terms:

> ". . . First it refers to the striking off as being not exceptional but [a] only minor error. But this was a serious matter. It did not take long to correct it but the point is that it would, while it was there, have affected the ability of Elite to collect the rent. Secondly, a reference is then made to the proposed CVA. But the proposed CVA was [a] also serious matter, which could have serious effects on the property because it could have affected the business. The important point being, on this score, that for the CVA to have proceeded, it would assume, as had been stated, H&H's insolvency. Furthermore, the transfer of assets was a serious event of default for the reasons which were given. The fact that the reservation of rights letters had acknowledged that the undertaking had applies is irrelevant. The undertaking not to enforce did indeed apply but it was subject to the exceptional circumstances proviso."

64. Mr Brisby submitted that the Bank had taken a relaxed attitude to these matters in its letter of 12 August 2013 and that in any event, the CVA could not affect the Bank's rights because it was a secured creditor (as the Register of Mortgages, Charges and Encumbrances to which we were referred, revealed) and both the properties at which the care homes were operated and the goodwill belonged to Elite (as illustrated by the Licence Agreement). He submitted, therefore, that Elite retained the goodwill in the businesses, was entitled to terminate H&H's licence, the business was being run by HHE which had offered the Bank a debenture and the transfer of assets had been at full value.

65. In relation to the unpleaded allegation that KPMG had been misled, Mr Brisby submitted that the Judge had not dealt with all of the additional matters which had been raised at paragraph 35 of the Appellants' skeleton below, including the history of the relationship between the Bank and the Appellants and the contentions concerning the transfer of assets to HHE from H&H at [69] and [70] of the judgment, and that his reasoning in relation to those which he had addressed was inadequate. For example, Mr Brisby says: that it is clear from [69] of the judgment that the Judge misunderstood the points made at paragraph 35g(iii) and (iv) of the Appellant's skeleton before him which went to the contention that KMPG had not been told that the Appellants were entitled to redress under the review in relation to the sale of the IRHPs; that the Judge was wrong to conclude at [70] that it was immaterial that it was stated in the final escalation request that it did not learn of the striking off the Companies Register until 4 September 2013, when it learnt of the Decolace striking off on 29 August; and that the Judge was wrong to conclude at [71] that the fact that HHE was registered with the Care Quality Commission and continued to operate the care homes was irrelevant because the escalation report was predicated on the risk to the old people and the reputational risk to the Bank.

66. Mr Mitchell, on the other hand, submitted that the circumstances were quite clearly exceptional and relied in particular on a number of matters. They were: that H&H which generated the cash in the business was insolvent and had not paid about £700,000 in Corporation Tax; there had been capital expenditure, a drop in receipts and it was alleged that too much money had been taken out of the business; the transfer of assets had occurred two days before HMRC had presented a winding up petition; the proposed CVA had been rejected by HMRC and a creditors' meeting was to be held on 12 September 2013; and that Mr Stavrinides agreed that it was necessary to appoint administrators but failed to complete the paperwork.

67. Further, in relation to the matters at paragraph 35g(iii) and (iv) of the Appellants' skeleton below, Mr Mitchell submitted that the escalation report listed the IRHPs sold to the Appellants, KPMG as Skilled Person was required to agree that a complainant was "unsophisticated" for the purposes of the review and therefore, was aware of the Appellants' position and that although eligible for redress, the Appellants would not necessarily receive monetary compensation.

68. In the light of my conclusions in relation to the 2014 Releases, the omission from the pleading of an allegation of an agreement to act in an unlawful manner and an intention to injure, and the lack of a real prospect of showing such a combination or agreement between the Bank and BDO, it is unnecessary to make any findings in relation to these matters. It is also unnecessary to consider the matters which arose out of the Respondent's Notice.

69. I would dismiss the appeal for the reasons set out above.

Mr Justice Nugee:

70. I agree with everything said by Asplin LJ.

71. I add some brief comments on one aspect. As she has explained, we are only now concerned with a single proposed cause of action, namely conspiracy to injure by unlawful means. The basic ingredients of this tort are not for present purposes in dispute. They can be found conveniently summarised by Morgan J in *Digicel (St Lucia) Ltd v Cable & Wireless plc* [2010] EWHC 774 (Ch) at Annex I to his judgment paragraph [2] as follows:

> "The necessary ingredients of the conspiracy alleged are: (1) there must be a combination; (2) the combination must be to use unlawful means; (3) there must be an intention to injure a claimant by the use of those unlawful means; and (4) the use of the unlawful means must cause a claimant to suffer loss or damage as a result."

