Neutral Citation Number: **[2026] EWHC 2723 (Comm)**

Case No: CL-2024-000468

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY DIVISION

COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 23 October 2026

Before:

THE HONOURABLE MRS JUSTICE DIAS

Between:

(1) ONECOM GROUP LIMITED
(2) ONECOM PARTNERS LIMITED
(3) ONECOM LIMITED
(4) IMS TECHNOLOGY SERVICES LIMITED

Claimants

- and –

(1) EVE CONNECT LIMITED
(2) KM TELECOM LIMITED
(formerly known as FTP Group (Telecom) Ltd) (in liquidation)
(3) MR JAMES PALMER
(4) MR KEVIN MITCHELL

Defendants

Mr Edmund Nourse KC and Mr Matthew Barry (instructed by Goodwin Procter (UK) LLP) for the **Claimants**
Mr Paul Strelitz, Mr James Shaw and Mr Glen Samuel (instructed by McDermott Will & Schulte UK LLP) for the First and Third **Defendants**

Hearing date: 15 October 2026

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APPROVED JUDGMENT

The Honourable Mrs Justice Dias:

Introduction

1. This is an application by the First and Third Defendants (the "**Defendants**"[1]) for summary judgment, alternatively strike out, in respect of certain aspects of the Claimants' case on quantum, specifically the claim to recover loss of profits over a period of 22 years following termination of the relevant contract.

2. The underlying dispute arises, in brief, as follows.

3. At the start of 2021, the Third Defendant, Mr Palmer, owned a number of businesses concerned with the sale of connectivity and telephony products, including a product known as "eve" which was then owned by the Second Defendant. In February 2021, he sold a substantial part of his business (including that part which now resides in the Second Claimant) to the First Claimant pursuant to an SPA dated 28 February 2021.

[1] This is for convenience. It is recognised that the application has been brought only by the First and Third Defendants and that the Second and Fourth Defendants are not formally parties to it.

4. The eve product itself was not sold to the Claimants, but was the subject of a separate Master Services Agreement, also dated 28 February 2021, whereby it was supplied by the Second Defendant to the Second Claimant, which then on-sold it to "reseller customers" who in turn on-sold it to ultimate end users.

5. Very shortly after these transactions:

   (a) The Second Defendant transferred its ownership of eve to the First Defendant, which thereafter supplied it to the Second Defendant under a separate services agreement;

   (b) Ultimate ownership and control of the Second Defendant was transferred to the Fourth Defendant, who seems to have been Mr Palmer's personal driver.

6. It is quite apparent that there is no love lost between the parties, who have embarked on attritional warfare on a number of fronts. The Claimants allege that following the conclusion of the SPA and MSA in February 2021, the First Defendant began to engage in business with the Claimants' competitors and to make unwarranted demands for payment of increased prices and unlawful deposits. The present proceedings were accordingly commenced by the First and Second Claimants against all four Defendants on 14 July 2023 alleging unlawful means conspiracy and a claim for inducing breach of contract.

7. Meanwhile, the Defendants allege that the Claimants had secretly and unlawfully hacked into a web portal operated by the First Defendant in May 2023 (the "**Hacking Incident**") and wrongfully continued to access the portal thereafter, despite demands that they desist (the "**Ongoing Portal Access**"). This, it is said, eventually led the Second Defendant to

terminate the MSA in November 2024 and has given rise to counterclaims by the Defendants for breach of confidence, unlawful means conspiracy and causing loss by unlawful means.

8. For their part, the Claimants say that the purported termination of the MSA was in fact an unlawful repudiation which had nothing to do with the Hacking Incident or the Ongoing Portal Access issues, but was simply part of the ongoing conspiracy against them. They further allege that following the termination the Defendants took steps to poach their customers – again in pursuance of the alleged conspiracy.

9. Separately, the First Claimant has brought a claim for some £3.3 million against Mr Palmer personally for breach of warranties contained in the SPA. The trial of that claim took place in July and judgment is currently awaited.

