Neutral Citation Number: [2021] EWHC 1743 (QB)

Case No: QB-2020-004542

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 June 2021

Before :

MR JUSTICE MARTIN SPENCER

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Between :

MILASI JOSIYA & 7,262 OTHERS	**Claimants**
- and -	
(1) BRITISH AMERICAN TOBACCO PLC **(2) BRITISH AMERICAN TOBACCO (GLP) LIMITED** **(3) IMPERIAL BRANDS PLC** **(4) IMPERIAL TOBACCO LIMITED** **(5) IMPERIAL TOBACCO OVERSEAS HOLDINGS LIMITED** **(6) IMPERIAL TOBACCO OVERSEAS HOLDINGS (1) LIMITED** **(7) IMPERIAL TOBACCO OVERSEAS HOLDINGS (2) LIMITED** **(8) IMPERIAL TOBACCO OVERSEAS (POLSKA) LIMITED**	**Defendants**

Mr Richard Hermer QC, Miss Tamara Oppenheimer QC, Mr Edward Craven and **Miss Kate Boakes** (instructed by **Leigh Day**) for the **Claimants**
Mr Charles Gibson QC, Mr Alex Barden and Mr Jacob Turner (instructed by **Slaughter and May**) for the **First and Second Defendants ("BAT Defendants")**
Miss Shaheed Fatima QC, Mr Andrew Scott and Mr Timothy Lau (instructed by **Ashurst LLP**) for the **Third to Eighth Defendants ("Imperial Defendants")**

Hearing dates: 19 and 20 May 2021

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives and BAILII by email. The date of hand-down is deemed to be as shown above.

MR JUSTICE MARTIN SPENCER :

1. By this group action, some 7,263 Malawian tobacco farmers, comprising 4,066 adults and 3,197 children, claim damages against certain companies in the British American Tobacco group (hereinafter "BAT Defendants") and/or certain companies in the Imperial Tobacco group (hereinafter "Imperial Defendants") for negligence and/or conversion (of the tobacco leaves) and/or unjust enrichment. On 15 March 2021, the BAT and Imperial Defendants both applied to strike out the claim pursuant to CPR 3.4(2)(a) or (b) and this judgment arises out of the hearing of those applications.

Background

2. For the purpose of these applications, I take the background from the first witness statement (hereinafter referred to as "Day1") of Mr Martyn Day dated 5 March 2021 and from the Particulars of Claim. This does not imply that the defendants necessarily accept this narrative as correct.

3. The claimants are Malawian citizens who all, at some stage, lived and worked on tobacco farms in the central and northern regions of Malawi. They overwhelmingly originate from the south of Malawi and are said to have been trafficked from their family homes to the tobacco farms. Most of the claimants lived and worked on the tobacco farms as family units where a family of usually some four to five would farm a plot of land of approximately 2.5 acres. The child claimants are aged between 3 and 17 and worked on the farms with their parents, undertaking a variety of jobs depending on their age.

4. Malawi is one of the poorest countries in the world, with around 80% of the population employed in agriculture. It has been calculated that some 51% of the population live below the poverty line and around 25% of the population are considered to live in extreme poverty, defined as living on less than $1.90 per day. This level of income makes it difficult to access food, clean water and shelter and nearly impossible to pay the cost of hospital or school fees. The claimants, falling within the "extreme poverty" bracket, are considered to be highly vulnerable.

5. The claims in tort and unjust enrichment are said to arise from the "unlawful, exploitative and dangerous conditions in which the claimants produced tobacco leaves" on the tobacco farms. Those conditions are said to include the widespread use of unlawful child labour, unlawful forced labour and the systematic exposure of vulnerable and impoverished adults and children to extremely hazardous working conditions with minimal protection against industrial accidents, injuries and diseases. The defendants, who are multinational tobacco groups and who manufacture cigarettes made from the tobacco leaves grown by the claimants, are said to have been fully aware (either actually or constructively) of the systematically unlawful, exploitative and dangerous conditions in which the tobacco they acquired and used was produced in Malawi. It is alleged that the defendants facilitated, assisted and/or encouraged such unlawful, exploitative and dangerous conditions in order to acquire tobacco leaves at the lowest possible cost and to maximise their profits from the sale of cigarettes. It is alleged that the defendants owed the claimants a duty of care. It is further alleged that the defendants have been significantly enriched at the expense of the claimants, this enrichment being unjust as the product of unconscionable exploitation of the claimants' weakness, duress, undue influence, failure of consideration pursuant to void, unenforceable or non-existent contracts and/or illegality giving rise to claims in restitution.

It is further alleged that a significant number of the claimants owned legal title to the tobacco leaves grown on the tobacco farms and that the defendants wrongfully deprived the claimants of the use and possession of those tobacco leaves, giving rise to a claim in conversion.

6. Mr Day explains that he and his firm, Leigh Day ("LD") have considerable experience (over 21 years) of bringing group claims on behalf of people living in the African continent including, for example, claims for Masai and Sumuru against the Ministry of Defence for leaving unexploded ordnance on practice ranges in northern Kenya, claims for 30,000 Ivorians for toxic waste exposure against Trafigura, a trader in oil, and claims for 2,500 Zambians against a multinational company, Vedanta, in relation to pollution emanating from a copper mine in the Zambian Copperbelt.

7. The Malawian tobacco farms are operated by "Contract Farmers" of whom the claimants are tenants. The Contract Farmers sell the raw (green) tobacco farmed by the claimants (through state regulated auction houses and subject to minimum price requirements imposed by the Tobacco Commission of Malawi) to "Leaf Buyers" who are part of multinational groups of companies with their headquarters in the US. The Leaf Buyers process the tobacco and then sell it to various customers including the defendants. The Leaf Buyers principally involved in the purchase of tobacco grown in Malawi are called Alliance One and Limbe Leaf.

The Pre-Action Correspondence

8. BAT Defendants have been represented by Slaughter and May ("SM") throughout. Imperial Defendants were represented by Allen & Overy LLP ("A&O") in the pre-action stages, and then by Ashurst LLP from shortly before the proceedings were begun.

9. On 20 September 2019, LD sent a Letter Before Action to certain companies in the BAT group, then on behalf of just 794 claimants, setting out in detail the background to the claim and the allegations against BAT Defendants, which at that time included unlawful means conspiracy, deceit, false imprisonment and intimidation as well as the causes of action now pleaded, together with allegations of criminal behaviour, such as breach of a statutory obligation or prohibition (which was imposed in Malawi for the benefit or protection of tenant farmers), money laundering, and assisting or encouraging the commissions of offences of human trafficking, slavery, servitude and forced labour, such alleged criminal behaviour being said to justify an injunction. The letter also made a request for documentation, as follows:

> "Documents Requested
>
> 83. In order to progress our clients' claims we request the following documents from the Defendants:
>
> a. A list of the farms and districts in Malawi from where the Defendants purchase tobacco;
>
> b. A copy of tobacco purchasing contracts between the Defendants and leaf buyers in Malawi relating to the farms being worked on by the Claimants;

c. A copy of export documents between the Defendants and leaf buyers in Malawi relating to the unmanufactured tobacco obtained from farms in Malawi.

d. Purchase documents related to the amount of tobacco purchased from Malawi in the last tobacco season.

e. Policies provided to the leaf buyers in Malawi in relation to farm conditions and farmer working conditions."

This request gives, perhaps, the first clue to the fact that the claimants' solicitors lacked information on a vital part of the chain linking each claimant to the defendants, namely that the defendants had purchased tobacco originating from the farms worked on by the claimants. This has been referred to variously as the "nexus issue" or "foundational issue".

10. The Letter of Claim was followed up, on 12 November 2019, with an Electronic Register of Claimants which included the name, gender, claimant category, family unit name and identity of the contract farmer for the previous season and the year that each adult claimant began tobacco farming. This was supplemented by a similar Electronic Register in respect of a further group of claimants in February 2020.

11. SM responded on behalf of BAT Defendants in their letter dated 20 December 2019. This letter noted, inter alia, four matters in particular:

(i) the fact that BAT Defendants had purchased only about 4% of the Malawian tobacco crop in the previous 6 years;

(ii) the lack of underlying factual evidence;

(iii) the failure to particularise individual causes of action; and

(iv) the need to prove title through the supply chain.

The letter also challenged the viability of the causes of action, including those which have survived into the Particulars of Claim. In relation to unjust enrichment, SM pointed out that the

> "Letter of Claim provides no evidential basis for the (novel) assertion that the Claimants can trace an equitable proprietary interest into tobacco leaves in the hands of the BAT entities. In particular, you have provided no details about the supply chain third-party leaf buyers, such as details of the terms on which the tobacco leaf is transferred in that part of the supply chain."

In relation to conversion, SM asserted that it is a

> "prerequisite for a claim in respect of conversion that a claimant has either (i) legal title to goods or (ii) an immediate right to possession of the goods. Even if your underlying premise were to be accepted (which it is not) – namely that the Claimants retained an equitable proprietary interest in the tobacco leaves that they produced – no cause of action for conversion therefore arises."

