Neutral Citation Number: [2026] EWHC 184 (Ch)

Case No: BL-2024-001363

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch D)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 February 2026

Before :

MR SIMON GLEESON

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Between:

Justin Mitchell Cohen — **Claimant**

- and -

Defendants

(1) Paul Morrison
(2) Rebecca Artmonsky
(3) John Reid
(4) Russells Solicitors (a firm)
(5) Apollo Branded Content Group International (in liquidation)

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Edward Bennion-Pedley (instructed by **Broadfield Law UK LLP**) for the **Claimant**
Justin Kitson KC (instructed by **Cadence Solicitors LLP**) for the **First and Second Defendants**
Roger Stewart KC and Theo Barclay (instructed by **Reynolds Porter Chamberlain LLP**) for the **Third and Fourth Defendants**

Hearing date: 16 December 2025

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Approved Judgment

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Mr Simon Gleeson :

1. This application follows a familiar pattern. The Claimant, Mr Cohen, invested in a start-up business which showed great promise financially. Unfortunately, its business model was entirely dependent on large numbers of people being permitted to gather together for entertainment, and the implementation of restrictions on such gatherings in response to the Covid outbreak caused it to fail. Mr Cohen had repeatedly tried to exit his investment at a substantial profit both in the run-up to Covid and thereafter but was unsuccessful in this endeavour and has now (he says) lost his money. He has responded by commencing legal action against the company, its directors and its solicitors in the hope of recovering some of his investment and lost profit.

2. The Particulars of Claim (which appear to have been drafted by the Claimant personally) identify an extraordinarily wide set of allegations of wrongdoing. However, there is something of a mismatch between the factual allegations made and the causes of action identified. The Defendants therefore seek to have the Particulars of Claim struck out, in whole or in part, or alternatively for reverse summary judgment.

The Facts

3. The *dramatis personae* are as follows. The Fifth Defendant, Apollo BC ("**the Company**") was the vehicle established to pursue the business venture, and in which Mr Cohen invested via the purchase of shares ("**the Shares**"), and of which he became a director. The First and Second Defendants, Mr Morrison and Ms Artmonsky, were the guiding minds of that venture, and directors of and majority shareholders in the Company. Mr Reid, the Third Defendant, was the solicitor to both the Company and to Mr Morrison and Ms Artmonsky. Mr Reid is a partner in the Fourth Defendant, a solicitor's firm, who it is argued are liable for his actions by reason of s.10 of the Partnership Act 1890.

4. I should also note that at the relevant time the Claimant held his shares through a company called Legendary Moments. However he says that the rights of Legendary Moments as regards the shares have been assigned to him. Although the exact position is disputed between the parties, the litigation has proceeded on the basis that the fact that Legendary Moments is not a party to this action does not inhibit its resolution.

5. The First and Second Defendants are experienced businesspeople in the field of event producing, and have worked together since 2008. The venture on which they embarked through the Company was in the field of what is referred to as "experiential marketing" – loosely, the business of enabling brands to build customer loyalty by providing those customers with enjoyable experiences (such as concerts or videos of celebrities). The service which the First and Second Defendants offered was the arranging and producing of such experiences.

6. The purpose for which the Company was formed was to pitch for mandates to deliver such experiences to companies wishing to promote their brands. As an early-stage start-up, the funding which it initially raised was what is known as "pre-funding" – that is, funding for the cost of preparing and launching a business.

7. Mr Cohen made three investments into the Company in 2016, 2017 and 2018, along with a number of other funders. Mr Cohen does not appear to have been content to be a passive funder, and wanted some involvement in the operation of the Company.

8. Mr Morrison and Ms Artmonsky say that the relationship with Mr Cohen broke down in 2017 such that they no longer wanted him involved in the day-to-day running of the Company. However, they needed further funds, and in 2018 Mr Cohen advanced those funds pursuant to a further Sale and Purchase Agreement dated 7 April 2018 (the "**2018 SPA**") which superseded an earlier SPA. Under this agreement Mr Morrison and Ms Artmonsky agreed to provide Mr Cohen with

> "…all information relating to the Company and its Subsidiaries including financial, non-financial, legal, investment and operational information which is reasonably necessary in order to enable [Mr Cohen] to undertake his duties (including fiduciary) as a director of the Company and/or Subsidiaries (Clause 10.9)."

9. This created the uncomfortable situation that the business of the Company was conducted by Mr Morrison and Ms Artmonsky, whilst Mr Cohen made repeated and vociferous complaints about the operation of the business and his exclusion from decision making.

10. By late 2018 Mr Cohen was making active efforts to sell the Shares, including to Mr Morrison and Ms Artmonsky. Mr Morrison and Ms Artmonsky assisted Mr Cohen in that regard by introducing him to potential buyers. However, no sale was agreed. By May 2019 relations between Mr Cohen and Mr Morrison and Ms Artmonsky had degenerated to the extent that neither wished to communicate further with Mr Cohen. They therefore asked Mr Reid, in his capacity as their and the Company's solicitor, to deal with and facilitate Mr Cohen's exit from the Company. This he appears to have attempted to do.

11. By October 2019 all of the efforts made by Mr Cohen to agree a sale to a third party seem to have failed, and he then approached Mr Morrison and Ms Artmonsky to sell the shares to them. This resulted in the **Option Agreement**, entered into on the 29 November 2019. The terms of this agreement were that Mr Morrison and Ms Artmonsky could have four months to purchase the Shares for \$3.75m.

12. It seems to be common ground that Mr Morrison and Ms Artmonsky, together or separately, did not have anything like the available cash necessary to effect this purchase in their own names. What they were doing was looking for an investor who might want to purchase the shares – the idea being that they could purchase the Shares from Mr Cohen in their own names and sell them on to a third party acquirer for a slightly higher cash price, keeping the difference as a commission on sale.

13. Mr Cohen also continued to look for buyers during this period, and was in contact with Mr Reid in December 2019 and January 2020 about a possible sale to third parties.

14. Whilst the negotiations with Mr Cohen had been progressing, Mr Morrison and Ms Artmonsky had been actively pursuing the business of the Company. In 2019 Mr Morrison and Ms Artmonsky had reached outline agreement with a content producer

(Westbrook Studios) and a brand client (Formula 1) for a major project in association with the Melbourne Grand Prix, and began finalising the terms of the funding needed for this project from C&C and Aquila Capital. That project was launched to global media on 13 January 2020.

15. On 4 February 2020 Mr Cohen served notice effectively repudiating his obligations under the Option Agreement. His position (which was fully set out in his notice of repudiation) was that he had entered into the Option Agreement on the basis of a business plan for the Company dated March 2019. However, a revised (and more optimistic) business plan was in the course of preparation. This revised business plan was only provided to him on 3 December 2019 – a few days after he had signed the Option Agreement.

16. Meanwhile, Mr Morrison and Ms Artmonsky had been in negotiations with a potential sponsor for the Melbourne F1 project (AgBioEn). This would have been a five-year deal with an annual rights fee to the Company of $20m per year. This deal was concluded on 6 February 2020 – two days after Mr Cohen had served his termination notice.

17. The Melbourne F1 Grand Prix was due to take place on 15 March 2020. It was cancelled the day before it was due to begin because of Covid restrictions imposed by the State government. However, Mr. Morrison & Ms. Artmonsky believed that they could still salvage the business of the Company given the AgBioEn deal and what had become a strong commercial relationship with C&C and Aquila Capital. Mr Cohen still wanted to exit the Company.

18. On 24 March 2020 Mr Cohen obtained access to the Sharepoint system operated by the Company. This gave him access to the internal documents of the Company, as well as some material relating to other activities of Mr Morrison and Ms Artmonsky. He downloaded these documents, and they constitute the bulk of the evidence on which he relies.

19. On 20 May 2020 Mr. Morrison & Ms. Artmonsky, Apollo BC, Apollo WT, the Claimant and Legendary Moments entered into an agreement (the “**Exit Agreement”)**. Mr Cohen agreed to resign as a director but, by Clause 5, it was agreed that he would remain entitled to receive documents pursuant to clause 10.9 of the 2018 SPA, as well as information and documents submitted to board meetings of the Company and its subsidiaries.