10. At the same time, there are undisputed debts owed by the First Claimant to Mr Palmer under both the SPA and a second, unrelated, agreement. Mr Palmer issued statutory demands for these sums in 2023 which have given rise to proceedings in the Insolvency and Companies Court. The only ground asserted by the First Claimant for withholding payment of these debts was based on a set-off of its cross-claims against Mr Palmer. However, the breach of warranty claim alone was not sufficient to extinguish the debts and the only other claims of substance against Mr Palmer were those of the Second Claimant, then estimated at some £8.2 million. On 27 November 2023, the First Claimant accordingly took an assignment of those claims from the Second Claimant.

11. On 7 February 2024, a consent order was agreed in the ICC proceedings, which recorded an undertaking by Mr Palmer not to present a winding up petition against the First Claimant in respect of the statutory demands, *"save to the extent that the Cross-claims (or either of them) are dismissed, discontinued, resolved by agreement or otherwise determined, such that the Cross-claims are no longer extant in a sum equal to or exceeding the Debts…"*.

12. In February of this year, Mr Palmer indicated that he intended to present a winding up petition against the First Claimant notwithstanding his undertaking. His argument is that the undertaking was given on the basis of the claims against him as they existed in February 2024. These related exclusively to the alleged breaches of contract prior to termination and did not include any claims for loss of profits arising out of the alleged poaching of customers *after* termination which were only added by amendment much later. However, the amounts claimed in respect of the pre-termination claims have since considerably reduced, and it is Mr Palmer's contention that the post-termination claim for loss of profits (estimated at around £16 million) has been artificially and deliberately inflated beyond anything which could be properly recoverable solely in order to avoid payment of the amounts otherwise agreed to be due to him. Indeed, it was only after Mr Palmer pointed out in his witness statement that the cause of action for the post-termination claims still resided in the Second Claimant that a further assignment of those claims had to be hastily undertaken on 26 May 2026.

13. The First Claimant responded to this development by issuing its own application for an injunction to restrain presentation of any winding up petition. That application comes on

for hearing by the ICC at the end of this month and it is the Claimants' case that the application before me is simply an attempt to lay the ground for an argument that the First Claimant's cross-claims are no longer extant (at least in part) within the meaning of the undertaking.

14. The present application is advanced by Mr Paul Strelitz on behalf of the Defendants on a number of bases:

(a) First, it is submitted that the claim for loss of profits over 22 years is unsustainable by reason of the principle set out in *Lavarack v Woods of Colchester Ltd, [1967] 1 QB 278*. He argues that the Second Defendant was entitled under clause 19 of the MSA to terminate the agreement without cause on 28 February 2026 in any event. Accordingly, it must be assumed that it would have done so and it is not open to the Claimants to claim any loss of profits after that date. In so far as they seek to do so, they have no real prospect of success and the claim is bound to fail. There are therefore no reasonable grounds for advancing that part of the claim and it can accordingly be struck out *pro tanto* under CPR Part 3.4(2)(a) and/or should be summarily dismissed.

(b) Secondly, Mr Strelitz argues that this allegedly inflated claim for loss of profits is part of an abusive litigation strategy to avoid paying an undisputed debt of around £11.5 million to Mr Palmer. This part of the claim can alternatively be struck out under CPR Part 3.4(2)(b) on the grounds that it is an abuse of process.

(c) Finally, it is said that the Claimants are in breach of a court order to provide certain responses to a Request for Further Information relating to the claim for loss of profits, such that it can be struck out under CPR Part 3.4(2)(c).

15. On behalf of the Claimants, Mr Edmund Nourse KC raises a number of objections to the form of the application. He submits that both strike out and summary judgment are wholly inappropriate remedies to be seeking. There is much force in this submission, to which I revert below. On the other hand, it is undoubtedly the case that the Claimants' case on quantum has been subject to repeated changes of tack and alteration, and despite strenuous attempts by the Defendants to obtain clarification, they have steadfastly resisted providing full particulars of how the claim for loss of profits has been calculated. Even now the position is somewhat opaque.

Background summary

16. The evolution of the claim can be summarised as follows.

17. On 12 June 2023 (well before the date of termination), the Claimants sent a letter before action intimating claims against all four defendants for, amongst other things, unlawful means conspiracy, inducing breach of contract and breach of the MSA arising out of allegedly unwarranted demands and interference with the provision of the contracted services. The letter indicated that loss of profits would in due course form one of the heads of claim. The Claimants were working to quantify this and would update the position as soon as they were able, although it was *"presently envisaged that the damages claim will*

be in the multiple millions of pounds." A further claim for breach of warranty against Mr Palmer personally was also foreshadowed.

