Neutral Citation Number: [2024] EWHC 4 (Ch)

Case No: BL-2021-001489

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 5 January 2024

Before :

MASTER BRIGHTWELL

- -

Between :

MOYSES STEVENS FLOWERS LIMITED	**Claimant**
- and -	
(1) FLOWER STATION LIMITED	**Defendant**
(2) MR DAVID COHEN	

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- -

Richard Hoyle (instructed by **Fox Williams LLP**) for the **Claimant**
Simon McLoughlin (instructed by **Ingram Winter Green LLP**) for the **Defendants**

Hearing dates: 1 November, 18 December 2023

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Friday 5 January 2024

Master Brightwell :

1. This judgment concerns two applications. The first is an application dated 23 June 2023, by which the claimant seeks orders striking out the defences raised by the first defendant to the claimant's claim for an account, alternatively an order for summary judgment. The second is an application by the defendant dated 10 November 2023, seeking orders declaring the meaning of a recital to an earlier order made on 14 April 2023, alternatively permission to withdraw that recital in the event that it constitutes an admission or a concession ("the Recital Application").

2. The claim concerns the contractual relationship between two companies, the claimant, Moyses Stevens Flowers Ltd ("MSFL") and the first defendant, Flower Station Limited ("FSL"). As their names suggest, both companies carry on business in the sale of flowers. Until around August 2020 the two companies were in the common ownership and control of two individuals, Mr Spasoje (Spalé) Marcinko, and Mr David Cohen, who was joined to the claim as the second defendant by a consent order made on 4 August 2022.

3. It is common ground that while the companies were in common ownership each would pay expenses on behalf of the other company. It also seems to be agreed that there was an obligation on the part of each company to repay the sums which had been incurred on its behalf by the other. In the re-amended defence and counterclaim of the first defendant, it is admitted that in the period from 2012 to around August 2020 MSFL and FSL each paid debts and met liabilities owed by the other on the other's behalf. MSFL pleads in the amended particulars of claim there was an implied agreement for repayment of the sums so paid by FSL to MSFL. Alternatively, MSFL claims that it is entitled to an order in restitution for repayment of the sums paid, or to an order for money had and received by FSL. I am told that MSFL believes it may recover up to £2.5m on the taking of an account, a suggestion rejected by the defendants.

4. It is common ground that, for the period from August 2019 onwards, no account has been taken and that such an account is now required. MSFL however claims an entitlement to an account from 31 January 2016 until completion of the agreement for the separation of the companies and then from completion onwards. FSL itself counterclaims an entitlement to an account for the financial periods ending 2020 and 2021.

5. FSL's re-defence pleads that, at the end of their respective financial years (MSFL's financial year ending on 31 January and FSL's financial year ending on 31 August), including for the years ending in 2016, 2017, 2018 and 2019, DJP prepared draft accounts for MSFL for Mr Marcinko to consider and approve, and prepared draft accounts for FSL for Mr Cohen to consider and approve. DJP are the chartered accountants said to have been instructed by both companies, Donald Jacobs & Partners.

6. Paragraph 4(d) to (g) of the re-amended defence and counterclaim says this:

> '(d) In preparing the Claimant's and FSL's draft accounts, DJP took instructions from Mr Marcinko and/ or Mr Cohen in relation to the identification and treatment of debts and liabilities met by each of the companies on behalf of the other and the necessary adjustments were made in the course of preparing the companies' draft accounts.
>
> (e) For the avoidance of doubt, both Mr Marcinko and Mr Cohen knew that DJP were preparing both the Claimant's and FSL's accounts and that debits and credits appearing (or forming the basis for entries) in the relevant year end's accounts for the Claimant would be reflected in the relevant year end's accounts for FSL (and vice versa).
>
> (f) The Claimant's accounts for the years ending 2016, 2017, 2018 and 2019 were prepared by DJP and approved by Mr Marcinko.
>
> (g) When Mr Cohen approved FSL's accounts for the years ending 2016, 2017, 2018 and 2019 he was satisfied that they gave a true and fair view of the assets, liabilities, financial position and profit or loss of FSL. FSL assumes that Mr Marcinko will say that he was similarly satisfied in relation to the Claimant's accounts for those years (as he was required to be in order to comply with his duty as director of the Claimant under *inter alia* sections 393 and 414 of the Companies Act 2006).'

7. In paragraph 10(a), FSL then pleads as follows:

> 'An account in relation to each of the years ending 2016, 2017, 2018 and 2019 has already been carried out on behalf of the Claimant (and FSL) and agreed by Mr Marcinko and Mr Cohen on behalf of the Claimant and FSL, with the assistance of the companies' accountants, and which accounting process resulted in the preparing, approval by Mr Marcinko and Mr Cohen and filing at Companies House of the Claimant's and FSL's respective company accounts.'

8. The defence of estoppel by representation is pleaded at paragraph 10(d):

> 'By Mr Marcinko agreeing the accounts for the Claimant in each of the years 2016, 2017, 2018 and 2019 in the circumstances set out herein (and, in particular, in paragraph 3 and 4 above) and by approving and filing at Companies House, the Claimant (and/or Mr Marcinko on behalf of the Claimant) represented to FSL that the accounts for those years and treatment of the liabilities met by each company on behalf of the other was finally agreed.'

9. This defence of estoppel by representation is then supported by a plea that the defendants relied on those representations and it is said that it would be

unconscionable and inequitable in the circumstances if MSFL were allowed now to deny that its and FSL's respective accounts for the relevant years had not been finally agreed for and on behalf of MSFL and FSL.