72. The second ingredient, the combination to use unlawful means, is an essential allegation – indeed it could be said to be at the very heart of the tort. But as Asplin LJ has said, no such allegation can be found in the draft pleading. Apart from an introductory paragraph at 40A, paragraphs 40B to 40O sets out the facts that the Claimants seek to rely on and 40P then sets out their contentions based on those facts. Almost all the factual allegations are concerned with the Bank and not BDO. Paragraph 40I does allege an inference that Mr Nygate of BDO knew that the Bank was going to foreclose, but not that he knew (or intended or agreed with the Bank) that this would be unlawful

as being in breach of the Bank's undertaking to the FCA; paragraph 40P.1 alleges that the Bank (Ms McDonald) combined with BDO (Mr Nygate) but does not say what it is that they combined to do, and in particular does not allege that they combined to use unlawful means; and paragraph 40P.2 then moves to the allegation of intent to injure which is the third ingredient referred to by Morgan J, not the second. Paragraph 40A is no more than a summary of the contentions in 40P and takes the matter no further.

73. As Mr Mitchell submitted, an allegation that A and B have conspired to use unlawful means is a serious allegation. To plead it requires at least alleging each of the essential ingredients of the tort. In the present case that was not done. Nor was this just an oversight: for the reasons given by Asplin LJ in [60] there was in truth no real prospect of making good the allegation that BDO combined with the Bank to use unlawful means.

74. For these and the other reasons Asplin LJ has given I too would dismiss the appeal.

Lord Justice Hamblen:

75. I agree with Asplin LJ and Nugee J.

Appendix

"CONSPIRACY TO INJURE/ UNLAWFUL INTERFERENCE

40A. The Claimants' case is that on about 4 September 2013 the Bank combined with BDO with the purpose of engineering a position whereby the Bank could foreclose on or adversely vary the Claimants' existing facilities, thereby inflicting intentional harm on the Claimants and the Group. The Bank's foreclosure and adverse variance to the facilities, implemented by the appointment of BDO as LPA Receivers, amounted to unlawful means and resulted in unlawful interference in the Claimants' business. Alternatively, the Bank's combination with BDO was actionable as a conspiracy to injure the Claimants.

40B. The Claimants will refer to the following matters.

40B.1 From mid-2012 the Bank's conduct towards the Claimants and the Group became increasingly demanding and oppressive. It appeared to the Claimants that the Bank was developing a policy of bearing down on SMEs such as the Claimants rather than supporting their mutual business development.

40B.2 On or about 22 June 2013, when the Claimants and the Group were under very considerable strain due to the past and continuing payment obligations under the IRHPs and the break costs loans, the Bank placed the Group's accounts into the "Barclays Business Support Team". As part of that process the Bank required the Claimants to appoint BDO to prepare a report on the financial condition and activities of the Claimants and the other companies in the Group.

40B.3 Although the Claimants were required to instruct BDO jointly with the Bank and bear the entire cost of the Report, the format was dictated by the Bank and provided that the Claimants would be entitled to see only the first part of the Report, the second part being confidential to the Bank and BDO. The nature

of BDO's appointment therefore predisposed BDO to be on the side of the Bank rather than of the Claimants.

40B.4 An initial draft of the BDO Report provided to the Claimants on 22 July 2013 contained a number of inaccuracies, which Mr Stavrinides identified in an email to BDO dated 22 July 2013, in particular the "fundamental issue" of the breakage costs under the FSA Review.

40B.5 BDO released a further draft of its Report on 23 July 2013 (the "23/7 draft BDO Report").

40B.6 It was alleged by BDO in the 23/7 draft BDO Report (among other things) that:

40B.6.1 The main cash generator for the Group was the care home business.

40B.6.2 The cash flow to enable the First Claimant to meet its debt servicing costs to the Bank came from the care home business operating from properties owned by Elite.

40B.6.3 Until 18 May 2013 the care home business was operated by H & H, and this was then transferred to H & H (E).

40B.6.4 Third party debtors and creditors were minor and the key issue facing the Group was H & Hs corporation tax liability to HMRC of £640,000.