20. Mr. Morrison & Ms. Artmonsky entered into two successive further Sale and Purchase Agreements (“**SPAs**”) with Mr Cohen for the sale of his shares - an SPA dated 17 July 2020 for the sale of the Shares at a price of £4,120,300 or US$ 5m (depending upon prevailing currency spot rates); and an SPA dated 21 December 2020 pursuant to which and Mr Morrison and Ms Artmonsky agreed to purchase the Cohen Shares at a price of US$6.77m.

21. It seems that economically these agreements had the same form as the 2019 Option Agreement, in that they could only have been completed if Mr Morrison and Ms Artmonsky were able to find a third party buyer who was prepared to offer the amount specified in cash as the purchase price of the Shares. They were unable to find any

buyer at the value specified, and the transactions therefore did not complete. There is no claim for specific performance of these agreements pleaded in this action.

22. The Company was wound up by the court on 11 December 2024.

What is to be Decided?

23. The essence of Mr Cohen's claim is that Mr Morrison and Ms Artmonsky withheld information from him which they were under a positive duty to disclose to him for the express purpose of deceiving him into selling his shares at an undervalue, and that Mr Reid both dishonestly assisted them in that endeavour, and assumed fiduciary duties to Mr Cohen himself which he subsequently breached. The various defences are that (a) no such information existed, (b) any such information which did exist was not required to be disclosed to him and/or (c) any such information related to their activities outside the Company. This is precisely the sort of thorny tangle of law and fact which can only be properly addressed at trial through examination of the evidence. Mr Cohen says that this fact alone means that no part of his case should be struck out. This is an instance of a form of argument often encountered in strike-out applications to the effect that because the issues are complicated, the matter should necessarily go to trial. This is, of course, not the case. A matter should only go to trial if untangling the relevant issues would deliver a clear answer to a clear question. If the questions can be resolved without clearing the thicket, they should be.

24. It is now necessary to turn to the specific claims which are being brought. These, as set out in the Particulars of Claim, are as follows:

i) The First and Second Defendants owed the Claimant fiduciary duties to disclose to (or at least not to conceal from) from the Claimant, financial and other material documents and/or information pertaining to the true financial and/or business prospects of the Company. This claim is based on the allegation that the arrangement between the Claimant and the First and Second Defendants was in the nature of a quasi partnership. This is supplemented by an argument that, whilst the First and Second Defendant were negotiating possible transactions for the Company, they owed fiduciary obligations to the Claimant to make material disclosure of that insider information (or at least not to conceal it).

ii) By assisting the Claimant in his unsuccessful attempt in 2019 to negotiate a sale of his shares to a buyer (a Mr Bakhsh), the First and Second Defendants undertook to act for the benefit of the Claimant or in a capacity analogous to agency, by facilitating the intended sale of the Shares to Mr Bakhsh in return for a commission. It is therefore argued that they assumed a fiduciary duty to provide, and/or not to conceal from, the Claimant "complete financial and other material information in respect of matters pertinent to the value of the [Claimant's] shares and/or to disclose their wrongdoing".

iii) In the period between 23 October 2019 and 29 November 2019, when the Claimant was negotiating with the First and Second Defendant directly for the sale of his shares, it is said that "they knew that, in breach of clause 10.9 of the 2018 SPA and/or their fiduciary obligations as set out above, they had concealed from the Claimant material financial information and documents … [and that] by reason of that concealment, [The First and Second Defendants] stood to gain personally by acquiring the Cohen Shares at an undervalue; [and that therefore the First and Second Defendants] were duty bound to disclose their wrongdoing, were bound to disclose the existence of the Takeover Plan and/or were bound to give full disclosure of financial and other material information at the outset of those negotiations and/or prior to concluding the 2019 Option but failed to do so." I am not entirely sure what legal theory underlies this claim, but I think it rests on the fiduciary's obligation to give full disclosure to those to whom he owes his duties..

iv) The First and Second Defendants owed fiduciary duties to the Company. It is argued that they acted in breach of those duties. However the Claimant does not purport to bring a derivative action.

v) There is a claim for specific performance of clause 10.9 of the 2018 SPA, by which the First and Second Defendants contracted to make available and supply all information relating to the Company and its Subsidiaries including financial, non-financial, legal, investment and operational information reasonably necessary in order to enable the Claimant to undertake his duties as a director of the Company and/or its Subsidiaries as aforesaid.

vi) There is a claim for breach of clause 12.3(c) of the 2018 SPA, by which the First and Second Defendants covenanted to procure that the Company and its Subsidiaries would not, except with the Claimant's prior written consent, engage in any business other than the business of the Company, and would not defray any monies other than in good faith for the purposes of or in connection with the carrying on of such business.

25. I think these claims can be separated out into the following causes of action:

A. Tortious Claims

1. Deceit, in that Mr Morrison, Ms Artmonsky and Mr Reid jointly deceived Mr Cohen.

2. Conspiracy to use illegal means to harm the Claimant between Mr Morrison, Ms Artmonsky and Mr Reid. The basis of this argument is that the illegality employed by all three of these parties was:

a. their breach of their fiduciary duties to the Company,

b. their breach of their contractual obligations to Mr Cohen, and

c. Mr Reid's breach of fiduciary duties owed directly to Mr Cohen.

3. Breach of a duty of care owed by Mr Reid to Mr Cohen.

B. Fiduciary Claims

4. Breach of fiduciary duties owed by Mr Morrison and Ms Artmonsky to Mr Cohen arising by reason of the company having been a quasi-partnership.

5. Breach of fiduciary duties owed by Mr Reid to Mr Cohen arising out of his having undertaken to act on his behalf and/or to advise him.

6. Breach of fiduciary duties owed by Mr Morrison and Ms Artmonsky to Mr Cohen arising by reason of their having adopted an agency role to sell his shares on his behalf.

7. Breach of some other fiduciary duty owed by Mr Morrison and Ms Artmonsky to Mr Cohen qua shareholder.

8. Dishonest assistance by Mr Reid in Mr Morrison and Ms Artmonsky's breach of fiduciary duty.

C. Contractual Claims

9. Breach by Mr Morrison and Ms Artmonsky of the 2018 SPA.

26. It is notable that the bulk of the Particulars of Claim allege a very large number of allegations of breaches by Mr Morrison and Ms Artmonsky of their fiduciary and statutory duties to the Company. However, Mr Cohen accepts that he does not bring a derivative action of any form, and these breaches are not actionable by him directly. He says, however, that they are relevant because they constitute the "illegal means" involved in the conspiracy allegation.

27. As regards the claims which he does bring, I think they can be analysed as follows.

The Tort Claims

28. The tortious claims must all fail unless there is evidence that the Claimant suffered damage which was a consequence of the tort concerned. The Claimant says that he suffered loss as a result of the loss of a chance to sell the shares whilst they were still valuable. The Defendants say two things. One is that the pleadings do not set out any such case, and that these claims, along with the claim in dishonest assistance by Mr Reid in Mr Morrison and Ms Artmonsky's tort claims against all of the Defendants should therefore be struck out. In the alternative they argue that, on the basis of the facts as they are currently known, there is no real prospect of the Claimant ever establishing such a case a trial. They therefore say – in effect – that if that is correct, then these causes of action fail in toto against all of the Defendants. I agree.

The Fiduciary Claims

29. The fiduciary claims are contested on two bases. As regards Mr Reid, the case against him is that the facts show that he acted in such a way as to assume fiduciary duties to Mr Cohen, and that he breached those duties. Mr Reid's position is that the facts pleaded do not give rise to any credible case that he ever assumed any such duties. The application in this case is hydra-headed – the question of whether relevant facts are not pleaded, or whether the facts as pleaded do not disclose a cause of action, is the same determination. However, since this enquiry does require some consideration of the significance of the facts (as opposed to their mere existence) I think this application is best regarded as an application for summary judgment.

30. As regards the dishonest assistance claim against Mr Reid, the argument here is that, even if Mr Reid did not owe fiduciary duties to Mr Cohen directly, he is still potentially

liable for dishonest assistance of the alleged breaches of duty of Mr Morrison and Ms Artmonsky to Mr Cohen (since dishonest assistance by Mr Reid in the breach of a duty owed to the Company by Mr Morrison and Ms Artmonsky would not be actionable by Mr Cohen otherwise than in conspiracy). For this purpose, I am obliged to assume that it could be shown at trial that Mr Morrison and Ms Artmonsky did in fact breach their fiduciary duties.