18. On 20 June 2023, the Claimants quantified the amount then due to Mr Palmer under the SPAs at around £20 million but asserted a set-off of c. £3.1 million in respect of the breach of warranty claim and c. £8.2 million in respect of the other claims asserted (i.e., including but not exclusively comprising loss of profits).

19. A Claim Form asserting these claims was issued by the First and Second Claimants on 14 July 2023. This was followed by Particulars of Claim served on 2 August 2023 which quantified the loss of profits element of the claims at c. £3.2 million. Draft Amended Particulars of Claim subsequently circulated in January 2024 revised the total claim down to around £8.1 million, including a reduced loss of profits claim of c. £2.088 million.

20. On 17 June 2025, by which time termination had occurred, Re-Amended Particulars of Claim were filed. The Third and Fourth Claimants were added to the proceedings, and the amount of the claim was increased from c. £8.1 million (as presented in January 2024) to c. £17.4 million, including claims for loss of profits by the Second Claimant (c. £13.5 million) and the Third Claimant (c. £2.5 million). The Claimants submit that the increase arose because of their claims for further losses attributable to the alleged poaching of customers following termination.[2]

[2] As already stated, the First Claimant did not in fact have any claims in its own right against the Defendants in respect of these claims. While it had already taken an assignment in respect of the pre-termination claims, it only took an assignment of the post-termination claims some days later, after it had been pointed out that it currently had no cause of action for them.

21. In terms of particularisation, the Re-Amended Particulars of Claim set out the profits said to have been lost by each of the Second and Third Claimants for the period prior to termination. They asserted that the Claimants had lost the entirety of the annual gross profit attributable to the eve services customer base as it existed at termination *"save for the limited number of customers Onecom was able to retain as customers by migrating them to other suppliers."* It was said that mitigation efforts were continuing and that credit would be given for all sums recovered as a result of these efforts. The pleading then set out a figure for estimated gross annual profit as at termination and asserted that Onecom would have retained and grown its eve services customer base and obtained profits *"over many years"* from the supply to such customers of eve services *"or equivalent services"*.

22. No further particulars of relevance were given as to how the loss of profits claim had been calculated. All that was said was that *"the relevant counterfactual assumptions and quantification of the loss of profits claim will be the subject of factual and expert evidence in due course"*, although it was *"presently and provisionally estimated"* to be in excess of £13.5 million for the Second Claimant and £2.5 million for the Third Claimant.

23. In their Re-Amended Defence and Counterclaim served on 27 June 2025, the Defendants pleaded that the Second Defendant would in any event have been entitled to terminate the MSA without cause on 28 February 2026, and that the Claimants' alleged loss must be calculated on the basis that they would not have been able to provide any eve services to their customers thereafter. There was no direct pleaded response to that assertion.

24. On 25 July 2025, the Defendants served a Request for Further Information. This sought particulars of:

    (a) The pre-termination loss of profits;

    (b) The loss of profits allegedly lost in each year for which the Claimants said they would have retained and grown the eve customer base; and

    (c) Full details of the calculation by which the figure claimed for future loss of profits had been arrived at.

25. The answer received to each of these requests was short and to the point. It consisted simply of two words: *"No response."*

26. The Defendants thereupon issued an application on 13 October 2025 to compel the provision of responses. This came before Mr Sean O'Sullivan KC, sitting as a Deputy High Court Judge, at the CMC on 21 October 2025. He ordered the Claimants to provide responses to the vast majority of the Defendants' Requests, specifically including but not necessarily limited to *"an explanation as to how the figures pleaded at paragraphs 71B-71F of the Re-Amended Particulars of Claim were arrived at, including an explanation of the steps in the calculation in sufficient detail to enable that calculation to be reproduced."*

27. In his judgment, the Deputy Judge explained the reasoning behind his order as follows:

"70. … [The requests] seek 'all facts and matters relied upon in support of' the various allegations about estimated losses. The claimants say that those are not requests which are required at this stage, and that they will be dealt with in disclosure or witness statements. That does not seem to me to be satisfactory. In particular, it seems to me it might be very difficult for the Palmer defendants to make sense of the disclosure and piece it together without knowing how that case is put. For example, they may be given collections of documents showing charges, or showing what has been paid or not paid by certain companies, but how do they know how to assemble those in a quantum whole? Similarly, I do not see why factual witnesses should be explaining how the case works, even if I would expect them to be providing evidence which supports it.