So far as negligence is concerned, SM referred to the decision of the Supreme Court in *Lungowe v Vedanta Resources PLC* [2020] AC 1045 and asserted that a correct reading of that case

> "makes clear that no duty of care to Malawian tenant farmers in their supply chain will arise on the part of the BAT Entities indeed to find such a duty would require a significant and unwarranted extension of the existing legal position."

12. In relation to the request for documentation, SM stated:

> "36. Your requests for documents go far beyond what would be reasonable or justified in the context of pre-action disclosure under the Practice Direction – Pre-Action Conduct and Protocols.
>
> 37. Given the obvious flaws in the proposed claims against the BAT Entities, it is clear that your requests are a misconceived attempt to obtain wide-ranging information in the vain hope of bolstering those arguments. The BAT Entities therefore declined to provide the documents sought."

13. Two points are perhaps worth making at this stage: first, perhaps surprisingly, no application to strike out the Particulars of Claim has been made on the basis of the challenge to the pleaded causes of action, but rather the strike out application is, as will be seen, based only upon the pleading of the nexus or foundational issue; secondly, despite SM's robust refusal to supply the documents requested, no application for pre-action disclosure was made before the issue of proceedings and service of the Particulars of Claim.

14. On 17 February 2020, LD responded, referring to the Electronic Register and asking SM to confirm the following:

> "(a) In light of your clients' statement that they 'have traceability down to the farm level and centralised Group-level management of all our tobacco leaf suppliers' please confirm which, if any, of the claimants appearing on the enclosed Electronic Register grew tobacco that was purchased by entities within the BAT Group in the last 6 years.
>
> (b) Please provide any documentation in support of your response."

The letter also made reference to the right to apply for pre-action disclosure under CPR 31.16.

15. On 27 March 2020, SM responded explaining that "traceability down to the farm level" did not mean that the BAT Defendants have the ability to identify whether a particular tenant farmer grew tobacco ultimately supplied to the BAT Defendants, but rather that they require the independent Leaf Buyers to retain records allowing the Leaf Buyers to identify the

contract farm from which any specified delivery of tobacco was sourced. Thus, BAT Defendants were asserting that they were not in possession or control of the documents which would provide the vital link between the individual claimants and the tobacco purchased by BAT Defendants. On 20 April 2020, SM again wrote noting that the correspondence to date did not confirm whether the putative claimants had any evidence that they grew tobacco that was ultimately purchased by BAT Defendants and, to the extent that they did not have any such evidence, invited LD to withdraw their allegations. In response, on 3 September 2020, LD asserted that they had evidence that the putative claimants were "likely to have grown tobacco" ultimately purchased by BAT Defendants.

16. So far as Imperial Defendants are concerned, LD sent a letter of claim on behalf of 1,808 unidentified claimants on 19 February 2020 in similar terms to that sent to BAT Defendants in September 2019. A&O responded on behalf of Imperial Defendants on 1 June 2020 and, as with SM, challenged the viability of the causes of action relied on. They, too, refused to comply with the request for documentation stating:

> "As explained in Section A above, your claims fail on the law and therefore it would not be reasonable or proportionate to conduct the exercise of locating documents responsive to your requests. We therefore do not agree to your requests."

17. On 2 September 2020, LD wrote further, requesting additional information including details of the entities within the Imperial Group who purchase tobacco from Malawi, the figures in kilograms of tobacco purchased annually over the previous six years by reference to documentary evidence and confirmation that Imperial Defendants could "identify which farmers growing tobacco for the Alliance One Group has grown tobacco for entities within the Imperial Group over the last 6 years." On 30 November 2020, A&O provided the information requested. They had explained, in the letter of 1 June 2020, that, on the basis of Imperial Defendants' calculations, entities in the Imperial Group purchased approximately 8.6% to 15% of Alliance One's Malawian sales per year and 3% to 12% of the total Malawian tobacco market. They also explained:

> "Our clients do not have the names of the contract farmers who have grown tobacco purchased by the Alliance One Group within the last six years, which has in turn been purchased by entities within the Imperial Group. Those Imperial Group entities are only in possession of the relevant grower identification numbers relating to the 'entitlement' tobacco purchased by them. To identify the names of the contract farmers corresponding to the grower identification numbers for the 'entitlement' tobacco, our clients would need to approach Alliance One. To identify the names of the contract farmers for the non-entitlement tobacco, our clients would also need to approach Alliance One, but this is likely to be a more challenging task, as our client will not have the corresponding grower identification numbers."

The Proceedings

18. As with BAT Defendants, LD did not pursue the matter of disclosure with Imperial Defendants but instead the Claim Form was issued on 18 December 2020 and Particulars

of Claim were served on 12 January 2021. By issuing when they did, LD avoided any jurisdictional problems arising from the end of the "Brexit" transitional provisions on 31 December 2020. They were, of course, within their rights to do so.

19. Appended to the skeleton argument of Mr Gibson QC and his team on behalf of BAT, there is a "roadmap" of the Particulars of Claim which I gratefully adopt (omitting any comments):

"Paras 1-7 – Summary

1. Includes allegations that Cs have all worked on tobacco farms "from which Ds source leaves" – defined as "the Tobacco Farms". (para 3)

2. Summarises claims against Ds based on Cs having "produced tobacco leaves for Ds on the Tobacco Farms". (para 4)

Paras 10-15 – The Parties

3. Explains that the 7,263 Cs at "all material times" grew tobacco "primarily on the Tobacco Farms". (para 10)

4. Describes the BAT Ds and the Imperial Ds, and alleges both made a "substantial proportion" of their profits from sale of products containing tobacco grown on the Tobacco Farms. (paras 11-15)

Paras 16-18 – Basis of Pleaded Claims and Reservation

5. Alleges that there is limited information in the public domain, including about the role of the Ds' subsidiaries and how tobacco is transferred intra-group. (para 16)

6. Alleges that the Cs do not have "meaningful visibility over the way in which the tobacco they grow on the Tobacco Farms is subsequently acquired and used by the Ds". Contends

    (i) that this constrains Cs' abilities to identify all relevant subsidiaries and

    (ii) to provide full particulars of each D's role. (para 17)

7. Reserves the right, following disclosure and further information, to amend or supplement claims, including by (i) adding further subsidiaries or (ii) providing further particulars of activities, knowledge etc. (para 18)

Paras 19-91 – Background and Factual Circumstances of the Claims

8. Describes the key actors in the Malawi industry. Describes Tenant Farmers, Contract Farmers, Leaf Buyers all by reference to the Tobacco Farms. (paras 19-24) Para 23 expressly describes leaves grown by the Cs as being supplied indirectly to Ds.

9. Describes Cs' recruitment and working conditions by reference to the "Tobacco Farms". (paras 25-33)

10. Describes sale of tobacco leaves and contractual arrangements. (paras 34-41)

11. Describes alleged working conditions/mistreatment on "the Tobacco Farms". (paras 42-48)

12. Alleges that the BAT Ds and the Imperial Ds (or their respective subsidiaries) "acquired tobacco leaves grown by the Cs on the Tobacco Farms" and used these to manufacture and make profits. (para 49)

13. Alleges that at this stage "the Cs are unable to identify exactly which of the Ds or subsidiaries … acquired and subsequently received and used the tobacco leaves". Alleges that: (para 50)

    a. Each of the Cs worked on one or more Tobacco Farms from which one or more of the BAT Ds and/or one or more of the Imperial Ds sourced tobacco leaves from AO or Limbe Leaf; and

    b. Was personally involved in growing a significant quantity of tobacco leaves which were acquired … by one or more of the BAT Ds and/or one or more of the Imperial Ds" (or their subsidiaries); and

    c. Each of the BAT Ds and each of the Imperial Ds acquired tobacco leaves … which were grown by at least a significant number of the Cs.

14. Defines "relevant C" as, in respect of the BAT Ds, Cs who grew tobacco on Tobacco Farms from which the BAT Ds sourced leaves. (para 51)

15. States that, following disclosure, Cs will provide further particulars as to which of the BAT Ds and Imperial Ds acquired leaves "grown by each individual C" and reserves the right to join further subsidiaries. (para 52)

16. Makes various allegations about Ds' knowledge. (paras 53-77)

17. Makes various allegations about Ds' policies, procedures etc. (paras 78-91)

Paras 92-114 – Applicable Law

18. Alleges that Malawi law is the governing law. (paras 92-93)

19. Makes various allegations of Malawi law. (paras 94-114)

Paras 115-158 – Ds' Tortious Liability

20. In negligence:

a. Alleges BAT Ds owed common law duty of care to Cs who grew tobacco on "the Tobacco Farms" from which the BAT Ds sourced tobacco leaves. (para 116)

b. Sets out alleged duty of care (paras 117-123) and negligence. (paras 123-125)

21. In conversion:

a. Alleges that Ds are liable in conversion because Cs had ownership and possession of the leaves which they had grown on "the Tobacco Farms" and Ds converted these. (paras 126-127)

b. Alleges that any contractual arrangements purporting to transfer title were void or voidable. (para 128)

22. In unjust enrichment:

a. Alleges that Ds have been enriched though saving of expenditure, receipt of leaves, and/or receipt of valuable services provided on the Tobacco Farms. (paras 130-131)

b. Alleges that the various transactions formed a single scheme. (paras 132-133)

c. Alleges a "genuine exception" to the rule in Investment Trust Companies v Revenue and Customs Commissioners [2018] AC 275. (para 134)

d. Alleges that the Ds' receipt, possession, use and control of tobacco leaves produced by the Cs is likely to have involved the commission of money laundering offences under POCA 2002. (paras 136-139)

e. Alleges the Cs had proprietary rights to leaves grown on the Tobacco Farms. (para 140)

f. Alleges unjust enrichment by reference to various unjust factors, being unconscionable exploitation, duress, undue influence, failure of consideration and illegality. (paras 141-158) Paras 159-165 – Loss and Damage

23. Alleges loss and damage, with details for individual Cs to be "further particularised following the issue of case management directions by the Court". Includes:

a. Deprivation of value of leaves (para 161);

b. Insufficient remuneration for labour on "Tobacco Farms" (para 162); and

c. Personal injury (paras 163-165).