10. The plea of reliance is put in the following terms, at paragraph 10(d)(ii):

> 'FSL (and Mr Cohen on its behalf) relied on those representations in (i) preparing, approving and filing its own accounts at Companies House for each of the years 2016, 2017, 2018 and 2019 (ii) carrying on its business (including with the Claimant) in the period(s) that followed (iii) dealing with third parties in the period(s) that followed (including on behalf of the Claimant) and on the understanding that the Claimant's and FSL's respective accounts for the years ending in 2016, 2017, 2018 and 2019 represented a true and fair view of the assets, liabilities, financial position and profit or loss of each of the companies and (iv) continuing in those ways without taking alternative or any other (more formal) steps finally to determine the accounting position as between the Claimant and FSL.'

11. FSL also pleads at paragraph 10(e) that MSFL is estopped by convention from now contending that the accounting position between the parties is other than is set out in their respective year-end accounts for the relevant years. This plea is also supported by an allegation that the accounting position between the parties was agreed, that FSL relied on that convention, and that it would be unconscionable and inequitable if the claimants were allowed now to resile from the convention, FSL having changed its position in reliance on the convention, as pleaded at paragraph 10(d)(ii) (set out above).

12. The procedural history of the claim is as follows:

    i) The claim form was issued by MSFL against FSL alone on 26 August 2021. A defence was filed in November 2021 (the document does not state the date in November when it was signed, but I am told its date is 17 November 2021).

    ii) MSFL made a Part 18 request of FSL on 21 November 2021.

    iii) FSL replied to the Part 18 request on 24 January 2022, indicating that its response to requests 7, 8 and 9 were sufficiently dealt with the defence, a position maintained until the 14 April 2023 hearing.

    iv) After two consent orders first making and then extending a stay for the purpose of mediation, a further order was made by consent on 4 August 2022, by which MSFL was granted permission to add David Cohen as the second defendant and to amend the claim form and particulars of claim. The new claim added by amendment is an alternative claim that Mr Cohen acted in breach of fiduciary duty as a company director of MSFL or in breach of his common law or other equitable duties to take reasonable skill and care in the

discharge of his accounting functions on behalf of MSFL and not to exceed his authority in the discharge of those functions.

v) A costs and case management conference was held before Deputy Master Linwood on 10 January 2023. The defendants disinstructed their solicitors shortly before that hearing, and Mr Cohen represented both defendants. Case management directions were given to a trial of a preliminary issue, being limited to issues of liability, with the taking of an account and any issues of quantum to be determined separately. The issues of liability will include the question whether the account between the companies has been agreed or settled and, if so, whether Mr Cohen is liable to MSFL pursuant to the claim added by amendment.

vi) The trial is listed for 5 days, including one day of pre-reading time, to begin in a window from 22 to 24 April 2024.

vii) After the CCMC, on 3 March 2023 (and after writing a pre-application letter on 13 January 2023), MSFL issued an application for a Part 18 order in respect of its Part 18 request dating back to 21 November 2021. I heard that application, which I discuss further below, on 14 April 2023.

viii) MSFL's current application was issued on 23 June 2023. On the same date the parties filed a draft consent order extending time for disclosure and exchange of witness statements to dates up to 29 November 2023, which order was made by Deputy Master Lampert. The parties were directed to comply with the heavy application provisions of the Chancery Guide, and Mr Hoyle's clerks did not write to the court with the parties' dates to avoid until 15 August 2023. The delay appears to have been caused at least in part by a request by the defendants for security for the costs of the application, which was then provided by MSFL by consent. In any event, there was significant delay in MSFL's application being referred to me for listing, which is why it did not come on for hearing until 1 November 2023.

13. At that hearing, I adjourned MSFL's application in order to permit the defendants to issue the Recital Application. As I explained in my ruling on that occasion, the witness statement of MSFL's solicitor, Mr Peter Ashford, did state the position that the defendants were precluded by the recital to the order of 14 April 2023 from arguing their defences in full, but the extent to which it was alleged or apparent that there had been a concession did not become apparent to me until near the end of the day. As I had not heard submissions on the scope and effect of the recital, I did not consider it appropriate to dispose of MSFL's application without affording the defendants an opportunity to apply to withdraw any concession or admission.

The recital

14. As I have indicated, the claim came before me on 14 April 2023, on MSFL's application for an order that FSL provide further information about its defence under CPR Part 18. This concerned requests 7 to 9 in the Part 18 request dating back to 21 November 2021. David Cohen, then representing FSL in person, asked for the application to be listed for a hearing and for him to have an opportunity to file evidence in response to the application (which he was granted), but he did not do so.

15. Unsurprisingly, I do not have a verbatim recollection of a hearing which took place as long ago as April 2023, but I accept Mr Ashford's description of the hearing, set out in his third witness statement. I gave an indication to counsel then instructed for the defendants on direct access (not Mr McLoughlin) that I considered that requests 7 (divided into 7.1, 7.2 and 7.3) (on the allegation of settled account), 8.1 (on representation(s) said to found an estoppel) and 9.1 (on the extent of the alleged reliance by FSL) justified the provision of further information, but that requests 9.2 and 9.3 did not appear to me to do so. Without my being required to give a ruling, the defendants' counsel proffered a form of recital to confirm the extent of the matters relied on by FSL in support of the allegation that there was an agreement or settled account between the companies. There was some discussion about whether the recital was acceptable to MSFL, and the hearing was briefly paused to enable counsel to take instructions from Mr Cohen.

16. The relevant recital to the 14 April 2023 order says this:

> 'AND UPON the Defendants having indicated by counsel that the Defendants' case as to whether there had been an account of inter-company liabilities agreed between the Claimant and the First Defendant in each of the years 2016, 2017, 2018 and 2019 is limited to an allegation that each company's director agreed and approved that company's formal accounts which were then filed with Companies House, and that the Defendants do not rely upon any other agreement or representation by words or by conduct in relation to the same.'