71. It is tempting to leave these kinds of matters for sequential exchange of expert reports. But, exactly in the way that Mr Justice Zacaroli identified, that is dangerous and perhaps misunderstands how a case of this type works and how much work goes on behind the scenes before formal deadlines arrive.

72. For those reasons, it does seem to me that it is appropriate for the claimants to explain how those figures are arrived at, setting out the steps in the calculation in sufficient detail to enable that calculation to be reproduced. It may be that if that involves identifying specific customers, then their names should be set out in some kind of schedule. But it ultimately depends how the claim figure is arrived at. The key is for it to be possible for somebody who is not the claimant to understand how the numbers have been reached; what the ingredients are.

73. … It is clear, in my judgment, that the quantum case as advanced is not sufficiently well explained and that it needs to be. It does not seem to me it would be helpful for the Court to say that Palmer defendants should go away and make further requests which are more carefully refined. The thrust of their complaint was clear and the reality is that no assistance was provided by the claimants. On [sic] *those circumstances, it does seem to me to be appropriate, in relation to those requests, to make orders along the lines I have suggested."*

28. Accordingly, 5 December 2025, the Claimants served a Response to the Request for Further Information as ordered (the "**RRFI**"). This referred, for the first time, to a 22-year period for the extrapolation of future profits, which was said to be based on *"the current length of comparable supply contracts with providers of equivalent services to the Eve services."* It also stated that a discount rate of 9.95% had been applied *"being Onecom's cost of capital, using debt interest as a proxy"* and a growth rate of 7.53% based on the average year on

year growth of the Second Claimant's eve business from Q1/21 to Q1/23 *"inclusive of service/customer churn"*.

29. When pressed by the Defendants for disclosure of the comparable supply contracts referred to, the Claimants rapidly backtracked on 13 February 2026, claiming that the reference in the RRFI was not, in fact, to any written or oral agreement, but rather to Onecom's commercial relationships with comparable suppliers stretching back at least 22 years. It has to be said that this was hardly apparent from the words used and that the RRFI was seriously misleading in that regard.) It was also conceded that there was no single agreement spanning the relevant period. The agreements themselves were eventually provided on 13 March 2026, comprising eight in total, of which most were for durations of 1-3 years, with one 5-year contract having been extended to 8 years. It is the Defendants' case that in any event, none of them is remotely comparable to the MSA.

30. The Defendants do not accept that the RRFI was sufficient to explain what formula had been used by the Claimants to arrive at their figures for loss of profits, or that it explained the steps in the calculation in sufficient detail to enable it to be reproduced, as required by the O'Sullivan order. They accordingly made further requests for clarification, in particular by a letter dated 2 April 2026 in which they intimated an application for summary judgment or strike out unless their concerns were addressed, and expressly raised the *Lavarack* point as appropriate for summary determination.

31. The Claimants' response on 8 April 2026 was that the Defendants' approach was misconceived but that there was no point in debating the matters raised when no application

had yet been made. Instead it was suggested that the Defendants should serve another Request for Further Information. It might be thought that this was a singularly unhelpful response if the Claimants were genuinely seeking to avoid an unnecessary application to court and, unsurprisingly, it led to the present application being issued on 15 April 2026.

32. The Claimants' evidence in response to the application represented a further evolution in their case. In particular, the Ninth Witness Statement of Mr Glynn-Jones clarified that:

    (a) Different calculations had been used for the calculation of loss of profits before and after termination;

    (b) A discounted cash flow ("**DCF**") methodology had been used (which the Claimants say should have been obvious, although the Defendants beg to differ);

    (c) Both the applicable discount rate and growth rate might vary depending on a number of assumptions. (The Defendants say that this raises yet more questions as to what these assumptions are, while the Claimants stoutly maintain that these are matters for expert evidence.)