Paras 166-180 – Remedies

24. Seeks damages (paras 167-174) including aggravated damages (paras 170-171) and exemplary damages (paras 172-174), an injunction (para 175), restitution or resulting/constructive trust, or an equitable lien (paras 176-139), and interest (para 180).

20. Paragraph 23 describes the claimants' role in the tobacco production process in Malawi as follows:

> "23. At all material times the Claimants all worked (and in most cases continue to work) on Tobacco Farms controlled by Contract Farmers which supply tobacco leaves to AO [Alliance One] Malawi and/or Limbe Leaf which, in turn, supply those tobacco leaves to the BAT Defendants and the Imperial Defendants. As to this:
>
> (a) The significant majority of male Adult Claimants are Tenant Farmers (a small number of male Adult Claimants who worked with Tenant Farmers while they were children have continued working on the same farms with the same Tenant Farmers after reaching the age of 18).
>
> (b) The female Adult Claimants are mostly wives of the Tenant Farmers and at all material times worked (and in most cases continue to work) on the Tobacco Farms with the male Adult Claimants.
>
> (c) The Child Claimants are all children or other relations of Tenant Farmers and at all material times worked (and in most cases continue to work) on the Tobacco Farms with the Adult Claimants.
>
> (d) The dates and duration of the Claimants' work on the Tobacco Farms varies from Claimant to Claimant. All of the Claimants worked on the Tobacco Farms within (at least) three years prior to the date when these proceedings were issued. For the avoidance of doubt, each Claimant's claim covers the entire period during which they worked on a Tobacco Farm growing tobacco which was acquired by the Defendants."

21. Of particular relevance to the present applications are paragraphs 49 and 50 of the Particulars of Claim which set out the "nexus" or "foundational" allegation, and state as follows:

> "**Defendants' acquisition and use of tobacco leaves grown by the Claimants**
>
> 49. The BAT Defendants (and/or subsidiaries directly controlled by the BAT Defendants) and the Imperial

Defendants (and/or subsidiaries directly controlled by the Imperial Defendants) acquired tobacco leaves grown by the Claimants on the Tobacco Farms and used those tobacco leaves for the manufacture of commercial tobacco products such as cigarettes. Those commercial tobacco products were then sold at a substantial profit by the BAT Defendants and the Imperial Defendants. Further or alternatively, the commercial tobacco products were sold at a substantial profit by one or more subsidiaries controlled by the BAT Defendants or the Imperial Defendants, and the profits thereby generated were remitted to the BAT Defendants (in the case of sales by the BAT Defendants' subsidiaries) and to the Imperial Defendants (in the case of sales by the Imperial Defendants' subsidiaries).

50. At this stage of proceedings, and in light of the matters set out in paragraphs 16 and 17 above, the Claimants are unable to identify exactly which of the Defendants or subsidiaries directly controlled by any of them acquired and subsequently received and used the tobacco leaves (or the traceable products of the tobacco leaves) grown by each individual Claimant. Based on the very limited information made available by the Defendants regarding the respective roles of each of the Defendants and pending disclosure, the Claimants aver that:

(a) Each of the Claimants:

(i) worked on one or more of the Tobacco Farms from which one or more of the BAT Defendants and/or one or more of the Imperial Defendants (and/or one of more of the subsidiaries directly controlled by the BAT Defendants or the Imperial Defendants) sourced tobacco leaves from AO Malawi and/or Limbe Leaf via the process described in paragraphs 34 to 40 above; and

(ii) was personally involved in growing a significant quantity of tobacco leaves which were acquired (or whose traceable proceeds were acquired) by one or more of the BAT Defendants and/or one or more the Imperial Defendants (and/or one of more of the subsidiaries directly controlled by the BAT Defendants or the Imperial Defendants) via that process.

(b) Each of the BAT Defendants and each of the Imperial Defendants acquired tobacco leaves (or the traceable proceeds of such tobacco leaves) which were grown by at least a significant number of the Claimants."

22. Paragraph 50 of the Particulars of Claim is further to be read with paragraph 52 of the Particulars of Claim which provides:

> "Following full and proper disclosure from the BAT Defendants and the Imperial Defendants and/or third parties, the Claimants will provide further particulars as to which of the BAT Defendants and the Imperial Defendants acquired and subsequently received and used tobacco leaves (or the traceable proceeds of such tobacco leaves) grown by each individual Claimant and when and how such leaves (or their traceable proceeds) were acquired."

It seems to me to be reasonably inferred from this paragraph that the claimants' legal advisers did not know, at the time proceedings were issued, details of which of the defendants acquired and used the tobacco leaves grown by each individual claimant.

23. After service of the Particulars of Claim, the two groups of defendants sought extensions of time for service of their defences. In the meantime, on 9 February 2021, a Case Management Conference ("CMC") was listed for one day on 24 March 2021 and on 5 March 2021, for the purposes of the CMC, Mr Day made his first witness statement, Day1. For the purposes of these applications, the relevant paragraphs of that witness statement are as follows:

> "41. As can be seen from the above correspondence, the Claimants made considerable efforts to engage with both sets of Defendants regarding the provision of early disclosure relating to the issue of whether the Defendants purchased tobacco from the farms where the Claimants grew tobacco. Both sets of Defendants refused to investigate these factual matters, which may have been dispositive of some of the claims.
>
> 42. Nearly all of the Claimant Farmers know who owns the land on which they grew tobacco and with which Leaf Buyer the landowner enters into a contract to grow tobacco. <u>But the Claimants do not know which tobacco company or companies the Leaf Buyer contracts with to sell their tobacco.</u> This is a step in the supply chain that is outside the Claimants' knowledge and control and is kept outside it (because the Claimants have no means of discovering to whom their tobacco is eventually sold).
>
> 43. The Leaf Buyers keep this information very confidential and do not share it. My firm has taken extensive steps to attempt to obtain this information via other sources in the Malawian tobacco industry but have not attempted to obtain it directly from the Leaf Buyers due to the risks of doing so is likely to pose to our clients (as to which see paragraphs 59-61 below). The multinational tobacco companies, including the Defendants, refuse to provide this information, even in the face of litigation.

> 44. The Claimants therefore do not have documentary evidence that categorially links each individual Claimant to one or more of the Defendants or companies within the Defendants' corporate groups. That is information that is held by the Defendants or their associated companies.
>
> 45. It is however clearly critical information on which the onward progress of these claims hinges, and because of the nature of the supply chain as explained above, it is information which the Claimants do not have but the Defendants do. Ordinarily of course information and documents relevant to the claim from the opposing party would be provided at the disclosure stage following close of pleadings. However, given the importance of this information to each individual claim, and hence to the case selection process, the Claimants propose that following provision of certain information regarding each individual Claimant (subject to confidentiality terms as to which see below), the Defendants carry out these investigations at this juncture. The Claimants propose that this exercise can either be carried out unilaterally by the Defendants or with my firm's assistance.
>
> 46. We would ask that the Defendants provide documentary evidence in support of any results of these investigations (and my firm would be prepared to enter into an appropriate confidentiality agreement if necessary). Without this information from the Defendants embarking upon the selection of the lead cases makes little sense. Provision by the Defendants of this information at this stage – information which on any view would become disclosable in due course – is the way to ensure sensible and proportionate case management of the claims." [emphasis added]

It was these paragraphs, and in particular the statements which I have underlined at paragraphs 42 and 44, which were principally the catalyst for the making of these applications.

24. Before doing so, the defendants' solicitors wrote jointly to LD on 11 March 2021 giving notice of the intention to make the strike out applications and indicating surprise at the concessions said to have been made by Mr Day. In response, LD wrote on 12 March 2021 stating that the suggestion that the "information in Day1 has somehow taken the Defendants by surprise … is disingenuous" because the "material sections of Day1 simply repeat the position as stated in [the Particulars of Claim]." On 15 March 2021, Ashurst on behalf of all the defendants jointly asserting:

    (i) Contrary to the assertions in Leigh Day's letter, the defendants were in fact surprised by the information in Day1: its effect was to concede for the first time that there is no proper basis for the claimants' foundational plea that there is any nexus between them and the defendants.