17. In light of the recital, and Mr Hoyle's indication that he was content with it as a response to the outstanding requests, I made an order only that the defendants answer request 7.3 by 9 May 2023. This required a statement of the defendants' case as to the agreed account contended for, 'and in so far as necessary for each of the Claimant's and the [First] Defendant's accounts in each year'. It also sought an answer to whether the agreed account was in writing, oral or by conduct. To this latter extent, it overlapped with requests 7.1 and 7.2 and was dealt with by the recital. I also made a costs order in favour of MSFL and summarily assessed the costs of the Part 18 application.

18. This request was answered later than I had directed. The response was provided on 22 May 2023, and provided the amount said to be owed by MSFL to FSL as at 31 August in each of 2016, 2017, 2018 and 2019. The balance owing as at 31 August 2019 is stated as £670,741.53.

The claimant's application

19. It seems to me to be appropriate to consider first MSFL's application, in which it is contended that the defence is liable to be struck out or subject to summary judgment, i.e. in the first instance on the assumption that the recital is withdrawn. This is not only because the applications were argued in that order. If the defence should be summarily dismissed even in the absence of the recital, then the Recital Application will fall away. Furthermore, in considering whether to permit the withdrawal of an admission or concession, I will need to consider the merits of the defence if the withdrawal is to be permitted.

20. MSFL submits that the defence to the claim in the period up to August 2019 should be struck out under CPR r 3.4(2)(a), which provides that the court may strike out a statement of case (or part thereof: see r 3.4(1)) if it appears that it discloses no reasonable grounds for defending the claim. Reference is also made to CPR Practice Direction 3A paragraph 1.4, which says that a defence may fall within the above rule where (1) it consists of a bare denial or otherwise sets out no coherent statement of facts, or (2) the facts it sets out, while coherent, would not amount in law to a defence to the claim even if true.

21. A defence is liable to summary judgment if the court considers that the defendant has no real prospect of succeeding on the defence (or issue) and there is no other compelling reason why the case or issue should be disposed of at a trial: CPR r 24.3. The test to apply was set out by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and has been subsequently approved and applied in this form in many cases (and omitting below the older authorities cross-referred to):

> 'i) 'The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success.
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.
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> iii) In reaching its conclusion the court must not conduct a "mini-trial".
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> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better….'

22. In *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18], Popplewell LJ said this about the test of real prospect of success:

> 'The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct.'

23. I accept that, where the power to strike out a statement of case is concerned, the court is concerned only with the contents of the document, and not with evidence: *Allsop v Banner Jones Ltd* [2021] EWCA Civ 7 at [7]. Where CPR r 3.4(2) is concerned, the court assumes that the facts pleaded are true (so the question is whether they are capable of constituting the defence pleaded): *Libyan Investment Authority v King* [2020] EWCA Civ 1690 at [96].

24. When considering a summary judgment application, the court does not uncritically accept that the pleaded case will be accepted at trial, but forms an assessment of the evidence, by a critical examination of it. The court is not bound to accept a self-contradictory or inherently incredible case: see *Maranello Rosso Ltd v Lohomij BV* [2021] EWHC 2452 (Ch) at [19].

25. In response to the summary judgment application, FSL relies on the first witness statement of David Cohen, dated 22 September 2023, and the witness statement of Mr Tony Cohen dated 23 September. Tony Cohen is an accountant employed by DJP at the material times, and is not related to the second defendant. The only evidence relies

on by MSFL in response is a second witness statement from Mr Ashford. There is no witness statement from Mr Marcinko before the court.

26. In his first witness statement, David Cohen makes the following statements, among others:

> '21 … For many years, until the final couple of years before Spalé and I separated, we, as the directors of FSL and MSF, would both attend a year-end accounts meetings with Tony Cohen of DJP. At those meetings, we would go through a set of draft accounts and the financial information, so that the year-end accounts could be finalised. This happened twice a year (once for MSF and once for FSL) and Spalé and I would attend both meetings….
>
> 23 Neither company maintained the necessary records to show which of them actually sold a particular consignment of flowers. The same was true for staff costs and vehicle costs given the high level of crossover between the companies. When it came to the preparation of the accounts, it was necessary to find a reasonable and sensible way to apportion those costs and inevitably that involved an element of judgment and estimation….
>
> 25 Perhaps most importantly, the starting point for all the figures would be both the previous year-end figures for the company in question and also the year-end figures for the other company. If we were working on the year-end figures for FSL as at 31 August then the year-end figures for MSF as at 31 January would be highly relevant. To put it another way, it would have been impossible to apportion costs between the two companies by looking at only one company in isolation. If anything, the accounts of the other company would be more relevant as they would always have been prepared more recently. All these matters were discussed at the year-end meetings that Spalé and I attended with Tony.
>
> 28 The almost inevitable result of this apportioning process was that one of the two companies always owed money to the other…Given that the companies were so closely connected this was inevitable and the final balance (sum due from one to the other) would be included in the "other debtors / creditors" section of the accounts. The figure in the 31 January year-end accounts for MSF would then be used as the reference point for the preparation of FSL next 31 August year-end accounts (and vice versa), and on it would go.
>
> 29 … My understanding has always been that by signing a set of company accounts, the director is confirming that the information contained is true to the best of their knowledge and belief. That is always how I approached the accounts and I assumed the same was true for Spalé, not least because they were the result of a detailed process of working out which company had paid for what in each relevant period that he and I had carried out with the companies' accountant, Tony Cohen, and where each set of company accounts necessarily informed the