31. That of course takes us back to the question of whether the facts disclose any fiduciary duty owed by Mr Morrison and Ms Artmonsky to Mr Cohen directly. There is no dispute that Mr Cohen is not able to bring any sort of derivative action against them. Consequently, even if Mr Cohen could show at trial that they had in fact breached their directors duties to the Company, his only action against them arising from those breaches would be the tortious action of conspiracy to defraud by unlawful means – the breaches being the unlawful means complained of. Thus, if the tortious action falls away on grounds of causation of damage, it takes the complaints about breaches of fiduciary (or statutory) duty to the Company with it. Thus the only remaining issue which needs to be separately identified is whether the conduct of Mr Morrison and Ms Artmonsky was such as to give rise to a freestanding fiduciary duty to Mr Cohen himself. Thus if Mr Cohen both fails on causation of loss, and also fails to show the existence of such a separate freestanding duty, then the case against Mr Morrison and Ms Artmonsky would also fall away completely.

The Contract Claims

32. The contractual claim is not contested, and the Claimant remains entitled to information about the Company. However, the Claimant has put forward an extremely long list of documents which he regards as encompassed by the words of the relevant clause. The First and Second Defendants say that none (or at least very few) of these documents are in fact required to be delivered under the clause. The question of which (if any) of these documents Mr Cohen is entitled to have will therefore have to be considered in further proceedings – it was not argued before me.

Application of Principles

33. I trust I can be forgiven for not setting out the relevant principles applicable to strike-out and reverse summary judgment applications – they were set out at length in counsels' written submissions, and no element of them seemed to me to be in dispute between them.

Strike-out

34. When considering an application to strike out the facts pleaded must be assumed to be true and evidence regarding the claims advanced in the statement of case is inadmissible. This is noted in *Terry Allsop v Banner Jones Limited* [2021] EWCA Civ 7 by Marcus Smith J (giving the judgment of the Court of Appeal) at [7], citing the judgment of Arnold LJ in *Libyan Investment Authority v King* [2020] EWCA Civ 1690, at [96]:

> "In contrast with the applications under CPR 3.4(2)(b), the applications under CPR 3.4(2)(a) and CPR 24.2 are concerned with the merits of the claim, specifically whether the claim meets

> the (low) threshold of what I shall call "reasonable arguability". Although it can be said that there is no material difference between the test applied by these two provisions, there is an important distinction between CPR 3.4(2)(a) and CPR 24.2, in that an application under CPR 24.2 can be supported by evidence, whereas an application under CPR 3.4(2)(a) should not involve evidence regarding the claims advanced in the statement of case."

35. The only point which seemed to me to be worth emphasising here is the question of how a defective statement of case should be addressed in a hearing of this kind. Where a statement of case is found to be defective, the court should consider whether that defect may be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (*Soo Kim v Youg* [2011] EWHC 1781 (QB)).

36. The point which was urged on me by the Defendants in this regard is that the Claimant has had numerous opportunities to rectify the various defects outlined above, but has failed to do so. They say that:

    i) The Defence squarely flagged that the POC was strikable, but the Claimant elected not to file a Reply to Defence.

    ii) A Part 18 Request seeking clarification of the Claimant's case was filed, but the response was uninformative.

    iii) When they applied for summary judgment/strike out, they invited Mr Cohen's solicitors to "provide a draft amended Particulars of Claim as soon as possible" and said that "if no such amendment is put forward we will draw this letter to the attention of the Court and invite the conclusion that your client has no other or different viable case". No draft amended Particulars of Claim were provided.

    They therefore argue that this is a case in which, if the Particulars of Claim are held to be inadequate, this is not a case where it would be appropriate to provide an opportunity to amend. In this regard, it is relevant to recall the words of Lord Phillips in *Loveridge v Healey* [2004] EWCA Civ 173 at [23]

    > "Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded."

37. As has been said elsewhere in other contexts, litigation of this kind cannot be allowed to be a dress rehearsal – it is the main event. Where a party comes to court with a fixed position, and refuses to change that position in response to challenges by the other party, they should not be allowed – if that position is rejected - to come back with an amended position at a later stage in the same matter. That would be tantamount to an abuse of the process of the court. Consequently, I think that on the specific facts of this case, this

is not a situation in which, if the Claimant's Particulars of Claim are struck out, he should be allowed a second bite at the cherry.

38. On a similar note, I should also say that the court has very limited patience with arguments that further information may come to light as a result of disclosure. In *Wilson v. HB (SWA)* [2025] 4 WLR 114, Coulson LJ made it clear at [17] and [21] that the court will not postpone judgment merely on the basis of an unsubstantiated expectation that further evidence might emerge. A party faced with a summary judgment application cannot resist it simply by asserting that a proper case will be formulated after disclosure. A party need not prove the factual assertions presented in their pleadings, but if they cannot even reliably speculate as to what the facts which they expect to prove might be, then they are engaged in an impermissible fishing expedition.

39. Shortly after the hearing in this matter had concluded, the Court of Appeal handed down judgment in *Blower v GH Canfield* [2025] EWCA Civ 1627 which addressed the way in which strike-out applications should be considered. I received written submissions from all represented parties on the extent to which that decision bears on the issues which arise in this case.

40. The position in Blower was that counsel for the appellant sought to raise on appeal a loss of a chance claim which was not pleaded or raised before the judge at first instance. The court said (at [78])

> "I agree with the judge that the pleading of causation and loss was insufficient. The amended particulars of claim set out the allegations about what would not have happened but do not state what it is alleged would have happened had the alleged negligence not occurred. It is not pleaded, for example, that the claims would have been settled for a particular sum or that they would have been successfully defended at trial and that Mrs Blower would also have suffered the legal costs which were irrecoverable in doing so. To put it another way, the positive counter-factual is missing. CPR 16.4(1)(a) was not complied with. It is not possible to make up that deficiency by implication, especially where there is no indication of what it is alleged would have happened. It is a mere matter of speculation."

41. Mr Bennion-Pedley points out that the position in Blower is the mirror image of the position here – the complaint about the pleading in that case was that loss of a chance was not pleaded, whereas here the position is that the loss of a chance is the only thing pleaded, unsupported by the necessary factual matrix needed to establish that the chance existed in the first place. He is correct in that submission, but I do not think it undermines the principle set out by the Court of Appeal, which is that proper pleading of all relevant elements is necessary.

42. I also note the dicta of Cotter J in *Charles Russell Speechlys LLP v Beneficial House (Birmingham) Regeneration LLP* [2021] EWHC 358 (QB) cited with approval by the Court of Appeal in *Blower*. At [61] he considers the options available to a Judge faced with an inadequate pleading. He observes (correctly) that the proper approach is to require an amendment, and that where a party declines to amend its pleadings, they

should not be permitted to depart from their pleaded case at trial unless there is no possibility of prejudice to the other side – the threshold of possibility being a low one.

Summary Judgment

43. CPR r.24.3 provides that the court may give summary judgment dismissing the whole of a claim or an issue if "it considers that the claimant has no real prospect of succeeding on the claim, defence or issue" and that "there is no other compelling reason why the case or issue should be disposed of at trial".

44. The Court's approach to summary judgment applications is set out in the notes to the White Book 2025 at [24.3.2] (page 673). When considering whether there is a "real prospect" of success, 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" (*Elite Property Holdings v Barclays Bank* [2019] EWCA Civ 204 per Asplin LJ at [42], in the analogous context of an application to amend a pleading).

45. In *Wilson v HB (SWA)* [2025] EWCA Civ 1360; [2025] 4 WLR 114, Coulson LJ confirmed at [17] and [21] (quoting the judgment below with approval) that "The court will not be dissuaded from giving judgment by mere Micawberism – the unsubstantiated hope that something might turn up."

46. It is not sufficient in response to an application for summary determination for a claimant to argue that they will plead a viable case once they have obtained disclosure. Accordingly, in *Eagle Trust Plc. v. S.B.C. Securities Ltd* [1993] 1 WLR 484 Vinelott J held at 508D-F that:

> "It would be wrong to allow Eagle to pursue [the claim] merely in the hope that something may turn up on discovery or in the course of the trial which would justify an amendment alleging circumstances from which knowledge on the part of Savory Milln can be inferred."

47. I also take note of the observations in this regard of Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm). She said:

> "21. The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that — even bearing well in mind all of those points — it would be contrary to principle for a case to proceed to trial."
>
> ….