(ii) As the joint letter from the defendants' dated 11 March 2021 has made clear, the strike out applications are not predicated on the lack of particularity over which of the defendants acquired tobacco grown by the claimants. They are predicated on the fact that the claimants now concede that they do not know whether any defendant (or member within their respective corporate groups) acquired such tobacco at all.

(iii) Contrary to Leigh Day's assertions, Day1 does not simply repeat the position as stated in the Particulars of Claim: on the contrary, it revealed new information and important concessions upon which the strike out applications are based. Day1 goes beyond the Particulars of Claim by disclosing for the first time that the claimants do not know whether their foundational plea is true and that they have no documentary evidence to support it.

(iv) In the circumstances, the defendants could not have made the strike out applications before Day1 was served.

These Applications

25. These applications were issued on 15 March 2021. They are made pursuant to CPR 3.4 (2)(a) or (b) seeking that the claims be struck out, alternatively, application is made for the claims to be stayed pursuant to CPR 3.1(2)(f) provides:

> "**3.4 - Power to strike out a statement of case**
> …
> (2) The court may strike out a statement of case if it appears to the court—
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;"

The application on behalf of the BAT Defendants is supported by a witness statement of Mr Jonathan Paul Clark and the application on behalf of the Imperial Defendants is supported by a witness statement of Mr Jonathan William Gale, both dated 15 March 2021.

26. For the BAT Defendants, Mr Clark states that it is apparent from Day1 that LD

> "issued these claims without any evidence to support the essential allegation that each of the individual Claimants grew tobacco leaves that were ultimately purchased by one of the defendants. It follows that, at present, no individual Claimant can sustain any claim (on any basis) against any of the defendants and the BAT defendants' position is that these proceedings have been commenced on a fundamentally flawed basis and all of the claimants' claims should be struck out."

He expands on this in paragraph 9 of his statement:

> "First, it now transpires (contrary to the position in the PoC) that the Claimants and their solicitors do not in fact have any basis for the allegation that any individual Claimant has

grown tobacco leaves that have ultimately been purchased by any of the Defendants (or their subsidiaries) (the "Nexus Issue"). That is crucial.

9.1 It is common ground that whether an individual Claimant grew tobacco that was ultimately acquired by the Defendants is an indispensable element of their claim - i.e. that none of the Claimants have any claim on any basis if they did not do this (Day 1st/40-41).

9.2 The Claimants pleaded, in PoC settled by counsel and supported by a statement of truth signed by Mr Day, that each Claimant worked on a farm or farms supplying leaves to the Defendants and that the Defendants acquired tobacco leaves grown by the Claimants - i.e. a clear assertion that this vital link existed in respect of the over 7,000 Claimants.

9.3 The Nexus Issue is an essential threshold point for any individual's claim not least because, as was explained to Leigh Day as early as 20 December 2019, BAT GLP1 has only purchased a very small proportion (estimated at 4% in the period 2014-2019) of the Malawian tobacco crop.

…

9.5 [Day1], which was served well after close of business on Friday, 5 March 2021 following much chasing from the Defendants, now reveals in categorical terms that Leigh Day do not know if any given Claimant grew leaves supplied to any of the Defendants. Accordingly:

(a) What was pleaded in the PoC was baseless.

(b) There is no validly constituted claim for any Claimant because no Claimant has any proper basis for alleging that the tobacco leaves they grew were supplied to the Defendants.

(c) It is clear that the action has been commenced prematurely without addressing this point, seemingly to pre-empt the change in the jurisdiction rules arising from Brexit, but on any view it is fundamentally flawed.

9.6 Leigh Day now belatedly try to remedy that fundamental defect by turning due process on its head and pushing it onto the Defendants to adduce evidence saying whether they have the information which would assist the Claimants to cure the defect in all their current (and it would seem future) claims: the Nexus Issue. That is inappropriate. There can be no requirement on the Defendants to obtain and/or produce information to assist the Claimants to identify whether the Claimants who have already issued have viable claims. Claims should not be issued on a trial and error."

27. On behalf of the Imperial Defendants, Mr Gale explains that the application is brought in the light of the claimants' "concessions" set out in Day1, essentially repeating what had been said in the letter of 15 March 2021.

28. In response to the applications and the witness statements in support, Mr Day made his further witness statement on 6 April 2021 ("Day2"). He states that the allegations made on behalf of the defendants are both wrong as a matter of fact and reflect a fundamentally erroneous understanding of what is required in order for a claimant properly to plead a particular averment in a statement of case. He denied that LD ever suggested they had documentary evidence which proved that each individual claimant has grown tobacco which was acquired by one or more of the defendants. He stated further that the defendants' applications are based on the erroneous premise that the claimants are not entitled to plead any factual averment or allegation unless they are already in possession of "evidence" which proves that averment/allegation. He stated that LD had been able to obtain relevant information from various categories of sources including client instructions, publicly available information and confidential source information from individuals in the Malawian tobacco industry which cumulatively provided a proper basis for the factual averments relevant to the nexus issue contained in the Particulars of Claim. Finally, he challenged the contention that unless the claimants were able to establish at the outset of the proceedings that every single one of the claimants grew tobacco leaves that were acquired by the defendants, then the claims of all 7,263 claimants stood to be struck out.

29. Furthermore, in Day2, Mr Day goes on to present a statistical argument purporting to show that in respect of any one of the 7,020 individual claimants who grew tobacco acquired by the Leaf Buyer, Alliance One, during one or more relevant seasons, it is more likely than not that tobacco grown by them during those seasons was acquired by one or more of the defendants. He asserts that, based on figures provided by the defendants, there is a 98% chance that any claimant who farmed for Alliance One in each of the relevant seasons would have grown tobacco for the defendants. It is not necessary to go into the detail of Mr Day's statistical argument at this stage. However, one example can be given. Mr Day sets out a table showing the total amount of tobacco which the Imperial Group purchased from Alliance One during each of the relevant seasons and compares this with the total amount of contract tobacco which Alliance One bought and sold in those seasons as follows:

Table 4: Amount of Malawian contract tobacco purchased by the Imperial Defendants from Alliance One each year (calculations based on data regarding volumes purchased provided by the Imperial Defendants)

Season	Total volume of contract tobacco sold by AO (kg)	Imperial purchases from AO (kg)	% of AO's total sales of contract tobacco that went to Imperial Group
2018/19	26,685,000	6,122,550	23%
2017/18	34,807,500	13,486,603	39%
2016/17	21,326,625	8,248,499	39%
2015/16	31,693,995	6,651,938	21%
2014/15	30,348,723	7,740,403	26%
2013/14	30,240,000	9,030,986	30%

Mr Day then states:

> "On the basis of the figures shown in the table above, and assuming that the tobacco acquired by the Imperial Defendants did not originate from the same farms each year, there is a 88% chance that, in respect of any Claimant who grew tobacco which was acquired by Alliance One during each of the Relevant Seasons, at least some of that tobacco was acquired by the Imperial Group. This percentage is calculated by working out, in respect of each growing season, the probability that particular tobacco sold by Alliance One was sold to a MCM other than Imperial, and then multiplying those probabilities together. This calculation shows that where a Claimant has grown tobacco which was acquired by Alliance One during six successive seasons, the probability that none of that tobacco was acquired by the Imperial Group is just 12%. It follows that the probability that the Imperial Group acquired at least some of the tobacco grown by that Claimant is 88%."

As will be seen, this kind of reasoning and the conclusions drawn are heavily criticised by the defendants, in particular by Mr Gibson QC on behalf of the BAT Defendants.

The Argument on behalf of BAT

30. For the BAT Defendants, Mr Gibson submitted that it is an abuse of process to issue a claim form in the absence of knowledge of any basis for the claim and when there is an inability to formulate a claim at the time of issue, and this includes a situation where the assertion of a claim is contingent or baseless. He submitted that the acceptance by Mr Day in Day1 that the claimants do not know which tobacco company or companies the Leaf Buyers contract with to sell the tobacco means that this claim is essentially speculative and liable to be struck out. He relies on, for example, the decision of HHJ Waksman QC (as he then was) in *Carey v HSBC Bank PLC* [2010] Bus LR 1142, a mass claim against various banks where one of the claims pleaded relied on the absence of a proper "IEA" agreement between the parties, the claimants' approach being to plead that if the defendant was unable to produce a properly executed IEA then they would invite the court to find in their favour. Judge Waksman QC concluded that this was abusive, accepting that:

> "The IEA claim is an abuse of process because it is speculative, in that on the face of it, Mr Adris would appear (at best) not to know whether he can show an IEA or not. The approach seems to have been to leave it to RBS to see if it can produce a copy of the actual executed agreement. If it can, and it is properly executed, the claim will presumably not be pursued … In other words the success of the claim does not depend on any input from the claimant on the issue but only on what (a) the defendant may or may not be able to show and (b) what the court should infer from that."

31. Mr Gibson similarly relies on the decision of Akenhead J in *Charter UK Ltd v Nationwide Building Society* [2009] EWHC 1002 (TCC) where the claimant had pleaded certain facts but stopped short of pleading a breach of confidence, and expressly reserved its right to amend following disclosure. Addressing the interaction between pleadings and disclosure, the learned judge held:

> "It is wrong in principle for parties to half plead the case in the hope or anticipation that that will create sufficient of an issue to give rise to disclosure obligations."