33. On 2 October 2026 yet more information was provided by the Claimants in correspondence. This explained that the figures in RRFI in fact contained an arithmetical error as an incorrect formula had been used. The correct formula was then given. It was also clarified that the growth rate had been calculated on the basis of the increase in total gross profits earned by the Second Claimant from its eve business in calendar year 2022 as compared to calendar year 2023 and that it included service and customer churn. For this reason, no

separate churn rate had been used. The Claimants refused to provide any further explanations in writing.

34. Against this background, there is considerable force in Mr Strelitz' submission that the exposition of the Claimants' case on the pleadings is inadequate to fulfil the basic function of setting out the legal and factual basis for that case. No doubt due to my own shortcomings, I, for one, had clearly not understood the case properly from reading the pleadings, and it only became somewhat clearer as a result of Mr Nourse's explanations in court. I am particularly troubled by the contention advanced by him in oral submissions (so far as I can see for the first time) that on a counterfactual analysis the Claimants would already have been taking steps to migrate customers to other suppliers *even without any wrongful termination by the Defendants*. This is not a pleaded allegation and yet it represents a key factual assumption which will need to be tested at trial.

35. This is wholly unsatisfactory. The overriding objective requires the Claimants' case on quantum to be clearly pleaded with sufficient particularity to enable the Defendants to identify the issues and instruct their expert accordingly. This means that they have to be able to understand what calculations have been performed and on what basis. In this respect, I cannot improve on the comments of Mr O'Sullivan KC set out above, which remain entirely apposite.

36. I was also treated to a tour of the battlefield that is the inter-solicitor correspondence in which the Defendants repeatedly pressed for information while the Claimants just as repeatedly maintained that this was not necessary in order for the case to be understood.

Ultimately, however, this was of less interest to me than seeing whether there was anything that the Court could and should do now to clear the undergrowth and put this case on an orderly track for trial next April and I have approached the application on that basis.

Applicable legal principles

37. There was no dispute between the parties as to the principles applicable to applications for summary judgment and strike out. In relation to summary judgment and strike out under CPR Part 3.4(2)(a), I was nonetheless referred to a number of authorities, including *Giwa v JNFX Ltd,* [2025] EWCA Civ. 961; *Anan Kasei Co. Ltd v Neo Chemicals & Oxides (Europe) Ltd,* [2021] EWHC 1035 (Ch.): [2021] F.S.R. 24; *King v Stiefel,* [2021] EWHC 1045 (Comm.) and *Arcadia Group Brands Ltd v Visa Inc.,* [2014] EWHC 3561 (Comm.) and have taken everything there said into account. In particular, while the court is not necessarily obliged to take all factual assertions at face value, it should beware of trying to embark on a mini-trial. I am also mindful that I should not pick out single issues for determination which might do no more than give one party a tactical advantage. There must be real utility in the relief sought. I accept that this could be the case if it would substantially narrow the issues for trial or have the effect of dispensing with an expert issue altogether, or make the dispute more susceptible to amicable resolution. *Per contra*, however, if the grant of relief would not actually resolve anything finally. Ultimately, the appropriateness of granting summary judgment or strike out under this head can only be determined on the basis of a fact-specific assessment of the circumstances of each case.

38. In relation to CPR Part 3.4(2)(b), the Defendants accepted that the court must be satisfied (a) that the Claimants' conduct is abusive; and (b) that striking out would be in accordance with the overriding objective. An ulterior motive on its own is not sufficient; it must be shown that the party in question is trying to achieve a collateral advantage beyond the proper scope of the action, or is conducting the proceedings in order to cause expense, harassment or prejudice beyond what is inherent in properly conducted litigation, rather than in order to vindicate its rights. Moreover, it must be a clear and obvious case.

39. As regards striking out under CPR Part 3.4(2)(c) (failure to comply with a court order), both parties accepted that the court had a discretion in this regard which was to be exercised in accordance with the overriding objective.