> 23. I should deal specifically with the law on summary judgment and claims in fraud, not least because it was at least implicit in the submissions for the Kings that such serious allegations were not suitable for summary determination.
>
> 24. The reality is that while the court will be very cautious about granting summary judgment in fraud cases, it will do so in suitable circumstances, and there are numerous cases of the court doing so. This is particularly the case where there is a point of law; but summary judgment may be granted in a fraud case even on the facts. I have done so in a case heard very close in time to this application: Foglia v The Family Officer and others [2021] EWHC 650 (Comm), where at [14] I gave some examples of other cases in which this course was also followed. In other cases, such as AAI Consulting Ltd v FCA [2016] EWHC 2812 (Comm) and Cunningham v Ellis [2018] EWHC 3188(Comm) fraud claims were struck out on the basis that the particulars of claim were inadequate in themselves to support the claims being made."

A. The Tort Claims

1. Deceit

48. The primary allegations set out in the Particulars of Claim are in respect of fraud. However, as Millet J said in *Armitage v Nurse* [1998] Ch 241 at 250-51, "The common law knows no generalised tort of fraud". The common law action for fraud, as set out in *Derry v. Peek* (1889) 14 App. Cas. 337, is an action for damages for deceit, that is to say, for fraudulent misrepresentation. Thus where a defendant makes a false representation of law or fact, knowing it to be untrue, or being reckless as to whether it is true, and intends that the claimant should act in reliance on it, then in so far as the latter does so and suffers loss the defendant is liable (*Clerk & Lindsell on Torts* 24th ed. para. 17-01). In general a representation is required – as Lord Maugham observed in *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All E.R.205 "mere silence, however morally wrong, will not support an action of deceit" (at 211). However, where there is a fiduciary relationship between the parties, there may be a duty to reveal information so that (for example) nondisclosure will make any resulting transaction voidable. Thus in *JSC BTA Bank v Ablyazov* [2013] EWHC 510 (Comm) a senior bank officer was held to have made an implicit representation to the bank where, having failed to disclose his interest in a number of companies, he procured the bank to make irrecoverable loans to them (at [170]).

49. Deceit is not actionable per se, there must be proof of damage resulting from the deceit (*Smith v Chadwick* (1884) 9 App. Cas. 187 at 190 per Lord Blackburn). The claimant must show that his loss results from the defendant's misrepresentation. The claimant is not limited to such losses as are suffered in connection with the falsity of the representation, but can recover all losses directly resulting from his reliance on it.

50. In *Eng Ltd v Harper* [2008] EWHC 915 (Ch); [2009] Ch. 91 it was held that damages in deceit could be recovered for loss of a chance. However, a claimant cannot recover in respect of a loss which, although consequent on a fraudulent misrepresentation, is

the result of an intervening commercial choice of his own. Thus if a buyer is deceived into buying bonds which he then chooses to retain as a business decision, and those bonds later decline in value, he cannot recover in respect of the subsequent decline: this is due to his own commercial choice, not to the original deceit (*Waddell v Blockley* (1879) 4 Q.B.D. 678).

51. There is no trace in the Particulars of Claim of any allegation of any positive representation – the complaints made by the Claimant are entirely in relation to things that he says he should have been told but was not told. The only way an action in deceit could survive would be if the Defendants were under a positive duty to disclose this information to the Claimant. On the facts, the only basis on which such an obligation could be said to arise would be if there were a fiduciary duty owed by the Defendants to the Claimant (see *JSC BTA Bank v Ablyazov* [2013] EWHC 510 (Comm)). The deceit claim therefore also fails if the case on fiduciary duties is not made out.

2. Conspiracy

52. The conspiracy which is pleaded in this case is a conspiracy to interfere with trade by unlawful means. It is fair to say that the position with regard to the ingredients of this tort is not exactly crystal clear (the issues are helpfully discussed in Annexe I to the judgment in *Digicel (St Lucia) Ltd and others v Cable & Wireless plc and others* [2010] EWHC 774 (Ch)).

53. The essence of unlawful means conspiracy is that two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a claimant who does incur the intended damage (*Baxendale-Walker v Middleton* [2011] EWHC 998 at [60]). It is not necessary for the injured party to prove that causing him damage was the main or predominant purpose of the combination, but that purpose must be part of the combiners' intentions. Further, provided that there is an intention to injure the claimant, it is no defence for the combiners "to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful" *Lonrho Plc v Fayed* [1992] 1 A.C. 448 at 466 and 468 per Lord Bridge.

54. The starting point here is that, in contrast with the law of criminal conspiracy, tortious conspiracies are actionable only on proof of damage (The Law of Torts 29-70). Thus regardless of the factual issues surrounding the possibility of a conspiracy, these issues will only have to be determined if Mr Cohen's pleadings disclose an arguable case that he has suffered loss as a result of the alleged conspiracy. This claim therefore stands or falls with the issue of causation.

3. Negligent breach of a duty of care owed by Mr Reid to Mr Cohen

55. It is not suggested that Mr Reid was acting otherwise than as a Solicitor throughout this matter – indeed, the fact that he was acting as such is the basis for the joinder of his firm. A solicitor owes contractual and tortious duties to his client. A person may be a client either through a contractual retainer or where the facts indicate that there is an implied retainer (*Caliendo v Mishcon de Reya* [2016] EWHC 150 (Ch)). An implied retainer arises in a situation where the parties act as if the relationship of solicitor and client existed, even though there is no express agreement to that effect. However, an implied retainer will not arise where a contractual retainer could not be entered into –

thus in *BDG Roof-Bond Ltd v Douglas* [2000] B.C.C. 770, where a solicitor acted for a director on the sale of his shares to the company, it was held that no implied retainer could arise between the solicitor and the company. This is important, because where a solicitor is retained by one party to a transaction, he usually owes no duty to any other party. Thus in *Yiu Chown Leung v Chow Wai Lam* [2005] 4 HKLRD 246, 8 HKCFAR 592, a solicitor acting for the borrower met the lenders twice, and at their request advised that there was no need to have a moneylender's licence, and explained to them the terms of the agreement. The Hong Kong Court of Final Appeal held that there had been no voluntary assumption of responsibility by the solicitor to look after the lenders' interests, they should have known that the solicitor was not acting for them (see also *Edenwest Ltd v CMS Cameron McKenna (A Firm)* [2012] EWHC 1471 (Admin)).

56. A solicitor's partners are vicariously liable for his wrongful acts or omissions when acting in the ordinary course of business of the firm or with the authority of his co-partners under s.10 of the Partnership Act 1890. In *Dubai Aluminium Co Ltd v Salaam* [2003] 2 A.C. 366, the House of Lords held that "wrongful acts" in s.10 included equitable wrongs such as dishonest assistance in a breach of trust, as well as tortious liability. They also held that such acts would be done in the ordinary course of the business of the firm if it could fairly and properly be so regarded, which was a question of law. Thus the drafting of an agreement by a partner to assist in a fraudulent scheme was so closely connected with acts which he was authorised to do that he could be regarded as having acted in the ordinary course of the firm's business, and his innocent partners were liable for his assumed dishonest assistance. The case was applied by the Court of Appeal in *JJ Coughlan Ltd v Ruparelia* [2003] EWCA Civ 1057 where it was held that the motive or purpose of the solicitor was irrelevant, but that one should not shut one's eyes to the true nature of the solicitor's acts when determining whether they fell within the ordinary business of a solicitor. It was necessary to look at the substance and detail of the transaction. In that case, the rogue solicitor attended meetings and acted as stakeholder, but the transactions promised absurd rates of return, and it was not part of a solicitor's business to be involved in such a scheme.

57. If the claims against Mr Reid were to be made out, there would be no basis for striking out the claim against the firm. However, if the claims against Mr Reid are struck out, the claims against the firm must necessarily also be struck out.

The Tort Actions - Causation

58. Mr Cohen accepts that he cannot show on the balance of probabilities that he has in fact suffered an actual loss as a result of the wrongdoing of the Defendants. He therefore argues that what he has suffered is the loss of a chance – in particular, the chance to sell the Shares before the collapse of the Company. He therefore claims damages on two alternative bases:

i) The loss of chance of achieving a sale of the Shares on a date between around May 2019 and the beginning of March 2020 for a price not less than US$6.77m (being the price that Mr Morrison and Ms Artmonsky were prepared to pay even post Covid); alternatively

ii) Damages by reference to the sums that would have been paid pursuant to the Option Agreement of US$3.75m which, but for the Defendants' dishonesty, Mr

Cohen would have had no grounds upon which to withdraw and from which he says that he would not have withdrawn.