It is submitted that these cases, together with *Nomura International plc v Granada Group Limited* [2008] Bus LR 1, illustrate the principles that a claimant in civil litigation must be able to plead, with a proper basis for doing so, matters which constitute and disclose a cause of action.

32. Applying these principles to the present case, Mr Gibson submits, firstly, that to issue proceedings as a group action on a trial basis, without knowing whether any individual has a claim and then seek disclosure to discover whether any claimant does have a claim, is an abuse of process. What is not acceptable in an individual unitary action is equally unacceptable in a group action. In a group action, the necessary nexus between each claimant and each defendant must exist, and if this fundamental pleading is subject to a reservation, then the case is "half pleaded," in the words of Akenhead J, and is liable to be struck out. He submits that the claimants accept that they have to establish the nexus against each defendant individually and the claim becomes defective once it is pleaded, as in paragraph 50(b) of the Particulars of Claim, that "Each of the BAT Defendants and each of the Imperial Defendants acquired tobacco leaves (or the traceable proceeds of such tobacco leaves) which were grown by at least a significant number of the Claimants" [emphasis added]. This, he submits, is simply not good enough: it effectively accepts that some claimants did not grow tobacco leaves that were acquired by either group of defendants, with the result that those claimants' claims are being smuggled in, as it were, within the group action, camouflaged by the legitimate claim of the majority.

33. Thus, Mr Gibson submits that paragraph 50 of the Particulars of Claim is defective in pleading that: "Each of the Claimants: (i) worked on one or more of the Tobacco Farms from which one or more of the BAT Defendants and/or one or more of the Imperial Defendants … sourced tobacco leaves from AO Malawi and/or Limbe Leaf" because this does not distinguish between the two groups of defendants and such a pleading is defective in a case where liability is only alleged to be several, not joint. This is then compounded by the acceptance on the part of the claimants in Day1 that they do not even know that their tobacco was acquired by either of the defendants, because there are other tobacco companies who bought tobacco from the Leaf Buyers and the admission, or concession, by Mr Day that "the Claimants do not know which tobacco company or companies the Leaf Buyer contracts with to sell their tobacco" means that some claimants cannot even say that one or other of the defendants acquired their tobacco. He submits that paragraph 42 of Day1 thus incorporates other tobacco companies than the defendants.

34. By contrast, what is pleaded in the Particulars of Claim is a clear averment that each claimant supplied a significant quantity of tobacco to each defendant, this being a categorical averment, not a half averment based on a statistical belief. This is then exposed by the revelation in Day2 that the belief in the Statement of Truth is in fact founded upon

statistical evidence. Mr Gibson submits that, in relation to a collective nexus, there is a fundamental difference between having generic statistical evidence based on assumptions leading to no more than a chance that tobacco leaves were acquired collectively, and the categorical averment made in the Particulars of Claim. He submits that if what the claimants are asking the court to do is in fact to draw an inference that a particular claimant picked tobacco leaves that were acquired by a particular defendant, it is necessary for the claimant to plead the primary facts relied on justifying the making of the inference, in a similar way to when fraud is pleaded and the court is asked to draw an inference of fraud from primary facts. He submits that where, as Day2 reveals, the allegation that the defendants acquired the claimants' tobacco leaves is based upon, and relies upon, certain key assumptions, the Particulars of Claim must set out those key assumptions so that the defendants know the case that they have to meet and are able to grapple with the issues arising in the case.

Argument on behalf of Imperial

35. For the Imperial Defendants, Miss Fatima QC built on the submissions by Mr Gibson QC as well as the witness statements of Mr Gale. In relation to the application under CPR3.4(2)(a), she put forward 6 propositions:

    (i) Each of the 3 causes of action pleaded against the defendants is advanced on the basis of the nexus or foundational allegation.

    (ii) It is apparent from Day1 that the claimants did not have a proper basis for the foundational allegation as pleaded, that is as a primary fact.

    (iii) The assertion at paragraph 50 is an inappropriate and inadequate pleading.

    (iv) The consequence of propositions (ii) and (iii) is that the Particulars of Claim do not disclose reasonable grounds for bringing the claim because the foundational allegation is not adequately pleaded and without it the 3 causes of action are not sustainable.

    (v) The conclusion in (iv) does not involve any assessment of the merits of the claimants' case.

    (vi) The response to the strike out in Day2 cannot cure what is a deficient pleading.

36. Developing these propositions, Miss Fatima observed that no inference is pleaded in paragraphs 49 to 50 of the Particulars of Claim. The only qualification is as to which defendant purchased the tobacco, not whether either of the defendants purchased the tobacco. She submitted that this is a critical distinction and the significant revelation in Day1 was that they do not know whether it was these defendants at all. She adopted the "camouflage" point (see paragraph 32 above) and submitted that the claimants' cover was blown by Day1 where the claimants conceded that they were unable to identify the "lead cases" until they knew which tobacco was acquired by the defendants. Paragraphs 42 to 46 of Day1 are important both for what is said and what is not said: it concedes that the claimants do not know who acquired their tobacco and whether the defendants acquired it at all; nothing is said about the basis for the belief that the defendants acquired the claimants' tobacco, pleaded in the Particulars of Claim and in particular there is no reference to "probability analysis" and thus no explanation is provided for how the

claimants could have believed the foundational allegation to be true when they didn't know whether it was true or not.

37. Miss Fatima submitted that there is an important distinction between knowledge and belief, as explained by, for example, Teare J in *The Brillante Virtuoso* [2019] 2 Lloyd's Rep 485. That case concerned the claimed hijacking of a ship by armed men when transiting the Gulf of Aden within the territorial waters of Yemen. The defendant underwriters pleaded wilful misconduct by the Owner within the meaning of s55(2)(a) of the Marine Insurance Act 1906 in that the Owner, with the assistance of the master and chief engineer, had arranged for a 'fake' attack by pirates and for a fire to be deliberately started on board the vessel which, if established, would prevent the claimant bank from recovering under the insurance policy because there would be no loss by an insured peril. Teare J said:

> "533. It is necessary to consider, first, whether, when pleading the defence of wilful misconduct by the Owner in March 2015, the Underwriters had actual knowledge of the Owner's wilful misconduct and in particular that the true reason for drifting off Aden was to enable a group of armed men to board the vessel and set fire to it. The nature of the required knowledge was addressed by Mance J in *Insurance Corp of the Channel Islands v Royal Hotel Ltd* [1998] Ll Rep IR 151 at p. 161:
>
> > 'Whether a person has knowledge is for lawyers essentially a jury question. The meaning of knowledge has perplexed philosophers from Plato (and no doubt before) to after AJ Ayer, and been said by some to be ultimately unanswerable. But as a matter of law and everyday understanding some points are reasonably clear. First of all, I reject Miss Bucknall's submission that a party must be taken to know whatever he could properly plead. The submission cannot be accepted, even if attention is confined to dishonest conduct which, under the Code of Conduct of the Bar of England and Wales, requires a pleader to have "... before him reasonably credible material which as it stands establishes a prima facie case."
> >
> > At the other extreme, knowledge is not to be equated with absolute certainty, itself an ultimately elusive concept. The impossibility of doubt which Descartes found only in the maxim "I think, therefore I exist" is not the criterion of legal knowledge. For practical purposes, knowledge pre-supposes the truth of the matters known, and a firm belief in their truth, as well as sufficient justification for that belief in terms of experience, information and/or reasoning. The element of regression or circularity involved in this description indicates why knowledge is a jury question.'
>
> 534. I was at one stage troubled that the 'statement of truth' now attached to pleadings (that the facts alleged are believed to be true) undermined Mance J's rejection of the submission that a party must

be taken to know whatever he could properly plead. But I was persuaded that it did not and that the best guide to the meaning of knowledge in this context remained Mance J's threefold test: (1) the matters said to be known must be true; (2) there must be a firm belief in their truth; and (3) there must be sufficient justification for that belief in terms of experience, information or reasoning. In the present case the matters said to be known are true, because the court has found them to be true. The Underwriters also had a belief in their truth because that was stated in the 'statement of truth' at the end of the Amended Defence. The crucial question is whether that belief can fairly be described as firm and sufficiently justified by the information available to them at that time. The Underwriters had sufficient information to justify the pleading but in 2015 they had much less information than they have now. The particulars then available were pleaded under paragraph 33C of the Amended Defence. Counsel for the Underwriters were able to say in closing (see paragraph 1 of the written closing) that it was 'obvious' that there had been wilful misconduct. I very much doubt that that could have been said in 2015 because so much more factual and expert evidence has since emerged. At that time, not only was the allegation of wilful misconduct denied, but the Owner argued that it was so hopeless that permission to amend to plead the allegation should not be granted. Counsel fairly summed up the state of the Underwriters' knowledge in these terms: 'Underwriters strongly suspected wilful misconduct, believed it, and committed themselves to attempting to prove it.' When I ask myself whether in 2015 the Underwriters can fairly be said to have had a 'firm belief' supported by the necessary 'sufficient justification for that belief in terms of experience, information and/or reasoning' I am persuaded that they did not.