40B.6.5 HMRC had issued a winding-up petition which had been adjourned on the basis that H& H would prepare a CVA proposal.

40B.6.6 Elite owed H & H £510,000.

40B.6.7After deducting loan capital repayments to the Bank, the business generated free cash of about £490,000 pa, from which Mr Stavrinides allegedly took his drawings.

40B.7 The stated purpose of the 23/7 draft BDO Report was to enable the Bank to consider the implications for the Group of the liability to HMRC and the winding-up petition and the extent to which the Bank might be able to help the Group if requested.

40B.8 By letters dated 24 July 2013 the Bank's Interest Rate Hedging Resolution Team notified the Claimants that they had been categorised as non-sophisticated customers within the meaning of the Review and that the sales of the IRHPs were automatically eligible for redress. It followed (as the Bank must have known) that the Claimants were entitled to substantial redress for the Structured Collars (at least) which would go all or most of the way to satisfy the First Claimant's alleged debt to H & H [sic – the Bank], even if H & H's corporation tax debt was neither reduced nor rescheduled.

40C. Despite the decision of the Bank's Interest Rate Hedging Resolution Team, and despite the Bank's agreement with FSA/FCA that customers in financial difficulties would be prioritised in the Review, the Bank failed to ensure that proper provision was made by BDO for the Bank's obligation to pay redress. Further, Mr Nygate of BDO (who ought also to have been astute to reflect in the BDO Report the Claimants' entitlement to redress) refused to make proper provision and stated to Mr Stavrinides that BDO's task in compiling the Report was to be very conservative and critical. Given that there was an obligation on the Bank to pay fair and reasonable redress, the position of both the Bank and BDO was illogical and suspicious and revealed a readiness to co-operate between them that was hostile to the interests of the Group.

40D. Further, as part of the Review, the Bank had previously undertaken to the FSA/FCA that the Bank would not foreclose on or adversely vary customer's existing tending facilities without the customer's consent except in exceptional circumstances. This undertaking was plainly intended to be for the benefit of the Bank's customers such as the Claimants.

40E. By reservation of rights letters sent by the Bank to H&H and to the First Claimant dated 14 August 2013 (hereinafter "the Reservation of Rights Letters") the Bank confirmed that this undertaking applied to the facilities provided by the Bank to the First Claimant and to H & H.

40F. The Bank (correctly) did not allege in the Reservation of Rights Letters that "exceptional circumstances" already pertained to those facilities. Further and in any event, upon an ordinary meaning of the Bank's undertaking, financial circumstances caused by the Bank's own failings in the sale of the Swaps or by its failure (contrary to the Specification) to prioritise its review of customers in financial difficulty could not amount to "exceptional circumstances" within the meaning of the Bank's undertaking to the FSA/ FCA.

40G. Neither the First nor the Second Claimant had at any time been in default of payment of any interest or any loan repayment to the Bank. However, on about 4 September 2013 the Bank discovered that the First and Second Claimants had been struck off the BVI Register of Companies on 1 November 2011 and 1 May 2012 respectively. This arose from administrative errors by the Claimants many months previously which could easily be rectified. However, instead of communicating at once with the Claimants to insist that the position be corrected, the Bank did not tell the Claimants until the following week. It is to be inferred that the Bank did this in order that the Claimants could not take the immediate opportunity to correct the position, or to make arrangements with third parties for any necessary financial support.

40H. At a meeting with the Bank (Ms McDonald) and BDO (Mr Nygate) on 9 September 2013 Mr Stavrinides was, without forewarning, informed by the Bank that:-

40H.1 the Claimants had been struck off the BVI register of companies;

40H.2 the Bank would serve immediate demand for repayment of their facilities on the Claimants;

40H.3 the Bank would appoint Tony Nygate of BDO as LPA Receiver over all the properties in the Group; and

40H.4 Mr Stavrinides should consent to BDO's appointment as administrator of H&H.

40I. It is to be inferred from Mr Nygate's presence at the meeting on 9 September 2013 that he already knew from the Bank (ie before the Claimants knew) that the Bank was going to foreclose on the loans and appoint Mr Nygate as LP A Receiver.

40J. Until that meeting Mr Stavrinides did not know about the striking off of the Claimants. He communicated his assumption that the striking off must have happened by mistake, and that he would take immediate steps to have the companies restored which was a straightforward process and could implemented immediately.