59. The key here is to identify where the line is to be drawn between those matters that Mr Cohen must prove and those which fall to be assessed upon the basis of the evaluation of the chance which Mr Cohen says he lost. In this regard see *Perry v Raleys Solicitors* [2020] AC 352 per Lord Briggs at [20]:

> "For present purposes the courts have developed a clear and commonsense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation."

60. That reflects the emergence of the classic two stage approach. In *Allied Maples Group Limited v Simmons and Simmons* [1995] 1 WLR 1602, for example Stuart-Smith LJ at 1609 H:

> "In these circumstances, where the plaintiff's loss depends upon the actions of an independent third party, it is necessary to consider as matter of law what it is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins."

61. The courts have consistently drawn this line by requiring the claimant to prove that he has lost something of value (which is to say a substantial chance rather than a speculative one) with the evaluation of that chance being a matter of quantification of damage (*Allied* at 1611 A and 1614 D)

> "… the plaintiff must prove as a matter of causation that he has a real and substantial chance as opposed to a speculative one. If he succeeds in doing so the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other…"

62. As Cotter J noted in *Charles Russell Speechlys v Beneficial House* [2022] Costs LR 343 at [50]:

> "It has long been a fundamental rule of litigation that a Claimant's statement of case must include all relevant facts. CPR 16.4.1(a) states that particulars of claim should include a concise statement of the facts relied upon. Relied in this context upon must mean relied upon as establishing and supporting a cause of action."

63. That is because, as Mummery LJ stated in *Boake Allen Ltd & Ors v HMRC* [2006] EWCA Civ 25 at [131]:

> "Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial."

64. In contractual and tortious claims, claimants must plead and prove a case on factual causation. The position was aptly summarised by Master McQuail in *Finnan v Charles Russell Speechlys LLP* [2023] EWHC 3058 (Ch) at [99]:

> "Causation of loss is an essential part of any cause of action that the claimant may have in tort and in its absence there can be no valid claim in tort; a cause of action in the tort of negligence is only complete when damage occurs. If there is no sustainable case on causation of loss there is no reasonable ground for pursuing any claim in contract as it will result in no benefit to the claimant."
>
> Accordingly, when pleading an action for damages, it is essential for a claimant to plead and prove what they would have done absent the alleged misconduct (*Perry v Raleys Solicitors* [2019] UKSC 5; [2020] AC 352 per Lord Briggs at [20]-[24]).

65. If a case on causation depends on a combination of the claimant and a third party's actions, it is well established that the claimant must plead and prove on the balance of probabilities what he would have done and can then plead a claim in relation to what third parties would have done on a loss of a chance basis (see the summary of the law by HHJ Hacon (sitting as a High Court Judge) in *Sprint Electric v BDL* [2020] EWHC 2004 (Ch) at [113]-[116] and [119]).

66. The fact that a claim is put on a loss of a chance basis does not absolve the claimant of the responsibility to plead his case on what he would have done, what he says a third party would have done, and what he says the outcome is likely to have been. The fundamental point is that it is for him to plead and prove what his own actions would have been.

67. To take a simple example, if a man involved in a motor accident argues that he was on his way to purchase a lottery ticket, and has therefore lost the chance of winning the lottery, he is not automatically credited with the loss of that chance. He must first prove that he would indeed have bought the ticket, and must plead the facts on which he relies for that conclusion, and only if he does so should his loss of the chance be recognised.

68. The facts of this case also illustrate a further aspect to the loss of a chance jurisdiction. An action such as entering a lottery is unilateral – once a man can show that he would have entered the lottery, the question of whether he would have won it is a matter to which he can say nothing more. However an action such as selling securities is bilateral – it requires agreement on both sides. In most cases it can be assumed that a seller would accept the best available offer, and, once the likely level of that offer has been

established, the value of the chance lost can be easily evaluated. However, if a man can show that he might have received an offer to buy securities for £100, but it can be shown that he would have accepted no less than £1000, then he has not lost a chance. Where, as here, the Claimant can be shown to have rejected a number of offers to buy his securities on the basis that the prices offered were too low, he cannot simply say that has lost a chance of selling at a fair price. I think he must go at least as far as pleading that he would have accepted different offers in different circumstances, sufficiently to enable the court to decide that it is more likely than not that he would have accepted any such offer. Nothing of the kind is pleaded (or indeed indicated).

69. The Claimant pleads two possible routes for causation of damage. The first is that, had it not been for the conspiracy, he would have completed the sale for $3.75m in 2019, and that the failure to do so has caused him harm due to the Shares' subsequent decline into alleged worthlessness. The second is that he could have secured a sale at some point between May 2019 and March 2020 on terms that "truly reflected" the value of the Shares.

The Option Agreement

70. As regards the Option Agreement, Mr Cohen's case is that he withdrew from this transaction because he discovered that the Shares were worth considerably more than he had agreed. He says that he has proved sufficient facts to enable him to say that, had he not withdrawn, this agreement could have been completed. He is probably correct as to this – the e-mails from Mr Reid sent at this time indicate a degree of confidence that the deal could have been completed at the agreed price.

71. However, what this means is that Mr Cohen's case is that he withdrew from the Option Agreement because he discovered information which had been withheld from him that showed that the shares were worth more than he had previously believed. The argument that, if this information had in fact been made available to him, he would have gone ahead at the lower value is entirely incredible. It is entirely clear – and is accepted by Mr Cohen - that his primary objective throughout the relevant period was – entirely justifiably – to obtain the maximum possible value for his Shares. More importantly his own evidence in his first witness statement (at [7]-[8]) is that he refused to perform his obligations under the Option Agreement precisely because he thought the value of the Shares had increased due to the January 2020 sponsorship announcement. The suggestion that he would have agreed to sell the shares at the original value must therefore be rejected as fanciful.

72. I think that it is clear to the summary judgment standard that there is no prosect of a court finding that Mr Cohen would have proceed with and completed the Option Agreement if the torts alleged had not been committed.

May 2019 to March 2020

73. I also note that it is not open to the Claimant to argue that he has lost a chance of selling to a third party purchaser. Throughout 2019 Mr Cohen had made repeated efforts to sell the shares to third party purchasers, including:

i) an attempt to build "a database of leads" of potential purchasers;

ii) a request to Mr Ludgero de Sousa, a business associate of the First and Second Defendants, to act as a broker for the sale of the Cohen Shares; and

iii) an attempted sale to Mr Shahad Bakhsh, an associate of the First and Second Defendants with whom Mr Cohen entered into discussions with a view to selling the Cohen Shares but who rejected Mr Cohen's asking prices of $3.25m and $4.25m as too high.

74. If a man has tried strenuously and failed to do a thing over a period, he cannot argue in retrospect that he has lost a chance of doing it. It seems to me to be entirely clear that throughout this period Mr Cohen was, on his own admission, trying as hard as he could to find a buyer for the Shares at the price which he considered them to be worth. His failure to achieve such a sale seems to me to be clearly an incidence of his own intervening commercial decision – that is, that he wanted a higher price than any available buyer was prepared to pay. It does not lie in his mouth at this point to say that he would have accepted a lower price in circumstances where, given the opportunity to do so, he rejected that opportunity.

75. It was strenuously argued before me by Mr Bennion-Pedley that the question of a loss of a chance cannot be addressed on a summary hearing, since the very essence of the claim requires a full hearing. He did not go quite as far as to say that, once a claim for the loss of a chance is made, the claimant need no longer plead identifiable damage in order to succeed on a strike-out, but that was the implication of his position.

76. I do not accept this argument. Where (as here) it is said that the loss to the claimant is a loss of a chance, the claimant must show that the chance existed before arguing that it was lost. The Defendants suggest that in order to make this case Mr Cohen would have had to have pleaded and proved (i) whether he actually would have wished to "secure an exit… between May 2019 and March 2020" (ii) what actions he would have taken to "secure an exit" absent the specific alleged breaches of contract, duties, deceit and conspiracy (iii) what price he would have been prepared to accept to secure his "exit" (iv) what the causal link is said to be between the wrongs alleged and his actions and (v) what his case is as to the outcome of any such approaches to others (to allow the evaluation of any lost chance). The Claimant replies that all of these issues go not to the question of whether a sale would have been secured, but only to the question of what the chance is that a sale would have been secured. His position is (in effect) that once the Claimant has alleged that he would have been prepared to sell the shares, all other matters are to do with the probability of the chance, and are for the court to assess. I think the Defendants' list is perhaps a little over-prescriptive, but it is clear that mere silence on these points cannot be a sufficient case.