535. Counsel for the Bank relied, first, upon the statement of belief in the truth of the allegations made in the Amended Defence. I do not consider that this is sufficient for the reasons given by Mance J. Further, the purpose of the requirement for a statement of belief in the truth of allegations made in a pleading is to prevent allegations being made in the truth of which there is no belief. The purpose is not to prevent a party from pleading an allegation which is supported by evidence but which may only be established at trial. In that sense the required 'belief' need not amount to 'knowledge'. Thus, in *Clarke v Marlborough Fine Art (London) Ltd* [2002] 1 WLR 1731, Patten J said:

> '20. The purpose of the requirement that a party should verify the factual contents of his own pleadings was to eliminate as far as possible claims in which the party had no honest belief. The consequence of making a false statement in a document verified by a statement of truth are serious and CPR r 32.14 provides for proceedings for contempt to be brought in such circumstances. It is therefore important at the outset to identify what Part 22

> does and does not require. In relation to a pleading the claimant or other relevant party who puts the document forward as a statement of his case is required to certify that he believes the facts alleged are true. He is not required to vouch for the legal consequences which he seeks to attach to these facts. That is a matter for argument and ultimately for the decision of the court. The purpose of Part 22 is simply to exclude factual allegations which to the knowledge of the claimant or other party are untrue or which the party putting forward the pleading to the court is unable to say are true.
>
> 21. In the most simple case the requirements of CPR r 22.1 will, if observed, exclude untruthful or fanciful claims but the notes to Part 22 also indicate that the purpose of the new rule was to discourage the pleading of cases which when settled were unsupported by evidence and which were put forward in the hope that something might turn up on disclosure or at trial …
>
> 22. There may however be cases in which the claimant has no personal knowledge of the events which form the factual basis of the claim. Executors or liquidators of companies are obvious examples. They are often required to investigate matters years after they have occurred with a view to establishing a possible claim. In such cases the same rules of conduct will apply to those whom they instruct but a position will often be reached when the available evidence does not point clearly to any single factual possibility. In a case of alleged undue influence for example it may be possible to infer from the relative positions of the donor and donee coupled with the obviously disadvantageous nature of the transaction that some form of oppressive or abusive behaviour has occurred yet the precise form which the undue influence took can only be established, if at all, at the trial. The evidence at the pleading stage from various potential witnesses may disclose a number of possibilities. In such a case it seems to me perfectly legitimate for counsel with sight of that evidence to plead out those possibilities as alternatives. There will be evidence to support each plea. The determination of which, if any, of the possibilities was the probable cause is a matter not for the pleader but for the court at trial.'
>
> 536. Counsel for the Bank further submitted that an insurer need not know 'all the particulars or incidents or the available evidence or the means of proof of the relevant circumstances giving rise to the right to avoid.' I accept that but, as stated by Mance J, there must be 'sufficient justification for that belief in terms of experience, information and/or reasoning.' Not everything need be known, but sufficient must be known to enable the insurer to have the necessary 'firm belief'."

Miss Fatima submitted that this is an important case because it provides a standard for what constitutes an adequate belief, relying in particular on paragraph 536. She submitted that

Day1 conceded in effect that the foundational allegation was in fact speculative in the case of each and every claimant, and to make speculative claims of this kind is not appropriate but an abuse of the process of the court.

38. Miss Fatima further submitted that, on the basis the claimants do not know who acquired their tobacco (whether the BAT Defendants, the Imperial Defendants or someone else), the foundational allegation must be advanced by way of inference, but it is not pleaded as such, nor are the underlying facts supporting an inference pleaded. She relies on CPR 16.4 which requires a claimant to plead "a concise statement of the facts on which the claimant relies" which must include the facts supporting an inference. She further relies on the dictum of Lord Millet in *Three Rivers DC v Bank of England (No 3)* [2001] 2 AC 1 that fraud or dishonesty must be distinctly alleged and sufficiently particularised, which equally applies to the principle that primary facts relied on for an inference must be pleaded. In an important footnote to her written skeleton argument, Miss Fatima states:

> "The Imperial Defendants do not suggest that a claimant cannot plead an allegation "unless they are already in possession of 'evidence' which proves that averment/allegation". The point is not that a claimant needs documentary or other evidence "which directly and conclusively substantiates each and every specific pleaded averment in a statement of case" but that there must be sufficient evidence for the plea that is advanced consistently with the claimant's obligations under CPR 16.4(1) and 22.1."

Although, in the Particulars of Claim, there are numerous examples where the claimants have resorted to pleas by inference and have made this clear (for example, paragraph 36 where it is pleaded "the Defendant/Leaf Buyer Agreements stipulate, amongst other things, the quantity of tobacco required to be supplied by the Leaf Buyers at the end of the growing season and, it is to be inferred, the price at which it must be supplied"), this is not the case with the foundational allegation at paragraphs 49 to 50. On the basis that it is reasonable to infer that the claimants instructed LD that they did not know the foundational allegation to be true, Miss Fatima submits that the foundational allegation should have been pleaded as an inference and, by not doing so, it has been pleaded inappropriately and inadequately. Where a proposition or matter is fundamental, a bald assertion is likely to be insufficient, as in the case of the assertion of impecuniosity in *Diriye v Bojaj* [2021] 1 WLR 1277.

39. In the light of the above submissions, Miss Fatima asks rhetorically: on what basis was the Statement of Truth signed? The answer is to be found in Day2, namely the inference from the statistical analysis, but the pleading does not reflect this. The effect of Day2 is, Miss Fatima submits, to demonstrate that the pleading of the foundational allegation is deficient.

40. The foundation for the argument under sub-paragraph (a) of CPR 3.4(2) that the Particulars of Claim disclose no reasonable grounds for bringing the claim is the "concession" in Day1. Addressing the argument that, in considering an application under this paragraph, no regard can or should be given to Day1, Miss Fatima submits that Day1 may in any event be looked at within sub-paragraph (b). In relation to sub-paragraph (b), there are additional factors relied on by the Imperial Defendants which are said to amount to "abusive" factors, for example the claimants' proposed order for disclosure, the fact that the concession in Day1 was not made until March 2021 by which time significant costs had been incurred, and the timing of the issue of the Claim Form to avoid the Brexit jurisdictional provisions, when at

that time there was an insufficient basis for the claim to be brought on the basis of the foundational allegation.

The Argument on behalf of the Claimants

41. On behalf of the claimants, Mr Hermer QC submitted that the applications on behalf of the defendants amount to an attempt to elide two separate concepts:

    (i) what is required for a party to plead the case; and

    (ii) what is required for a party to prove the case at trial.

    Thus, he submits that the applications proceed on a misconceived basis as to the applicable legal principles and confuse the requirements for a sustainable statement of case on the one hand and the need for each of the claimants to prove their claim at trial on the other. The issue on the applications is whether the claimants have a *sufficient* basis for advancing the claims as pleaded in the Particulars of Claim. He agrees that the basis for the pleading of the nexus allegation is an inferential analysis, but this is not how the claimants propose to prove their case at trial which will be on the basis of documents. The issue in relation to the nexus allegation is one of primary fact and will be so decided at trial. However, even though the claimants do not presently have all the evidence they need to prove the nexus allegation, he submits that each and every claimant can properly and individually aver that which is pleaded in paragraph 50 of the Particulars of Claim.

42. In relation to these allegations, Mr Hermer emphasises the limited basis upon which they are put. Thus, there is no application for summary judgment under CPR 24, there is no suggestion that the Particulars of Claim are legally incoherent, unreasonably vague, or vexatious, and there is no application to strike out under CPR 3.4(2)(c), which empowers the court to strike out a statement of case where "there has been a failure to comply with a rule, practice direction or court order" which puts into context, he says, for example Miss Fatima's submission based upon CPR 16.4 (see paragraph 38 above). He suggests that the fact that the defendants have chosen not to apply for summary judgment is particularly significant in the light of the fact that, on the claimants' case, the defendants are either already in possession of, or should easily be able to obtain, evidence which comprehensively establishes the identity of those claimants from whom they have or have not acquired tobacco.

43. Answering the submission that, the basis of the pleading of the nexus allegation being an inferential analysis, it should have been pleaded as such, Mr Hermer submits that the requirement to plead an inferential case is limited to where a core fact is required to be proved at trial by inference, for example an allegation of dishonesty. This is to be contrasted with where a claimant has a reasonable belief in a primary fact: in such circumstances there is no requirement to plead the "thinking process" that led to the pleading which would involve pleading evidence or matters of privilege. He refers to the first paragraph of the judgment of Leggatt J (as he then was) in *Tchenguiz and others v Grant Thornton UK LLP and others* [2015] EWHC 405 (Comm):

> "Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background

> facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial."

He refers also to what was said by Saville LJ in *British Airways Pension Trustees Ltd v Sir Robert McAlpine and Sons Ltd* (1995) Const. L.J. 365:

> "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other and is able properly to prepare to deal with it. Pleadings are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to the end, and that end is to give each party a fair hearing. Each case must of course be looked at in the light of its own subject-matter and circumstances."