***Lavarack:* Summary Judgment/CPR Part 3.4(2)(a)**

40. I therefore turn to the critical issue which lies at the heart of the Defendants' application, namely that the pleaded claim for loss of profits over 22 years is unsustainable in the light of the principle set out in *Lavarack.* Unless they are unarguably right about this, the application for summary judgment and under CPR Part 3.4(2)(a) must fail, and the remaining heads are substantially undermined.

41. The Claimants make essentially three points in this regard. First, they dispute the threshold requirements for bringing the principle into play. Secondly, they say that the principle has no application to claims in tort in any event. Thirdly, they submit that they came to court to meet an application for summary judgment/strike out, not for determination of a

preliminary issue. The Defendants could have applied for trial of a preliminary issue but have not. If they had, careful consideration would have needed to be given to the formulation of the issue for determination and it would have been necessary to satisfy the court that such determination was appropriate. None of that has been done and the court should not embark on such an exercise "on the hoof".

42. I accept the force of this last argument. Nonetheless, if there is a discrete point of law which I am in a position to decide and which would clear the decks in any helpful manner and allow a more focused approach to the expert evidence, then there would be a powerful incentive to exercise my case management powers so as to grasp the nettle in pursuance of the overriding objective. The question is therefore whether this is a point which I can properly decide on the material before me and, even if it is, whether I should do so.

43. I start by trying to identify exactly what the *Lavarack* principle is.

44. Its origins lie in the well-known *dictum* of Maule J in *Cockburn v Alexander* (1848), 6 C.B. 791 that *"the question, upon a breach of the contract, is, what is the condition in which the plaintiffs would be if the defendant had performed the contract. Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burthensome to the defendant."* This passage was relied upon expressly by Diplock LJ in *Lavarack* itself, when he reiterated the principle that a defendant to a breach of contract claim was not liable in damages for doing that which he was not bound to do:

"The law is concerned with legal obligations only and the law of contract only with legal obligations created by mutual agreement between contractors – not with expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do. And so if the contract is broken or wrongly repudiated, the first task of the assessor of damages is to estimate as best he can what the plaintiff would have gained in money or money's worth if the defendant had fulfilled his legal obligation and had done no more.

Where there is an anticipatory breach by wrongful repudiation, this can at best be an estimate, whatever the date of the hearing. It involves assuming that what has not occurred and never will occur has occurred or will occur, i.e., *that the defendant has since the breach performed his legal obligations under the contract, and if the estimate is made before the contract would otherwise have come to an end, that he will continue to perform his legal obligations thereunder until the due date of its termination. But the assumption to be made is that the defendant has performed or will perform his legal obligations under his contract with the plaintiff and nothing more. What these legal obligations are and what is their value to the plaintiff may depend upon the occurrence of events extraneous to the contract itself and, where this is so, the probability of their occurrence is relevant to the estimate.*

...

The events extraneous to the contract, upon the occurrence of which the legal obligations of the defendant to the plaintiff thereunder are dependent, may include events which are within the control of the defendant: for instance, his continuing to carry on business even though he has not assumed by his contract a direct legal obligation to do so. Where this is so, one must not assume that he will cut off his nose to spite his face and so control these events as to reduce his legal obligations to the plaintiff by incurring greater loss in other respects. That would not be the mode of performing the contract which is "the least burthensome to the defendant."

A concurring judgment was delivered by Russell L.J.

45. In order to take advantage of this principle, Mr Strelitz submitted that it was only necessary to show that the Second Defendant "could" have terminated the MSA lawfully on 28 February 2026. Mr Nourse did not dispute that it "could" have done so, but submitted that it was also necessary to establish that it "would" have terminated, which he said was quintessentially a factual question unsuitable for summary determination.