77. Mr Cohen argues in the alternative that, had the information been disclosed to him earlier, he could have made use of it to find an alternative buyer at a higher valuation. The problem with this argument is that he needs to show that an alternative purchaser, presented with the information which he by then had, would have made a bid which he would have accepted – both of these limbs needing to be present. The problem with this argument is that by early 2020 Mr Cohen – and therefore any possible third party - had all of the information which he needed in order to establish his own valuation of the Company. Throughout 2020 attempts were made to sell his shares (including to and by the Third and Fourth Defendants). These attempts were unsuccessful. At this point it is not suggested that any of the Defendants were motivated by anything other than a

sincere desire that Mr Cohen exit his investment and cease his involvement with the Company. Perhaps more importantly, these discussions were conducted after the announcement of the F1 deal and the conclusion of the AgBioEn agreement. Mr Cohen is left arguing, in effect, "none of the buyers we actually talked to were prepared to pay the price which I wanted, but there might have been a theoretical buyer who might have been". This is an argument from desperation. In order to be satisfied that a chance was in fact lost I would need to see pleaded facts that such a chance existed. I think this would require him, at a minimum, to plead the facts which he relies on to show that he would in fact have acted differently. As the Defendants vociferously point out, such facts are entirely absent from the POC. The form which the Claimant's pleading takes treats the making of such an offer as being equivalent to the drawing of a prize in a competition. That approach cannot be applied here – the claimant must show both that he might have received an offer, and that he would have accepted it.

78. Mr Cohen's argument in this regard is that he did indeed negotiate a sale to Mr Morrison and Ms Artmonsky during the pandemic once the Defendants' concealment had come to an end. His argument is, in effect, that the fact that he negotiated a sale for US$6.77m during this period is all the evidence he needs that he could have negotiated a sale for that amount during this period.

79. The problem with this argument is that although that is what he had negotiated, it proved impossible to execute. I agree that the fact of the SPAs is evidence that he would have accepted a price of first USD $5m and then $6.77m if anyone had been prepared to offer it to him. However, it seems equally clear that no-one was. These agreements operated, in practice, in exactly the same way as the Option Agreement – the arrangement was that Mr Morrison and Ms Artmonsky would try to find external financiers prepared to fund the purchase of the shares. More importantly, at the point where all of the relevant parties were seeking a buyer for the Shares, and all of the relevant information was in the public domain, no buyer could be found at the price required by Mr Cohen. That seems to me to dispose of the argument that Mr Cohen lost a chance to dispose of his shares. There was unquestionably, at that time, an opportunity for him to dispose of the Shares. However, what lost him that opportunity was his own commercial assessment of the value of the Shares.

80. I also note that Mr Cohen's case in this regard is that if he can have sufficient disclosure as to the negotiations which Mr Morrison and Ms Artmonsky held with potential third party purchasers, he may be able to establish that there might have been a third party purchaser at the price that he required which Mr Morrison and Ms Artmonsky, through some unaccountable perversity, had failed to communicate to him. I find this incredible. It is accepted that by this time both they and Mr Cohen were extremely anxious to terminate the connection between them. It is common ground that relations had broken down and that they wanted him gone. More importantly, it is accepted – and indeed Mr Cohen asserts – that there were potential funders who would, at this point, have been prepared to fund a transaction at a lower price. It seems to me sufficiently clear on the pleadings that the only obstacle to a sale of the Shares at this point was Mr Cohen's price expectations. His position is not simply that he would have sold the Shares at their fair value, but he would have sold them at the price he demanded had a buyer materialised at that price. It is a matter of fact that no such buyer materialised. It is also accepted that, at the time when he was trying to sell the Shares, the facts relevant to the

valuation were in the public domain, and were not (if they ever had been) concealed from him or, *a fortiori*, any potential buyer.

81. I also note, for completeness, that I do not accept Mr Cohen's argument that his prospects of a sale should be assessed by reference to an independent valuation. The question of whether a sale of his Shares could have been achieved in this period must be assessed primarily by reference to what we know of his attempts to sell the Shares in this period.

82. I therefore find to the summary judgment standard that Mr Cohen did not lose any opportunity to sell his Shares at a price which he would have accepted.

83. As a result of these findings, I find that there is no causal link between the losses suffered by Mr Cohen and the alleged torts committed by the Defendants. All of those actions therefore fail, and must be dismissed.

B. Fiduciary Obligations

84. A number of the pleaded causes of action involve allegations of breaches of fiduciary duties. I am not in a position to decide whether any such duties have been breached. The task before me today is to see whether there is sufficient factual support for a finding that such duties arose in the first place.

85. As Millett LJ observed in *Bristol & West Building Society v Motthew* [1998] Ch. 1 "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence" (at 18).

86. No cause of action can arise where the facts are not such as to constitute the "circumstance" in which a fiduciary duty might arise.

4. Fiduciary obligations owed by Ds to C as a result of the company being a quasi-partnership

87. There is no question that the establishment of a company between co-venturers does not necessarily completely exclude the law of partnership, and that the application of that law may give rise to obligations between the participants in the company inter se which go beyond the requirements of Company law. In *O'Neill v Phillips* [1999] 1 W.L.R. 1092 at 1102G-1103, Lord Hoffmann held that the Court of Appeal had been right to find that the company had the "characteristics identified by Lord Wilberforce… as commonly giving rise to equitable constraints upon the exercise of powers under the articles".

88. David Richards J explained the position as regards quasi-partnerships in *McKillen v Barclay* [2012] EWHC 521 (Ch). He said:

> "103. … It may or may not be a relationship of trust and confidence of the sort discussed in *Ebrahami v Westbourne Galleries* [1973] AC 360, although the complex commercial arrangements between the parties in this case will tell against that view. Even in a case such as Westbourne Galleries, it was not

> suggested that fiduciary duties arose, only that the exercise of legal rights might be subject to equitable considerations, such that the exclusion of one of the shareholders from management, contrary to the express or implicit understanding between the shareholders, could make it just and equitable to wind up the company or, now, give relief under the unfair prejudice provisions: see *O'Neill v Phillips* [1999] 1 WLR 1092." This reinforces my view that, even if the arrangement between the parties were held to be a quasi-partnership, that would not give rise to a conclusion that fiduciary duties were owed between the parties.

89. Thus the fact that there may be a quasi-partnership does not, of itself, give rise to any fiduciary obligation.

90. Even if the Company had been established as a quasi-partnership, an arrangement of this kind would not give rise to fiduciary relationships in the absence of specific facts. Those facts can be broadly summarised as the existence of a relationship of trust and confidence between the parties. It is entirely clear from the pleadings that no such relationship existed between the Claimant and the First and Second Defendants at the relevant times.

91. The First and Second Defendants also observe – correctly – that in any event the Particulars of Claim do not plead the facts and matters that would require to be established for the idea that the Company was a quasi-partnership to be established.

5. Obligations owed by Mr Reid to Mr Cohen

92. Mr Cohen argues that Mr Reid owed fiduciary duties to him by reason of his having agreed to act as his agent. The question to be decided at this stage is as to whether Mr Reid's pleaded actions are capable of giving rise to a fiduciary duty to Mr Cohen which could potentially have been breached. I note that the issue is not whether, in all the circumstances, Mr Reid might have assumed such a duty – the issue is the narrow one of whether the specific actions pleaded, taken together, could be said to give rise to a real prospect of a court finding that he could be said to have owed such a duty. It is helpful in this regard to examine the actions taken by Mr Reid which are set out in the Particulars of Claim as giving rise to this duty.

93. The Claimant's case that Mr Reid was his fiduciary arises out of the fact that he says that Mr Reid offered to assist the Claimant to 'sort out' his position. He says that Mr Reid

    i) "took the lead exploring the sale of the shares on behalf of the Claimant in discussions with various possible buyers"

    ii) purported to act as mediator between the Claimant and the First and Second Defendants,

    iii) made observations as to the value of his Shares and the price that he might reasonably expect to achieve for them – in particular that he said that the

Claimant would be 'very lucky to get US$3.75m' for the Shares or words to that effect.