In a group action, he submits that the purpose of the pleading is to enable the parties to identify the issues in dispute: it serves an essentially utilitarian function. Because of the common issues, it was convenient to serve Particulars of Claim against the defendants jointly, but the claimants could have served Particulars of Claim separately for each defendant.

44. Mr Hermer submits that it is perfectly proper for a claimant to issue proceedings notwithstanding the existence of some uncertainty about the factual basis and viability of the claim. Thus, in *Gulati v MGN* [2013] EWHC 3392 (Ch), Mann J referred to "the familiar case in which a claimant makes an ostensibly sustainable allegation but acknowledges that the process of disclosure is necessary to make the case stronger or to have it investigated properly." He went on to say:

> "It is a familiar state of affairs that a claimant is ultimately reliant on disclosure from the other side in order to bring his case home, particularly in cases where the nature of the wrong is such that the defendant's activities were covert so that, if the case is good, the defendant is likely to have a substantial amount of material in its hands with no equivalent in the hands of the claimant. Unless the prospects of getting disclosure are "fanciful", the claimant is generally entitled to maintain its case in those circumstances. That is not to say that claimants are entitled to embark on speculative cases in the hope that disclosure will throw up something useful. The claimant must have more than that to start with, but the inability to make a full case without

> disclosure is not, in my view, a bar to starting the litigation in the first place."

The test applied by Mann J was whether the claims are "purely speculative". He said:

> "Provided that there is enough to prevent them falling into the category of the purely speculative, the nature of the wrong or alleged is such that the claimants will or may have little knowledge and evidence of their own at this stage and will need the benefits of pre-trial procedures in order to add to their case. There is nothing wrong with this. It is what disclosure (among other steps) is for."

Mr Hermer drew on examples of cases where, although the basis for the factual allegations made was thin, judges had refused to strike out the case but had instead made orders for disclosure: *Arsenal Football Club Plc v Elite Sports Distribution Limited* [2003] FSR 26 and *Dellal v Dellal* [2015] EWHC 907 (Fam) per Mostyn J.

45. Mr Hermer also draws comfort from the authorities on Statements of Truth. In *Clarke v Marlborough International Fine Art Establishment* [2002] 1 WLR 1731 Patten J explained that CPR 22 "presupposes that the [pleaded] facts are ones in respect of which there is some evidence to justify the pleading" and he went on to explain that a party is entitled to plead inconsistent alternative cases "unless it can be said that one of the alternatives is unsupported by any evidence and is therefore pure speculation or invention on the Claimant's part". In *Binks v Securicor Omega Express Ltd* [2003] 1 WLR 2557 Maurice Kay LJ stated that it was "necessary to adopt a broader approach to Part 22" and that the authorities pointed away from "an unduly narrow view…of Part 22". , He went on to state that:

> "Although I accept that the purpose of Part 22 is to deter or discourage claimants from advancing a case which is inherently untrue or wholly speculative (a purpose which will never be wholly achieved), I do not accept that its purpose extends to the possibility of relieving of liability a defendant whose own evidence may establish a cause of action against him. That would not be consistent with the overriding objective of dealing with a case justly."

Carnwath LJ agreed that one purpose of Part 22 is to discourage claims being advanced which are "inherently untrue or wholly speculative".

46. Thus, the theme of these cases, submitted Mr Hermer, is to apply a test of whether the case is "wholly speculative", a test which these claimants comfortably pass given the basis for the pleading set out in Day2. He submits that there is no dispute, now, that careful consideration was given to the nexus issue prior to service of the Particulars of Claim, as Mr Day explains in Day2. He submits that no explanation has been given as to why paragraph 50 of the Particulars of Claim can be adjudged to be purely speculative. Although the defendants have raised the question as to whether the claimants should have sought pre-action disclosure, the core question for the court is whether, without pre-action disclosure, the pleading was on a wholly speculative basis: if it was not, then such failure is irrelevant. Reliance is equally placed by the claimants on *The Brillante Virtuoso* [2019]

2 Lloyd's Rep 485 and in particular on what was said by Teare J at paragraph 235, cited in full in paragraph 37 above:

> "… the purpose of the requirement for a statement of belief in the truth of allegations made in a pleading is to prevent allegations being made in the truth of which there is no belief. The purpose is not to prevent a party from pleading an allegation which is supported by evidence but which may only be established at trial. In that sense the required 'belief' need not amount to 'knowledge'."

47. Although he says that he does not need it, Mr Hermer also relies on a line of authority that a more generous approach to pleadings is appropriate in claims arising from collusive or clandestine anti-competitive behaviour: see *Bord Na Mona Horticulture Limited v British Polythene Industries Plc* [2012] EWHC 3346 (Comm), per Flaux J and *Nokia Corporation v AU Optronics Corporation* [2012] EWHC 731 (Ch) per Sales J. Properly analysed, the real complaint by the defendants is, in fact, he says, the failure to plead out individually the factual basis for each of the individual 7,263 claims and this is all the more objectionable where the claimants' inability at this stage to plead precisely which claimant supplied tobacco leaves to which defendant is the result of the clandestine nature of the industry in which the defendants choose to operate, where the defendants are in possession of the information which would answer that issue (or have the means to acquire that information) and where the defendants refused at the pre-action stage to engage with the claimants and provide information which would have addressed the nexus issue.

48. In relation to the application under CPR 3.4(2)(a), Mr Hermer submits that the authorities established the following important principles concerning the application and effect of that provision:

(i) The focus under CPR 3.4(2)(a) is exclusively on the coherence and validity of the Claimants' pleaded case: see, for example, *Swain v Hillman* [2001] 1 All ER 91, *Oystyerware Ltd v Intentor Ltd* [2018] EWHC 611 (Ch) and *CPS v Motasim* [2018] EWHC 562 (QB) where Goose J said:

> "The wording of CPR 3.4(2)(a) clearly involves an assessment of the pleaded claim without considering the evidence or inferences that might or might not be drawn from undisputed facts."

(ii) Accordingly, the court is not required (nor even permitted) to consider whether the pleaded allegations are supported by evidence. See, for example, *S v Royal Borough of Kensington & Chelsea* (QB/2018/0216) where Stewart J explained that, "the test for striking out proceedings…is one that does not look at the evidence on the claim" and went on to hold that, "the judge was in error and wrong in law in striking out the case under Rule 3.4, because he considered and weighed the evidence in making such a strike out". There are numerous other examples of the application of this principle.

(iii) The court must instead assume that the pleaded facts are true and can only strike out the claim if it is certain that, even if those facts are proved at trial, the claim is nevertheless bound to fail.

(iv) The test under CPR 3.4(2)(a) is more stringent than the test for summary judgment.

(v) If the court concludes that a statement of case discloses no reasonable grounds for bringing the claim, the court must consider whether to grant permission to amend the claim rather than striking it out.

49. In relation to the application under CPR 3.4(2)(b), Mr Hermer submits that the authorities established the following important principles concerning the application and effect of that provision:

(i) The test under CPR 3.4(2)(b) is whether the statement of case is likely to obstruct the just disposal of the proceedings or involves a party using the court's process for a purpose or in a way significantly different from its ordinary and proper use. Thus, in *HRH Duchess of Sussex v Associated Newspapers Ltd* [2020] EMLR 21 Warby J explained at:

> "(3) Rule 3.4(2)(b) is broad in scope, and evidence is in principle admissible. The wording of the rule makes clear that the governing principle is that a statement of case must not be 'likely to obstruct the just disposal of the proceedings'. Like all parts of the rules, that phrase must be interpreted and applied in the light of the overriding objective of dealing with a case 'justly and at proportionate cost'.
>
> (4) "Abuse of process" is a sub-set of category (b). An abuse of process is a significant or substantial misuse of the process. It may take a variety of forms. Typical examples are proceedings which are vexatious, or attempts to re-litigate issues decided before, or claims which are "not worth the candle" (*Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] Q.B. 946). But the categories are not closed."

Abuse of process has been defined as "a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process" (*Attorney General v Barker* [2000] 1 F.L.R. 759 per Lord Bingham CJ)

(ii) Even if the court concludes that there is an abuse of process, it can only strike out the case if this is a proportionate response. In *Cable v Liverpool Victoria Insurance Co Ltd* [2020] 4 W.L.R. 110 Coulson LJ explained that the court must apply a two-stage test when faced with an application to strike out for abuse:

> "First the court has to determine whether the claimant's conduct was an abuse of process. Secondly, if it was, the court has to exercise its discretion as to whether or not to strike out the claim (see paragraph 64). It is at that second stage that the usual

balancing exercise, and in particular considerations of proportionality, becomes relevant."

(iii) There is a need for "particular caution" before striking out "first time" litigation. The threshold for striking out at an early stage is very high. In *Munícipio De Mariana v BHP Group Plc* [2020] EWHC 2930 (TCC) Turner J referred to the need for "particular caution to be exercised before striking out 'first time' litigation". He explained that a "recurrent theme" in the case law is "the reluctance of the court to deprive a claimant, on procedural grounds, of a platform upon which to prosecute a claim of adequate substantive merit where she has not ventilated such a claim in earlier proceedings"

On the basis of the above, Mr Hermer submits that the defendants must show that, by issuing this claim, the claimants have acted in a way which brings the administration of justice into disrepute and they have got nowhere close to doing so.