> next set of accounts for the periods ending 31 January, 31 August, then 31 January again and so on….
>
> 30 … Spalé knew very well that one of the most important items of business at each of these meetings was to apportion costs between MSF and FSL. In addition to the accounts meetings themselves, Spalé had unrestricted access to the Sage ledgers for both companies and to both John and Sami. He would frequently raise queries with them about all sorts of accounting issues, perhaps a particular customers owing money to one or other of the companies or about payment for a particularly large flower delivery…Finally, and most importantly, it was Spalé who, as a director of MSF, signed the MSF accounts in the full knowledge that they had been prepared in reliance on how FSL had prepared its accounts and on the basis that they would necessarily inform how FSL would prepare its accounts…'

27. The three (closely connected) lines of defence, all pleaded in paragraph 10 of the re-amended defence and counterclaim are, as set out above, settled account, estoppel by representation and estoppel by convention.

28. In *Anglo-American Asphalt Co Ltd v Crowley Russell & Co Ltd* [1945] 2 All ER 324, the court was concerned with the obligation of a licensee to account for the royalties payable under a contract for the manufacture and sale of goods involved in road making. The plaintiff licensor claimed an account of the sums due to it. The defendant had provided rolling statements of goods sold, which had been accepted by the plaintiff, but which had never been investigated. Romer J held that the principle of settled account did not apply where the whole accounting was to be rendered by one party to the other. However, he also said this, at 331B, referring to the judgment of Turner LJ in *Hunter v Belcher* (1864) 2 De GJ & Sm 194:

> 'As I understand the theory of a settled account, it is to such a case as that (ie a case of mutual debits and credits) that the theory is applicable. Where A owes, or may owe, B money, and B owes, or may owe, A money, and in their accounts they strike a balance and agree that balance, that truly represents the financial result of their transactions. There is mutuality in it, and whereas A may be giving up something or B may be giving up something, for the purpose of settling the matter between them, they expressly or by implication agree to a conventional position which is established by striking a balance, and that results in what is called a settled account.'

29. It is clear therefore that a settled account may be reached as to the mutual debits and credits between contracting parties by an express agreement, in writing or orally, or by implication, which might generally involve a course of conduct between the parties. From the evidence filed on its behalf, FSL plainly seeks to contend for the account between the companies having been settled by a course of conduct.

30. The requirements of each form of estoppel are set out in the judgment of Fancourt J in *Alma Property Management Ltd v Crompton* [2022] EWHC 2671 (Ch). As to estoppel by convention, at [65], he repeated the formulation of Briggs J in *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch):

> '65 In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings . . . are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.'

31. He added, at [66], the requirement that the claimant seeking to establish reliance on an estoppel 'must know that the person against whom the estoppel is raised … shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for Cs reliance on the common assumption' (citing *Tinkler v Revenue and Customs Commissioners* [2022] AC 886 at [51] (Lord Burrows)).

32. The requirements of a defence of estoppel by representation were summarised at [67] in this way:

> '(1) the making of a representation of fact (2) that is clear and unambiguous (3) that was liable to induce the party to whom it was made to alter their position or rely on it and (4) did induce that party to alter their position or rely on it (5) to the detriment of that party (6) which is materially inconsistent with the later position being taken by the party who made the representation.'

33. The courts have stressed the need for clear pleading of the representation or convention relied on. As Fancourt J said, in the case of a representation, it must be 'clear and unambiguous'. In *Aras v National Bank of Greece* [2018] EWHC 1389 (Comm), at [115], Picken J said that with a plea of estoppel by convention, there must be 'clarity over what comprises the common assumption (if there is such a common assumption) as determined by the Court and not by the parties…'.

34. Mr Hoyle submits that it was determined or effectively determined at the hearing on 14 April 2023 that the defendants' pleading was inadequate, the implication being that the defences were liable to be struck out in the absence of the provision of further information. I do not think that is quite correct. The recital was undoubtedly offered to avoid an order (or a wider order) being made, and I expressed the view that MSFL was entitled to further particulars of how the defences were being put forward.

35. It is in my view possible for a defence to disclose coherent facts which, if true, would constitute a good defence (and thus not to be susceptible to strike out), and yet for the court to consider that the claimant is entitled to the provision of further information in order to prepare its own case or to understand the case it has to meet. There are occasions where a party is entitled to notice of further particulars that would otherwise not be made known until the provision of witness statements of fact. Likewise, there are occasions where a party is entitled to disclosure in advance of Extended Disclosure for the same reason (see CPR Practice Direction 57AD, paragraph 5.11).

36. I consider that the defence does allege a settled account and does allege why it is said that there is one. I consider paragraph 4(g) of the defence (set out above) to be relevant in that regard: it is alleged that Mr Marcinko on behalf of MSFL was satisfied the figures were correct, and that the company accounts were signed off accordingly. This is an allegation of a course of dealing and does not require particulars of each and every meeting in order to be a properly pleaded defence. Paragraph 10(d)(ii) is also relevant: it is said that FSL relied on Mr Marcinko's conduct. On the face of the pleading, this is part of the plea of estoppel. It is clear from David Cohen's first witness statement, however, that it is also key to an understanding of how it is said that it was impliedly agreed that the accounts would not later be reopened. It would follow from such a finding of settled account that it was agreed that each party would not seek to reopen earlier years. This is a necessary feature of a settled account; I do not consider that it has to be pleaded out separately – it is sufficient for that purpose that it is alleged that the account was agreed.