94. It is also alleged that

i) Mr Reid told Mr Cohen on 17 February 2020 that Mr Morrison and Ms Artmonsky could exercise the 2019 Option and would do so, were it not for the threat that protracted litigation would ensue;

ii) Mr Reid reiterated these points on 19 February 2020;

iii) Mr Reid raised the spectre of a claim for specific performance of the 2019 Option);

iv) On 14 February 2020, Mr Reid suggested that Mr Morrison and Ms Artmonsky could purchase the Cohen Shares in March 2020 for US$5 million or potentially US$6 million. A further email the same day suggested up to US$5.5 million

95. I have no hesitation in rejecting the Claimant's argument that these allegations, taken together and viewed in the most favourable light, support the idea that Mr Reid had taken on any fiduciary duties to him. It is not disputed that Mr Cohen knew at all times that Mr Reid was retained by the Company and by Mr Morrison and Ms Artmonsky as their solicitor, and was acting on their behalf. There is no suggestion that there was any arrangement between Mr Reid and Mr Cohen that could have constituted either an express or an implied retainer of Mr Reid by Mr Cohen. The position between Mr Reid and Mr Cohen was therefore that Mr Reid was acting – and Mr Cohen knew that he was acting – for other parties to the transaction, and that he was seeking to persuade Mr Cohen, on behalf of those parties, to enter into a transaction involving them. The idea that a solicitor in such a situation who expresses view to a third party as to the merits of the transaction, or who helps to find supporting parties, or who intermediates between the third party and his client, is assuming a fiduciary duty to that third party, seems to me to be completely unarguable. This is an argument in which reverse summary judgment is entirely appropriate.

96. I do not think that there is an explicit argument to the effect that Mr Reid acted as agent for Mr Cohen in the sale of the Shares, and therefore owed fiduciary duties on that basis. However, if there is, it fails for the same reason that the equivalent claim against the First and Second Defendants fail as set out in paragraphs 105-6 below.

Common Law Negligence

97. This also takes us to the argument that even if Mr Reid did not owe fiduciary duties to Mr Cohen, he had nonetheless assumed common law duties. If Mr Reid was neither a fiduciary nor bound by any obligations arising from an implied retainer, the question is therefore whether he had, by taking the actions identified above, assumed a common law duty in tort.

98. It is important to note that an action in negligence requires the establishment of a duty of care. As the editors of *Charlesworth and Percy on Negligence* put it, "so far as the law of tort is concerned, people are entitled to be as negligent as they please towards the whole world, provided that they do not owe any particular person a duty to take

care". (16th Ed. 2-01). This cause of action could therefore only succeed if the facts supported an allegation that Mr Reid had assumed a duty of care to Mr Cohen.

99. There seems to me to be no possible basis for any such finding. The acts alleged to found the duty of care are the same as those alleged to found the fiduciary duty. My starting point is that, on ordinary *Caparo v Dickman* [1990] 2 A.C. 605 principles, a solicitor acting for one party to a transaction does not owe a duty of care in negligence to other parties to that transaction (or, indeed, parties dealing with his client generally) unless the facts are such as to suggest that he has voluntarily and knowingly assumed such a duty. It is possible that this is in fact an empty set, in that the existence of such facts would give rise to an implied retainer in any event. However, I am satisfied that the facts alleged above do not give rise to any duty owed to Mr Cohen by Mr Reid in negligence, for the same reason that they do not give rise to any fiduciary duty.

100. I should note that I do not find this congruence surprising. As Millett LJ said in *Motthew*,

> "Although the remedy which equity makes available for breach of the equitable duty of skill and care is equitable compensation rather than damages, this is merely the product of history and in this context is in my opinion a distinction without a difference. Equitable compensation for breach of the duty of skill and care resembles common law damages in that it is awarded by way of compensation to the plaintiff for his loss. There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case. (P. 17 at G)."

101. I would add that the question of whether a duty arises in the first place seems to me to be the subject of the same broad symmetry.

102. I note that this finding says nothing to the question of whether Mr Reid was involved in a conspiracy against Mr Cohen. The question of whether that allegation is actionable turns on a very different set of considerations.

103. It is clear that Mr Reid owed duties to the Company and/or its Subsidiaries as its solicitor. Mr Cohen seeks to argue that those duties included – in practice – informing him of the activities of his fellow-directors. However, he accepts than any such breaches are not actionable by him in these proceedings.

6. Duties owed by Mr Morrison and Ms Artmonsky to Mr Cohen

104. Mr Cohen pleads that Mr Morrison and Ms Artmonsky 'undertook to act for the benefit of the Claimant and/or Legendary Moments as agent, or in a capacity analogous to agency, by facilitating the intended sale of the Cohen Shares to Mr Bakhsh in return for a commission.' No such contract is pleaded, in breach of CPR 16.

105. It is not the case that an agent is necessarily a fiduciary (see *Bowstead & Reynolds* 1-016). An agent is likely to be a fiduciary where he has the power to exercise discretion on behalf of his principal. However, to establish that A is the agent of B is not, per se, to establish that A owes fiduciary duties to B. The reality of the position is that where

A is trying to help B to execute a transaction with C, the question of whether A is a fiduciary of B will be determined by reference to the criteria set out in *Motthew* in the same way as any other determination of fiduciary status.

106. The Claimant says, in effect, that because Mr Morrison and Ms Artmonsky undertook to help him sell his shares in the company, they were therefore acting as his agents and owed him fiduciary duties. That is, per se, clearly wrong. The question is as to whether Mr Cohen reposed any trust and confidence in them as regards any such sale. It is clear that exactly the reverse was the case – they were simply trying to identify interest by third party buyers. There is no suggestion that they had any power to commit Mr Cohen to a deal at any specific price – indeed, Mr Cohen seems to have maintained at all times complete control of the terms of any possible price, with such control going well beyond the price to be obtained and extending to details of the warranties to be given and obtained in any such transaction. Such an arrangement cannot be said to give rise to any fiduciary duty.

107. A great deal of Mr Cohen's Particulars of Claim conflates these two issues – his argument is that because Mr Morrison and Ms Artmonsky owed duties to the Company to provide information to him, by failing to provide that information they harmed him, and therefore must be liable to him. This is to put the cart before the horse. The question of whether they breached their duties to the Company is an entirely separate question from the question of whether they owed duties to him. It is only in the latter case that he – as opposed to the Company – has an action.

108. There is another ground on which Mr Cohen argues that Mr Morrison and Ms Artmonsky owed him a fiduciary duty, that being that they had considered a scheme under which other businesses controlled by them could acquire the Company and integrate its activities into a wider design (described as the "Takeover Plan"), and that the existence of this scheme imposed fiduciary obligations on them to make material disclosure of the existence of those plans to him as a shareholder. It may or may not be the case that some duty of the kind might have arisen had the scheme matured into a fully-funded proposal. However, Mr Cohen does not plead any facts in this regard beyond asserting that a proposal of the kind was at one point written down and considered. I do not think that there is the slightest prospect of establishing on the facts pleaded that any such fiduciary duty existed.

7. Fiduciary duties arising from Director status

109. In relation to any alleged fiduciary duty owed by directors to other directors and shareholders, the authorities establish a narrow and exceptional jurisdiction. First, the general rule is that directors owe their fiduciary duties to the company only, not to not fellow directors and shareholders personally. In *Peskin v. Anderson* [2001] 1 BCLC 372 (CA), the Court of Appeal confirmed that no fiduciary duty is ordinarily owed by directors to shareholders as such, and that any departure from the general rule arises only in special factual circumstances where a director has undertaken, or is found to have assumed, a responsibility to a particular shareholder, typically involving a specific relationship of trust and confidence and reliance by that shareholder.

110. That approach was applied and developed in *Sharp v. Blank* [2015] EWHC 3220 (Ch), where the Court reaffirmed that a personal duty may arise only where there is a sufficiently proximate relationship, such as targeted communications or advice to

particular shareholders, creating a real assumption of responsibility and reliance. See Nugee J.'s judgment at [12]:

> "'I take it therefore to be established law, binding on me, that although a director of a company can owe fiduciary duties to the company's shareholders, he does not do so by the mere fact of being a director, but only where there is on the facts of the particular case a 'special relationship' between the director and the shareholders. It seems to me to follow that this special relationship must be something over and above the usual relationship that any director of a company has with its shareholders. It is not enough that the director, as a director, has more knowledge of the company's affairs than the shareholders have: since they direct and control the company's affairs this will almost inevitably be the case. Nor is it enough that the actions of the directors will have the potential to affect the shareholders – again this will always, or almost always, be the case. On the decided cases the sort of relationship that has given rise to a fiduciary duty has been where there has been some personal relationship or particular dealing or transaction between them'"

111. *Stein v. Blake* [1998] 1 All ER 724 (CA) confirms the orthodox principles that fiduciary claims are company claims save in exceptional circumstances and underscores the need to identify with precision the legal person to whom the duty is owed and the proper claimant. These authorities require the claimant to establish a specific, fact-sensitive undertaking or assumption of responsibility by the directors towards the shareholder, coupled with reliance and a conflict or abuse of that undertaking, before any personal fiduciary duty can be said to arise.