Discussion

50. As the authorities cited by Mr Hermer make clear, consideration of an application under CPR 3.4(2)(a) is confined to the coherence and validity of the claim as pleaded, and it is not permissible for the court to consider and weigh the evidence supporting the pleaded claim. Stewart J was, in my view, undoubtedly right in *S v Royal Borough of Kensington & Chelsea* (QB/2018/0216) when he stated that, "the test for striking out proceedings…is one that does not look at the evidence on the claim" and went on to hold that, "the judge was in error and wrong in law in striking out the case under Rule 3.4, because he considered and weighed the evidence in making such a strike out". In those circumstances, it does not augur well for the defendants that the catalyst for the making of these applications was what was stated by Mr Day in Day1 because the linking of these applications to Mr Day's knowledge enters into the forbidden realm of consideration of the evidence available to support the allegations made in the Particulars of Claim.

51. Furthermore, in my judgment the statements in support of these applications contain an important, and fundamental, *non sequitur*. This emerges, for example, in paragraph 9 of Mr Clark's statement where he asserted that because Day1 *"reveals in categorical terms that Leigh Day do not know if any given Claimant grew leaves supplied to any of the Defendants … what was pleaded in the PoC was baseless."* In my judgment, this does not follow at all and falls into the error identified by Mr Hermer QC in his submissions of failing to distinguish between the information required for a claim to be pleaded, supported by a statement of truth, and the evidence required to bring home at trial what has been pleaded. All that Mr Day was conceding was that he does not yet have the documentary proof to show the nexus between the claimants and the defendants but that was not a concession that he lacked any evidence at all for the pleaded case and Day2 shows that there was such an evidential basis. However much Mr Gibson QC criticises or challenges that evidential basis, this is not a matter which it is appropriate for the court to consider or enter into in relation to a strike out application under CPR 3.4(2). It would be a different matter if this had been an application for summary judgment. This error identified by Mr Hermer has, in my judgment, been carried through into the submissions by both Mr Gibson and Miss Fatima.

52. At one stage, I was troubled by the way in which, at paragraph 50 of the Particulars of Claim, it was pleaded that: "*Each of the Claimants: (i) worked on one or more of the Tobacco Farms from which one or more of the BAT Defendants and/or one or more of the Imperial Defendants"*. The use of "and/or" is typically appropriate where defendants are alleged to be jointly and severally liable but is arguably inappropriate where the liability is alleged to be several only. However, where, as here, the claimants do not yet have the detailed knowledge to distinguish between each of the defendants vis-à-vis the claimants, in my judgment it is acceptable to plead the nexus allegation in this way. In due course, the claimants may have to clarify which of them pursues the case against the BAT Defendants, which of them pursues the case against the Imperial Defendants and which of them pursues the case against both, but at this stage the matter is pleaded in such a way that the defendants know the case which they have to meet and the issues raised, and this is all that is required: see the dictum of Leggatt J in *Tchenguiz and others v Grant Thornton UK LLP and others* [2015] EWHC 405 (Comm) cited above at paragraph 43.

53. Miss Fatima submitted that the fact that an application under subparagraph (a) is confined to a consideration of the pleadings without consideration of the evidence is, in the present case, of no significance because the applications are equally brought under subparagraph (b) as an abuse of the process of the court, in relation to which consideration of evidence is acceptable and the test to be applied by the court may ultimately be the same. I accept that and, in the circumstances, it is appropriate to consider the arguments and submissions in this case as though they were all made under subparagraph (b) and thus take into account the evidence in the various witness statements and in particular in Day1 and Day2.

54. The fundamental question to be considered in this case is whether, on the information available to them, the claimants had any business pleading the nexus allegation in the way that they did as a primary fact rather than as an inference (together with setting out the basis for the inference). This question incorporates whether and when it is proper to sign a statement of truth attesting to the claimants' belief that the contents of the Particulars of Claim are true when, as submitted by the defendants, the signatory to the statement of truth, here Mr Day, did not have the necessary information or foundation for such belief but merely a basis for asserting that the Particulars of Claim, and in particular the nexus allegation, might be true.

55. The answer is, in my judgment, to be found in the passage from *The Brillante Virtuoso* [2019] 2 Lloyd's Rep 485 which is set out at paragraph 37 above. At paragraph 534, Teare J queried whether the 'statement of truth' undermined Mance J's rejection of the submission that a party must be taken to know whatever he could properly plead but was persuaded that it did not and he reiterated that the best guide to the meaning of knowledge in this context remains Mance J's threefold test: (1) the matters said to be known must be true; (2) there must be a firm belief in their truth; and (3) there must be sufficient justification for that belief in terms of experience, information or reasoning. We are not concerned at this stage with (1) because that depends upon the eventual findings of the court at trial: frequently, matters are pleaded which turn out to be untrue because of the court's findings. For present purposes, I must assume that what is pleaded in the Particulars of Claim is true, and that includes the nexus or foundational allegation pleaded at paragraphs 49 and 50 of the Particulars of Claim. In those circumstances, the issue is whether the claimants have a firm belief in the truth of the nexus allegation and whether there is sufficient justification for that belief. On the basis of the material and information before me, I consider that it is appropriate to accept Mr Day's assertions to this effect. No

bad faith is alleged against Mr Day, and rightly so. Although the statistical reasoning process which has led Mr Day to believe in the truth of the nexus allegation may be erroneous, I am in no position to decide that and make a judgment in that regard. Nor would it be appropriate for me to do so on an application of this nature. I am assured by Mr Hermer that (without waiving privilege) the Claimants are, as he put it, "absolutely satisfied" that the statistical reasoning that they have adopted is based on "a mathematically and statistically … valid formula" and that is more than sufficient for present purposes.

56. As Mr Hermer submitted, for the court to find an abuse of process pursuant to subparagraph (b), the case needs to be at the extreme end of the spectrum amounting to a significant or substantial misuse of the process, in the words of Warby J in the *Duchess of Sussex* case (see paragraph 48(i) above). An appropriate statement of the law is to be found in the judgment of Coulson LJ *in Cable v Liverpool Victoria Insurance* [2020] 4 WLR 110:

> "5.1 Abuse of Process
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> > 42 Although we were referred to a large number of authorities on abuse of process, the relevant principles can be summarised shortly. The classic summary of abuse of process can be found in the speech of Lord Diplock in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 536C:
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> > > "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, it would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute amongst right-thinking people. The circumstances in which abuse of process can arise are very varied … It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limited to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."
>
> This passage has been cited many times since, most recently by the Supreme Court in *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 WLR 2004, a case where the claimant had greatly exaggerated his long term disabilities.
>
> 43 A working definition of abuse of process, adopted by both leading counsel in this appeal, was set out by Lord Bingham, then Lord Chief Justice, in *Attorney General v Barker* [2000] 1 FLR 759. At para 19 he defined an abuse of the process as "a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

This test shows, in my judgment, the kind of case it needs to be for the court to strike it out as an abuse of process, and the present case is a long way from being of that nature. Whilst I accept that a case which is, in the words of Mann J "wholly speculative" I do not consider the nexus allegation to be wholly speculative: on the contrary, there is a clear pathway to be seen for the claimants' tobacco leaves to end up in the hands of the defendants and that is sufficient to take the case out of the "wholly speculative" category.

57. Both defendants submitted that where the foundation for an allegation, here the nexus allegation, is an inference, it should be pleaded as such and the claimants should plead the factual basis for the inference which they seek the court to draw. In my judgment, this is misconceived: although an inference may form the basis for the belief that the allegation is true to enable the allegation to be pleaded and the statement of truth to be signed, it does not follow that the matter should be pleaded as an inference. The claimants have chosen to plead the nexus allegation as a matter of primary fact, and that is what they will have to prove, in due course. That will be, I have no doubt, on the basis of documentary evidence which has yet to be obtained or disclosed. There is no requirement, though, for the claimants to have possession of that documentary evidence at this stage in order to be able to plead the nexus allegation in the way that they have. As Mr Hermer submitted at the outset of his argument, and as I accept, what is required in order to plead a matter and sign a statement of truth at the start of proceedings, and what is required to prove an allegation at trial are separate and distinct things and an elision of these two fundamentally different concepts lies at the basis of the misconception which has led to the making of these applications.

58. It will be apparent from the above that I generally accept the submissions of Mr Hermer and prefer them to the submissions on behalf of the defendants and for these reasons these applications to strike out the Particulars of Claim are dismissed.

59. Although there is an application made as part of the claimants' resistance to the strike out that I should make an order for disclosure, in my judgment this would not be appropriate on the basis of the evidence before me. Clearly, there is a significant deviation between what Mr Day asserts that the defendants have by way of documentary evidence to be disclosed and what the defendants say they actually have. The resolution of this dispute should be by way of a formal application by the claimants for disclosure, supported by appropriate evidence, which can then be replied to by the defendants in witness statements supported by statements of truth. In the course of his submissions, Mr Hermer acknowledged that the court could reasonably take the view that this was the appropriate way to proceed.