37. Even though, as I accept, one must look only at the four corners of the pleading in order to decide a strike-out application, what is now provided in the evidence and in the defendants' submissions on the application shows a fuller explanation of what was pleaded all along. In particular, the defendants have given an explanation that it is its case that the account was settled because FSL continued dealing with MSFL on the basis of previous accounting positions, and thus relied on those positions. That obviously goes beyond the statement in the recital to the April order, and it can be seen when standing back that the recital contained only part of what FSL in fact relied on, thus leading to inevitable confusion. It is also the sort of explanation which could and should have been provided in April and which, if it had, would have avoided a good deal of what has happened since. I should also say that I myself now have a far

greater understanding of the defendants' position than I did in April, not least because they are now represented by the author of the re-amended defence and counterclaim.

38. Turning now to estoppel by convention, Mr Hoyle submits that the alleged convention is insufficiently clear, and in particular that it is not pleaded that it was understood that no future claims could be made. As I have already said, I consider that this is implicit in the allegation that it was agreed that the accounts were settled. An agreement inferred from primary facts and a common assumption will inevitably have much in common. I consider the allegation at paragraph 10(e)(ii), that 'it was agreed between the Claimant and FSL that the accounting position was set out finally in their respective year end accounts…' is sufficiently clear to constitute (if true) a relevant common assumption.

39. The defence also alleges reliance by FSL in, *inter alia*, the parties carrying on future business dealings both with third parties and with each other, and that it would be inequitable for MSFL to resile from the alleged common assumption. I consider the pleading to be adequate.

40. Accordingly (and before coming to consider the recital to the April order) I would not strike out the defences of agreement/settled account or estoppel by convention. Furthermore, I consider that the defendants have, albeit undoubtedly belatedly, provided in their witness evidence the sort of details which could and ought to have been provided in response to the Part 18 request and application. The contents of David Cohen's statement, parts of which I have quoted above, are quite consistent with the pleaded defence and explain how it is intended to operate in a way which was not entirely apparent from the face of the pleading. That does not mean that the statement of case disclosed no reasonable grounds for defending the claim, or set out no coherent statement of facts. If it had been as bad as that, I think that MSFL would have pursued an application much sooner (and not merely indicated in the amended particulars of claim that it was likely to make an application at a later date), and not waited over a year from the Part 18 response and until after the CCMC before doing so. MSFL was, however entitled to a better understanding of the case it faced.

41. If it were considered in isolation, the position in respect of the plea of estoppel by representation would be less certain. Any pleaded representation must be clear and unambiguous. It seems to me that the plea at paragraph 10(d)(i) of the defence is on analysis a plea of a common assumption, and therefore of an estoppel by convention. Furthermore, it seems to be tolerably clear that the defendants rely on an implied and not an express agreement, which means that any representation must likewise be implied. I have not heard submissions on the extent to which a representation may be implied and, more importantly, there is an almost total overlap between the three lines of defence as they rely on the same facts. The legal test for estoppel by convention also very closely mirrors that applying to estoppel by representation. For those reasons, I would not consider it appropriate to strike out the plea of estoppel by representation alone.

42. I turn now to consider the summary judgment aspect of MSFL's application.

43. Mr Hoyle's position is that, at its highest, FSL's pleading and evidence suggests only that the companies agreed a balance for the respective debtor and creditor figures for the purposes of the companies' statutory accounts. In particular, he relies on the lack of evidence of an agreement that one company could not in the future sue the other. He relies also on the fact that company accounts should always be amended where they are incorrect (with reference to Companies Act 2006, s 454), and points out that what the second defendant says in that regard at paragraph 47 of his first witness statement (which suggests that accounts cannot be amended if they are wrong) is incorrect in law. What Mr Cohen says would certainly be wrong as a general statement of law, but he appears to be commenting on the effect of the facts of this case.

44. The detailed summary in his witness statement suggests that each company relied after the rest point of each set of accounts on the stated balance as between the companies. This suggests either an agreement or an understanding shared between them. A point I take from this is that David Cohen is saying that neither party, during the continuing relationship between the companies, did suggest that there was or might be any error. This is a point which a trial judge might view as being in favour of FSL's case.

45. The suggestion that there was an implied agreement to settle accounts between the parties, as discussed by Romer J, has in my view a better than fanciful prospect of success. I accept there may be little more relevant documentary evidence (and the defendants might have been expected to produce it on this application if there were). But an assessment of the evidence of both sides would take place at trial, in order for an assessment to be made of whether there was or was not an understanding or implied agreement that the accounting balances between the companies could not be reopened after they had been agreed (and, indeed, if they had been agreed) for the purposes of preparing and signing statutory accounts. I also consider it not fatal to the defence that David Cohen has not given evidence of who was in the room at each and every meeting and the dates and places where they took place. An agreement to settle accounts (or a relevant convention or understanding) can be implied from circumstances. The witness statements for the defendants set out how that understanding is said to have arisen over several years, making clear that the level of Mr Marcinko's engagement varied over time. The evidence also asserts that it was understood that it was not open to either company to resile from the figures which had been agreed as to the balance between them. This includes a contention that this was understood by MSFL (through Mr Marcinko) as well.

46. At this point in the analysis, it has to be relevant that there is no evidence from Mr Marcinko for me to consider at this stage. In the absence of evidence in response, it is realistically arguable that the pleaded allegations of FSL are correct. I do not doubt that the lack of express agreement or representation that the accounts were settled will

be a real hurdle for the defendants to surmount, but I do not consider it to be merely fanciful that they may do so. It is tolerably clear what the focus of the enquiry at trial on this issue will be.