46. Mr Nourse's submission derives powerful support from the decision of Phillimore J in *Bold v Brough, Nicholson & Hall Ltd,* [1964] 1 W.L.R. 201 which was discussed at some length in *Lavarack* where it was contrasted with the decision in *Beach v Reed Corrugated Cases Ltd,* [1956] 1 W.L.R. 807. In *Bold v Brough, Nicholson,* the question was whether a wrongly dismissed employee was entitled to be compensated for loss of benefits under a pension scheme which he would have been entitled to claim had his employment continued. The employer had the right to discontinue the entire scheme at any time, but no discretion to withhold benefits from the plaintiff specifically. The Court of Appeal in *Lavarack* held that the discretion to continue or discontinue the pension scheme was not a discretion as to the manner of performing their contract with the plaintiff but a discretion as to the way in which they would conduct their business as a whole and that the plaintiff *"was entitled to be recompensed for the likelihood that his employers would have continued to conduct their business as a whole in such a way as to produce the event which would have entitled him to claim pension contributions under his service agreement if it had been performed."*

47. By contrast, in *Beach v Reed Corrugated*, the employers had an option to discontinue retirement contributions to the plaintiff, irrespective of whether the general scheme continued. Thus, *"the likelihood of their continuing the general scheme was ... irrelevant to their legal obligation to the plaintiff. They could perform their contract in the manner least burthensome to themselves by discontinuing his retirement contributions."*

48. All these cases were subsequently considered by the Court of Appeal in *The World Navigator,* [1991] 2 Lloyd's Rep. 23 in the context of a claim by buyers to recover

demurrage which they had had to pay as a result of a delay in loading a vessel due to sellers' breach of contract. Reference was also made to the decision of Mustill J (as he then was) in *Paula Lee Ltd v Robert Zehill & Co. Ltd,* [1983] 2 All E.R.390 in which he drew a distinction between identification of the contractual promise (where the defendant is assumed to perform in the way least detrimental to himself), and the valuation of that promise (where it is necessary to assess the likelihood of any relevant contingencies occurring and adjust the damages accordingly). In *The World Navigator,* Parker LJ did not express an opinion on this suggested distinction (which had been adopted by Phillips J at first instance) but instead took the view that Mustill J had in truth not been considering what the defendant would probably have done but was instead applying the ordinary *Lavarack* principle and seeking to identify the minimum which it could have been obliged to do had the contract continued. In the case before him, he held that there was *"no question of looking at extraneous events, whether or not in the control of the sellers, and therefore no question of it being permissible to look at probabilities."*

49. Lord Justice Staughton, on the other hand, was unpersuaded by Mustill J's distinction which he did not regard as supported by the authorities. In his view, the *Lavarack* principle applied equally whether the defendant's choice related to the term of the contract actually breached or only to subsequent performance or continuation of the contract. In his view, *Bold v Brough, Nicholson* did not impinge in any way on this general principle and it *"was only in connection with the possible occurrence of events extraneous to the contract, whether in the control of the defendant or of anyone else, that probability has to be considered".*

50. In this context, the decisions of the Supreme Court in *The Golden Victory,* [2007] 2 AC 353 and *Bunge SA v Nidera BV,* [2015], UKSC 43; [2015] Bus LR 987 may also need to be considered. In the former, Lord Scott said at [30]:

> *"If a contract for performance over a period has come to an end by reason of a repudiatory breach but might, if it had remained on foot, have terminated early on the occurrence of a particular event, the chance of that event happening must, it is agreed, be taken into account in an assessment of the damages payable for the breach. And if it is certain that the event will happen, the damages must be assessed on that footing. In* The Mihalis Angelos, *[1971] 1 QB 164, 210, Megaw LJ referred to events "predestined to happen". He said that*
>
> > *'if it can be shown that those were, at the date of acceptance of the repudiation, predestined to happen, then … the damages which [the claimant] can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events.'*
>
> *Another way of putting the point being made by Megaw LJ* [*is that the claimant is entitled to the benefit, expressed in money, of the contractual rights he has lost, but not to the benefit of more valuable contractual rights than those he has lost."*

51. Lord Carswell in the same case stated as follows at [61]:

> *"It might be doubted whether Megaw LJ intended to enunciate a general rule limiting consideration of subsequent events to those predestined to happen, seen from the date of acceptance of repudiation, and it may be observed that neither Lord Denning MR nor Edmund Davies LJ went so far as to tie the consideration of subsequent events to those which could be seen at the date of repudiation as certain to happen. If, however, the meaning to be taken from Megaw LJ's statement is that only events predestined to happen will qualify to bring the exception into operation, then I must decline to accept that as correct…"*

52. In *Bunge v Nidera*, the Supreme Court affirmed the decision in *The Golden Victory*, stating at [23]:

> *"There is no principled reason why, in order to determine the value of the contractual performance which has been lost by the repudiation, one should not consider what would have happened if the repudiation had not occurred. On the contrary, this seems to be*

fundamental to any assessment of damages designed to compensate the injured party for the consequences of the breach. If the contract had not been repudiated, it would have been lawfully cancellable. If it was lawfully cancellable, the charterer would have been entitled to avail himself of that right regardless of his motive. The only question is whether he would in fact have done so ….”