40K. Notwithstanding Mr Stavrinides' assurance that the Claimants would be restored (as in fact they were on 13 September 2013), on 10 September 2013 the Bank made demands for repayment of both Claimants' facilities and on 13 September 2013 appointed Tony Nygate of BDO as LP A Receiver over the First Claimant's properties.

40L. After the said meeting on 9th September 2013 the Bank continued to put constant pressure on Mr Stavrinides to consent to the appointment of BDO as Administrator to H & H. On 11 September 2013, and in the face of Mr Stavrinides' refusal, the Bank served a demand on H&H under the guarantee given in respect of the First Claimant and, on the basis that the First Claimant had defaulted under the demand served on 10 September 2013, hastened to the appointment of BDO's Tony Nygate and Sarah Ravment as joint administrators of H&H under their debenture later that day.

40M. By letter dated 8 October 2013, the Bank alleged that because the First and Second Claimants had been struck off, it would affect their legal ability to collect rent and that appointment of an LPA Receiver would allow the collection of rent. However, BDO have taken no step to collect the rent since their appointment and it is to be inferred that the Bank did not have any real concerns about the collection of rent.

40N. It is to be inferred from the matters set out at paragraphs 40G-40M above that the Bank decided to use the Claimants' absence from the BVI Register as a cynical opportunity to join with BDO with the purpose of depriving the Claimants of the care home cash flow that they needed to continue in business.

40O. For the avoidance of doubt, there were no "exceptional circumstances" within the meaning of the Bank's undertaking to the FSA/FCA which emerged in the month before the Bank purported to appoint BDO as LPA Receivers over the properties of the First Claimant which could justify any adverse variation in the Bank's facilities to the Claimants and H & H. In particular:-

40O.1 The Claimants' absence from the BVI Register was not an exceptional circumstance, but instead a minor error which could readily be corrected.

40O.2 H & H's corporation tax liability and its proposed CVA was not an exceptional circumstance. In this regard the Claimants will contend as follows.

(1) The Claimants' facilities and the Bank's security documentation were by necessity subject to implied terms that the Bank would not do anything which would render the Claimants in breach of their loan and/or security covenants (hereinafter "the Implied Term").

(2) The mis-sold IRHPs caused the cash deprivation across the Group, which in turn caused H&H's/the Group's inability to pay the corporation tax liability and thereafter H&H's proposed CVA.

(3) Accordingly these matters were the direct result of the Bank's breach of the Implied Term and could not amount to exceptional circumstances within the meaning of the Bank's undertaking to the FSA/FCA.

(4) Further and in any event, the Bank's Reservation of Rights Letters had acknowledged that the undertakings applied to the facilities of the Claimants and H & H.

40P In the circumstances, the Claimants contend that:-

40P.1 On or about 4 September 2013 the Bank (by Ms McDonald) combined with BDO (by Mr Negate), their mutual purpose being to deprive the Claimants of their source of free cash from which the Claimants' obligations to the Bank could be discharged.

40P.2 It is to be inferred (from the matters set out at paragraphs 40C and 40G-40M above) that the Bank and BDO thereby intended to injure the Claimants.

40P.3 It is to be inferred (from the matters set out at paragraph 40C and 40G-40M above) that in its variation of the facilities of the Claimants and the Group and its purported appointment of BDO as LPA Receivers the Bank acted in breach of its undertaking to the FSA/ FCA which was designed to protect the interests of the Claimants. This amounts to the use of unlawful means.

40P.4 In the premises the Bank is liable to the Claimants for conspiracy to injure by unlawful means, and/or for unlawful interference in the Claimants' trade or business.

40P.5 Alternatively, in circumstances where the Bank was subject to a bar on foreclosure and variation of facilities by reason of its undertaking to the FSA/FCA which was designed for the protection of customers such as the Claimants, there is a sufficiently high degree of proximity, targeting and blameworthiness in the Bank's conduct as to justify the imposition of liability on the Bank for loss caused by its breach of the FSA/FCA undertaking, even if that undertaking was only actionable by the FSA/FCA at the behest of the Claimants rather than by the Claimants themselves.

40P.6 Alternatively, it is to be inferred from the irrational and extreme nature of the matters set out at paragraphs 40C and 40G-40M above that the predominant intention of the combination between the Bank and BDO was to injure the Claimants. In the premises, the Bank is liable to the Claimants for conspiracy to injure."