47. I consider that the same can be said for the defence of estoppel by convention. The facts relied on by FSL in support of the common assumption that the accounts were settled and therefore could not be reopened naturally overlap with those in support of the plea of settled account. Further, paragraph 39 of David Cohen's first witness statement addresses the requirement that there must be conduct crossing the line such that one can say that MSFL has assumed some element of responsibility for FSL's reliance on the common assumption. This paragraph states that Mr Marcinko knew when he signed the accounts for MSFL and they were filed with Companies House that they would be used as the starting point for FSL's accounts when they came to be prepared (and likewise vice versa). It would be for a trial judge to assess whether that conduct (i.e. signing the accounts) was attributable to a common assumption that the accounts were settled. Again, and in the absence of any evidence from Mr Marcinko, I do not consider that the defendants' position is fanciful. For the reasons given at paragraph 41 above, I do not consider the plea of estoppel by representation separately.

48. In the absence of the recital to the 14 April 2023 order, therefore, I would dismiss MSFL's application.

The Recital Application

49. The recital is set out at paragraph 16 above. Mr McLoughlin contends that there was no admission or concession within it. I consider this to be incorrect. In the context of the Part 18 application, it was clearly a concession that FSL would rely on only some and not all of the matters pleaded in paragraphs 3 to 10 of the re-amended defence and counterclaim. That is apparent from the face of the recital and I do not consider it helpful to descend into discussion of the construction of court orders. A recital is in any event not an order. In this case, it was a reduction into writing of a statement made by a party as to its position in the litigation. That it was viewed as a concession by MSFL can be seen from it having issued the strike out application, the possibility of which was ventilated at the April hearing.

50. In that context, it is also the case as Mr McLoughlin recognises that the recital touches on the estoppel defences, because they rely on the agreement between the parties. The nature of the alleged common assumption between the companies goes beyond the agreement or settled account defence. I consider that if the defendants are bound by the terms of the recital, they will not be able to rely on many of the facts on which they seek to rely. They clearly do not seek to rely merely on the limited matters mentioned in the recital.

51. I agree with Mr McLoughlin, however, that the recital contains a concession and not an admission. It does not admit the truth of any part of the claim pleaded by MSFL (see *Sabbagh v Khoury* [2020] 1 WLR 187 at [43]). It narrows the scope of the facts relied on by FSL in support of its defences. This is therefore a case where FSL seeks to withdraw (or perhaps amend) an averment, rather than an admission: see *Bayerische Landesbank Anstalt des Offentlichen Rechts v Constantin Medien AG* [2017] EWHC 131 (Comm) at [20]–[21] (Popplewell J). FSL has always denied that it is liable to account in the period up to August 2019, and the recital did not detract from that position. It has always been free to choose whether to make the points pleaded in paragraphs 3, 4 and 10 of the re-amended defence and counterclaim, and to decide how to do so. The apparent narrowing of the basis on which it pursued that position was not a partial admission of the claim; it was a narrowing of the averment which it had previously made.

52. The test to be applied is therefore that which applies where an application is made to amend a statement of case pursuant to CPR r 17.3. Mr McLoughlin relies on the formulation of Lambert J in *Pearce v East and North Hertfordshire NHS Trust* [2020] EWHC 1504 (QB) at [10]:

> ‘10 The legal framework is not in dispute and can be stated succinctly here. The starting point is CPR 17.3 which confers on the Court a broad discretionary power to grant permission to amend. The case-law is replete with guidance as to how that discretionary power should be exercised in different contexts. I need cite only two cases which taken together provide a helpful list of factors to be borne in mind when considering an application such as this: *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC) and *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm). From those cases, I draw together the following points.
>
> a) In exercising the discretion under CPR 17.3, the overriding objective is of central importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.
>
> b) A strict view must be taken to non-compliance with the CPR and directions of the Court. The Court must take into account the fair and efficient distribution of resources, not just between the parties but amongst litigants as a group. It follows that parties can no longer expect indulgence if they fail to comply with their procedural obligations: those obligations serve the purpose of ensuring that litigation is conducted proportionately as between the parties and that the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately is satisfied.
>
> c) The timing of the application should be considered and weighed in the balance. An amendment can be regarded as “very late” if permission to amend threatens

> the trial date, even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason. Where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. A heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The timing of the amendment, its history and an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise: there must be a good reason for the delay.
>
> d) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' to the disruption of and additional pressure on their lawyers in the run-up to trial and the duplication of cost and effort at the other. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission. If allowing the amendments would necessitate the adjournment of the trial, this may be an overwhelming reason to refuse the amendments.
>
> e) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered. Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise.'

53. I was also referred to the statement of relevant principles in an Annex to the judgment of Henshaw J in *Toucan Energy Holdings Ltd v Wirsol Energy Ltd* [2021] EWHC 895 (Comm). He cited at [7] (of the Annex), the decision of Coulson J in *CIP Properties*. Then at [8], he said:

> 'As to prospects of success, if there are no real prospects then that is determinative. Apparent lack of prospects, even when not so low as to meet the CPR Part 24 threshold, is also a factor against the granting of permission….'

54. Then, at [9] and [10]:

> '9 It is relevant to have regard to the degree to which the case sought to be advanced by the amendment is one that the parties have in fact already been addressing….
>
> 10 On the other hand, the mere fact that an issue has received *some* attention in the preparation of the case and the experts' reports is not necessarily sufficient to make permission to amend appropriate….'

55. As a preliminary argument in this connection, Mr Hoyle submits that it is an abuse of process for FSL to apply to withdraw the concession. He relies on the recent exposition of Miles J of the law concerning abuse of process, in *Harrington & Charles Trading Co Ltd v Mehta* [2023] EWHC 2420 (Ch), especially at [63]–[68] and [78]–[80].