112. As set out above, there is no pleaded factual basis on which it could be found that Mr Morrison or Ms Artmonsky acted so as to assume any such duty to Mr Cohen.

7. Other duties

113. It is not entirely clear from the pleadings what other duties are asserted. To the extent that it may be suggested that parallel duties in negligence may be owed by a director to a shareholder outside the existing parameters of Company Law, I can only say that it would take a great deal to convince me that such an action could or should be capable of being brought. No such attempt is made here.

8. Dishonest assistance.

114. In order to establish liability for dishonest assistance for breach of fiduciary duty, it is necessary to establish that: (a) there was a fiduciary duty owed at the material time; (b) the fiduciary committed a breach of that duty; (c) the defendant assisted the fiduciary to commit that breach of duty; and (d) the defendant's assistance was dishonest.

115. Mr Cohen's argument here is that Mr Reid dishonestly assisted Mr Morrison and Ms Artmonsky to breach their fiduciary duties to the Company. There is no doubt that they did owe such duties, and for the purpose of this hearing I assume that they breached

those duties. The only remaining question is therefore whether Mr Cohen could bring an action against Mr Reid on that basis.

116. I think the difficulty for Mr Cohen here comes back to causation. The only possible equitable remedy which he might claim on this basis is equitable compensation. Equitable compensation comes in two forms – reparative and substitutive (see *Snell* (35th ed.) at para 20-20. It is clear that reparative compensation in equity follows (broadly) the same principles which apply for common law damages and, in particular, may only be awarded in respect of losses the claimant can show would not have occurred but for the breach in question (*AIB Group v Mark Redler & Co. Solicitor*s [2015] A.C. 1503*; Gwembe Valley Development Co Ltd v Koshy* [2004] 1 B.C.L.C. 131 CA at [149]). This is broadly the same causation test that is applied in tort. It is also clear that this principle also applies to substitutive compensation, where compensation can only be paid where there is proof of a deterioration or diminution in the value of an asset which is directly caused by the breach of duty concerned. Any claim for equitable compensation would therefore fail on the same causation grounds that cause the tort claims to fail.

9. Breach of Contract

117. This claim relates to two clauses of the contract between the parties. The terms – which it is accepted were in place at all material times - are set out in the 20 May 2020 agreement as follows.

Clause 5:

> "'It is further agreed that until the JC Parties have sold all shares in [Apollo BC] which are owned by the JC Parties ('the JC Shares') and all shares in [Apollo BC] which become subject to share options which may be granted to any or all of the JC Parties by any or all third-party minority shareholders of [Apollo BC] ('the MS Shares') (hereinafter the JC Shares and MS Shares shall jointly be referred to as 'the LML Shares'), the PB Parties shall act in good faith and use their best endeavours to promptly provide the JC Parties with:"
>
> (a) all information and documents that JC would have been entitled to receive under clause 10.9 of the JC Agreement as if he was still a director of [Apollo BC], AWT, WTL, WTML, and all other Group Companies; and
>
> (b) all information and documents that have been submitted to board meetings of EMAG, including the agendas, minutes (signed versions where approved) for and/or of such meetings, management reports and accounts, and 'to do lists'.'

118. Also, Clause 10.9 of the 'JC Agreement' provides as follows:

> "'Each of the Sellers and the Company represent and warrant they shall make available and supply all information relating to the Company and its Subsidiaries including financial, non-

financial, legal, investment and operational information which is reasonably necessary in order to enable the Buyer to undertake his duties (including fiduciary) as a director of the Company and/or Subsidiaries.'"

119. It is clearly the case that an action for breach of contract may be successfully brought even in the absence of any damage (although in such a case damages may be nominal). Consequently the claim for breach of contract survives the findings above as to causation and loss.

120. There is clearly scope for considerable dispute between the parties as to what information – if any – the Claimant is entitled to receive which he does not already have. The First and Second Defendants make the perfectly reasonable point that the scope of this obligation is profoundly unclear. In particular, since the debate between the Claimant and the First and Second Defendants turns to a very large extent on whether the plans in which they were engaged as regards MMW were part of the business of the Company or not, the issue as to what information might have been necessary for the Company to provide to the Claimant in order to permit him to "undertake his duties (including fiduciary) as a director of the Company" is in many respects the very thing which a trial of this issue might be expected to decide.

Summary of Conclusions

1. The claims in tort in Deceit, Conspiracy and Negligence all fail on the grounds that any damage suffered by Mr Cohen cannot be shown to have been caused by the actions complained of, and no cause of action therefore arises.

2. Mr Morrison and Ms Artmonsky could not have owed any fiduciary duties to Mr Cohen.

2.1 The Company was not a quasi-partnership and, even if it had been, that would not of itself have given rise to fiduciary duties between the quasi-partners. There is no pleaded evidence on which it would be possible to conclude that a fiduciary duty was created.

2.2 Even if it were concluded that Mr Morrison and Ms Artmonsky had acted as Mr Cohen's agents in the attempted sale of his shares, there is no pleaded evidence that would support an argument that the relationship was a fiduciary relationship.

2.3 Mr Morrison and Ms Artmonsky did not owe fiduciary duties to Mr Cohen *qua* shareholder, and there is no pleaded evidence that would support a conclusion that their actions were sufficient to give rise to such a duty in any other respect.

3. Mr Reid did not owe fiduciary duties to Mr Cohen. The pleaded actions by Mr Reid are insufficient to enable a court to conclude that he had assumed any such duty.

4. Mr Reid cannot be liable in dishonest assistance for Mr Morrison's and Ms Artmonsky's breach of fiduciary duty to Mr Cohen, since no such duty arose.

5. Mr Cohen may have a valid action against Mr Morrison and Ms Artmonsky for breach of the 2018 SPA. However, if this claim is pursued, a further hearing will be needed to establish what documents (if any) Mr Cohen is entitled to in this regard.

Costs

121. Mr Cohen has made allegations of the most serious possible kind against the Defendants.

122. In *Clutterbuck v HSBC* [2016] 1 Costs LR 13 David Richards J held at [16 – 17]:

> "[16] The general provision in relation to cases in which allegations of fraud are made is that, if they proceed to trial and if the case fails, then in the ordinary course of events the claimants will be ordered to pay costs on an indemnity basis. Of course the court retains a complete discretion in the matter and there may well be factors which indicate that notwithstanding the failure of the claim in fraud indemnity costs are not appropriate, but the general approach of the court is to adopt the course that I have indicated.
>
> [17] The underlying rationale of that approach is that the seriousness of allegations of fraud are such that where they fail they should be marked with an order for indemnity costs because, in effect, the defendant has no choice but to come to court to defend his position."

123. This principle remains applicable where proceedings are brought to an end (whether by strike-out, settlement or by other means) before trial. In *Far Out Productions Inc v Unilever UK & CN Holdings Ltd* [2009] EWHC 3484 (Ch), Mr N Strauss Q.C. stated at [4]:

> "In my view, the underlying rationale of the rule, or at least a substantial part of it, was succinctly expressed by Mr. Prescott Q.C., when he said that the effect of discontinuance is to deprive the party, against whom (at least in some cases including this one) serious allegations have been made, of the opportunity of vindicating himself. A defendant who establishes that the claim is without foundation, and so vindicates himself, is normally entitled to the costs of the action. Therefore, if the claimant chooses to bring proceedings, but then discontinues them, it is only natural that he should pay the defendant's costs unless there are substantial reasons justifying a different result."

124. I will hear full submissions on costs from counsel in due course, but I would invite them to bear these dicta in mind in making those submissions.

125. This hearing is adjourned to a further date. In response to an application made by the Claimant, the time limit for applying for leave to appeal is extended under CPR 52.12(2)(a) so as to begin on the date of that further hearing..