56. MSFL's argument is that the defendants accepted the position at the April 2023 hearing that their pleading was not sufficient and that further information was required, conceding that they must give the confirmation in the recital in order to avoid an order being made against them. Now, it is said that they seek to go back on that and to assert that their pleading was satisfactory all along (a point which they appear to have asserted in correspondence once their solicitors had been re-instructed and after MSFL had intimated its intention to bring a strike out application). Mr Hoyle submits, therefore, that the defendants seek 'to fight the same "battle" twice' (citing *Harrington* at [79](ii), itself referring to *Chanel Ltd v FW Woolworth & Co Ltd* [1981] 1 WLR 485, in which the defendants gave undertakings in response to an injunction application and later sought to discharge the undertakings on the basis of evidence which it could have sought to adduce at the outset).

57. Taking account of the matters I have set out at paragraphs 34 to 37 above, I do not consider that the defendants are in reality seeking to have the same battle twice. As I have explained, the defendants accepted at the April 2023 hearing that further information ought in principle to be provided, and avoided an order by making a concession. Their present position is not that the re-amended defence and counterclaim read in isolation is sufficient, but that the pleading together with the further information which has been provided in the form of witness evidence rather than a Part 18 response enables MSFL to prepare its own case and to understand the case that it has to meet. I have already indicated that I accept the defendants' submission in that regard. Accordingly, the defendants are not going back on their position about the adequacy of the information contained within their pleading (it not having been in issue in April 2023 whether it was liable to be struck out), but they are seeking to go back on or to withdraw the terms of the concession made. I consider that the application should be considered through the prism of the test to apply where a party seeks to amend and not through the lens of abuse of process. Mr Hoyle himself made his submissions on the prejudice suffered by each party on the basis that the amendment test applied. He did not directly explain what factors should govern the broad merits-based assessment the court would be required to undertake in order to determine whether there was an abuse. I made a similar point in *Kulkarni v Gwent Holdings Ltd* [2023] EWHC 484 (Ch) at [59], where it was submitted that an application to withdraw an admission was an abuse of process.

58. Turning to the question whether the defendants ought to be permitted to amend to withdraw the concession contained in the recital, the key issues appear to be the timing of the application and the proximity to the trial of the preliminary issue, and

the prejudice to each party. I have already indicated why I consider that the proposed amendment has a real prospect of success.

59. I have set out the procedural chronology above. There was a gap of over 13 months between FSL's response to the Part 18 request on 24 January 2022, and the Part 18 application being filed on 3 March 2023, after the CCMC. There was then a further seven-week delay in pursuing the listing of the strike out application, once it was issued. That is a significant reason why these applications have come on when they have, a little over four months before the trial listing. It is relevant that MSFL could have pursued the Part 18 application very much sooner, even allowing for the stays for mediation in the first half of 2022. It is also right to say, of course, that the defendants ought to have appreciated the need to apply to withdraw the concession much sooner, having been put on notice of MSFL's application and its position generally by a letter from its solicitors dated 25 May 2023. Their position has been set out with some clarity since 22 September 2023 in David Cohen's first witness statement.

60. I consider that all of these matters are relevant to an assessment of the lateness of the application. As Carr J (as she then was) said in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38], 'lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done.'

61. The parties have agreed revised directions to trial of the preliminary issue, by a consent order dated 20 November 2023. Mr Hoyle was at pains to point out that it was not accepted by MSFL that the trial date could still be met. This was on the footing that it could not be accepted that the defendants would, on past form, properly comply with their disclosure obligations and that further applications could therefore be anticipated.

62. The timetable to the trial of the preliminary issue is undoubtedly now tight, but I do not agree that I should assess the position on the footing that the defendants will not comply with their obligations. They can be criticised for their handling of the April hearing, and the failure earlier to appreciate the need to apply to withdraw the concession made at that hearing. They have solicitors and counsel instructed and there is no real reason to suppose from the defendants' present engagement with the proceedings that there will be a failure by the defendants to comply with their obligations.

63. The responsibility for this issue being before the court at this juncture lies very much with both parties. It lies with MSFL for having waited a conspicuously long time to pursue an application for a Part 18 order. It also lies with the defendant for having failed properly to engage with the issue before and at the April hearing, and for a while thereafter as well. There were no submissions as to the near two-month delay in

listing MSFL's application – it would be unfair for me to assume that this was solely the defendants' fault. The defendants' request for security for costs did not itself justify MSFL in delaying in taking steps to have its application listed for hearing.

64. In all those circumstances, I consider the amendment application to be late, as it could have been made sooner, but not very late.

65. As far as prejudice to MSFL is concerned, it has clearly relied on the concession and reasonably issued its application accordingly. Expenditure has inevitably been incurred. The preparation for the trial of a preliminary issue will now be far more pressed than it would have been. MSFL has to a real extent been messed around, which is undoubtedly a relevant consideration, but this does not mean without more that it will be prejudiced going forwards.

66. The prejudice which the defendants will suffer if the amendment is not permitted is that their defence will (as Mr McLoughlin appeared to accept) be dismissed. MSFL says that it considers its entitlement on that part of the account between the companies which the defendants contend to be settled to be for a sum of up to £2.5m. There is a real prejudice to the defendants in FSL not being permitted to defend the claim, which will always be the case where an amendment is required in order for a claim or defence to be viable. I do not ignore the fact that the defendants can be seen to be responsible for the need to make the Recital Application, and bear in mind that prejudice to an amending party caused by its own conduct is much less important when balancing the injustice to each party. This is analogous to the consideration of whether, when a party seeks to withdraw an amendment, there is new evidence available which was not available when the admission was made (see CPR r 14.5(b)).

67. I have already explained why the amended defence has a realistic prospect of success, and why I consider the defence to be adequately pleaded. I do not express a view on its strength – it would not be appropriate to do so in the absence of any understanding of MSFL's response on the facts. I would not go so far as to say that the defence is very weak, as Mr Hoyle submits. As the case depends to some extent on inferences, the burden will clearly be on the defendants to establish that an agreement or common assumption of settled account is the correct inference or implication from the primary facts.

68. I make clear that I take account of the overriding objective, the need to comply with the CPR and the use of court resources. Even though FSL has not breached a court order (save in the late provision of a response to request 7.3 in the Part 18 request), it is going back on the position adopted at a previous hearing. Court time has been spent that could have been avoided. Whether or not the avoidance of the preliminary issue trial would lead to the use of less court time overall may well depend on the outcome, and the scope of any subsequent account or enquiry. I therefore do not take that into account.

69. I consider the two most significant factors to be (a) the defendants' belated recognition that they had conceded a significant part of their position, thus leading MSFL to bring its application, rather than in preparing for trial, and (b) the prejudice to the defendants in not being able to run FSL's defence at all. FSL's explanation for its defence would have been much better provided in April. Rather than accepting that they needed to apply to withdraw, the defendants maintained the position that there was no need to do so. This has put MSFL under greater pressure, and in incurring expense and in doing work which could have been avoided.

70. On the other hand, this is not a case where an amendment is sought to be brought in late which is entirely unheralded and which will require a new area of factual enquiry to be explored. The area of enquiry has been apparent all along; what was lacking was a clearer statement of why FSL said that there was a settled account or common assumption that the accounts would not be revisited. It is also before the directions for disclosure and witness statements have been carried out, although I recognise that they have been put back to a very late stage.

71. Despite FSL having only in response to MSFL's application explained its case as it should have done sooner, I do not agree with Mr Hoyle that the defendants have been endlessly reformulating their case. Apart from the April recital, the defences have not changed in any significant respect. They have now been more fully explained, particularly in evidence. A better characterisation is that there was a significant period during which the defendants did not properly engage with the proceedings. That includes their instructing counsel shortly before the April hearing on a direct access basis (as explained in David Cohen's third witness statement). This does not lead me to see a particular risk now of a disorderly trial, as Mr Hoyle suggested, nor of a heightened risk of the defendants being permitted at trial to ambush MSFL with new points. Any trial judge will be alert to the need to prevent a party being prejudiced by such tactics.

72. As I have said, MSFL has to a very real extent been messed around, although the relevance of the proximity to trial is significantly reduced by the long delay in it having brought forward its Part 18 application, and then in progressing its strike out application. If the defendants are not given permission to amend by withdrawing the concession in the April recital, they will be barred from defending the claim to an account up to August 2019. Despite Mr Hoyle's forceful (and conspicuously able) criticism of the defendants' conduct, when I weigh the points set out above I do not consider that the first defendants' defaults justify the effective dismissal of its defence. While not a straightforward evaluation, the balance of injustice to each party weighs in favour of permitting FSL to withdraw its concession by amendment.

Conclusion and postscript

73. The recital agreed by the defendants at the hearing on 14 April 2023 constituted a concession by FSL that it would be relying on only part of its pleaded case. I consider

that, in all the circumstances, FSL should have permission to amend its defence in order to withdraw that concession. I necessarily also consider that the defence so amended has a realistic prospect of success. Furthermore, MSFL now has the information sought at the April hearing, which is consistent with the defendants' pleaded case. I do not consider that it is expedient to direct further amendments or the provision of a further Part 18 response as I do not consider that they are now required in order for MSFL to understand the case it has to meet. I will therefore allow the defendants' application and dismiss MSFL's application.

74. The draft judgment, essentially in the form of paragraphs 1 to 73 above, was sent to the parties in advance of being handed down in the usual way. Together with suggested corrections to the draft, Mr Hoyle filed supplementary submissions, together with a number of attachments not in the bundle or referred to at the hearing, concerned with the listing of MSFL's application. I have explained above that it was not listed for around seven weeks after it was issued, that I had not received submissions as to why, and that it would be unfair to assume that this delay was all the defendants' fault.

75. It appears that MSFL's solicitors asked the defendants' solicitors for their dates to avoid on three occasions shortly after the application had been issued, but that these were not provided until the security for costs issue had been resolved. I agree that dates ought to have been provided by the defendants sooner. By the same token, MSFL's remedy was contained in paragraph 14.51 of the Chancery Guide but, for whatever reason, it did not avail itself of it. This provides that it if is not possible to agree dates promptly, the applicant should file a letter on CE-file explaining why. Where a respondent fails to provide dates to avoid, the court will usually give them a final but short opportunity to do so and then list the application on the information available. As Mr McLoughlin submits in response to Mr Hoyle, there was a delay in security for costs being agreed. It appears that after 7 June 2023 MSFL proceeded on the footing that the security issue needed to be resolved before listing could proceed.

76. Accordingly, nothing that I have seen in the parties' supplementary submissions leads me to consider that my view expressed at paragraph 63, that the responsibility for this issue being before the court at this juncture lies very much with both parties, requires to be revisited. It was clear in any event that I had made no finding as to who was responsible for the listing delay because I had heard no submissions on it, and that my principal reason for mentioning it was because it was relevant to a full understanding of why the applications are being determined so close to the trial date. In particular, I disagree with Mr Hoyle that my conclusions are 'regrettably wrong' and do not consider that there is any need for me to redraft any of the judgment and to revisit the overall balancing exercise, as he invites me to do.