53. I do not find this to be a straightforward point. In particular, it seems to me that the relationship between *The Golden Victory* and *Bunge v Nidera* on the one hand, and *Lavarack* and *The World Navigator* on the other needs further exploration, particularly since both lines of authority drew on the decision in *The Mihalis Angelos.* On any view, this is a point which requires much more extensive and focused argument and is inappropriate for summary determination.

54. Accordingly, I regard it as at least arguable that it is necessary to determine whether the Second Defendant “would” have exercised its right to terminate the MSA in order for the *Lavarack* principle to apply. If so, then this raises a factual enquiry which clearly cannot be determined on a summary basis.

55. Mr Strelitz sought to rely on a passage in the speech of Lord Wilson in *Geys v Société Générale,* [2012] UKSC 63; [2013] 1 AC 253 where he referred to the *“ ‘least burdensome’ principle, namely that damages should reflect only the losses sustained by the employer’s decision to repudiate the contract unlawfully rather than by his having hypothetically proceeded, in the manner ‘least profitable to the plaintiff, and the least burthensome to the defendant’, to terminate the contract lawfully: see* Cockburn v Alexander *(1848), 6 CB 791, 814 (Maule J), and* McGregor on Damages, 18th ed. (2009) para 8-093. *So, where under the terms of the contract it had been open to the wrongfully repudiating employer to*

have taken a course which would have terminated the contract quickly as well as lawfully, the damages will be small." He submitted that this was authority for the proposition that it was not necessary to show that the defaulting party "would" have terminated lawfully, only that it "could" have done so.

56. In my judgment, this passage simply cannot bear the weight which Mr Strelitz sought to put on it. First, the only point at issue for the Supreme Court was whether the automatic or the elective theory of repudiation applied to employment contracts and its decision was expressly limited to that context. Lord Wilson's reference to *Cockburn v Alexander* was simply ukkystratuve of why damages might not always provide adequate compensation on the automatic theory. Secondly, the primary focus of the court was on when the contract had in fact been terminated. There was no discussion of whether the defaulting party needed to prove that it would have acted in a particular way (or of the apparent paradox which might have arisen if it did). In the light of the court's decision on the date of termination, there was no need to consider this point.

57. For these reasons, I cannot accept it as unarguable that the *Laverack* principle applies in this case without any need for a factual investigation.

58. Mr Nourse then raises a further issue as to whether the principle in any event applies outside a purely contractual context. Mr Strelitz argues that it does, because it is in essence a principle of causation which is part and parcel of constructing the relevant counterfactual. He submits that it therefore applies to any claim for compensatory damages, whatever the

basis of the claim. In this context, he drew attention to the comments of Lord Leggatt in *Recovery Partners GP Ltd v Rukhadze,* [2025] UKSC 10; [2026] AC 209 at [162]:

> *"When a claimant's right to claim compensation depends on proving a causal connection between a breach of a duty owed by the defendant and harm suffered by the claimant, the law uses counterfactual reasoning to determine whether the necessary causal connection has been shown. A comparison is made between what actually happened and what would have happened if the breach had not occurred. The purpose of the comparison is to identify with precision those consequences, if any, of the defendant's conduct for which the defendant should (subject to any further limiting factors) be held responsible."*

59. There is a powerful argument that the appropriate yardstick for measuring damages in a claim for repudiatory breach of contract is the defendant's minimum contractual obligation because it is only the minimum contractual obligation of which the claimant has been deprived by the repudiation. But while I can also see a case for saying that the principle extends more generally beyond the realms of pure contractual breach, it can equally be said that, outside the contractual context, the question is much more obviously a question of causation rather than simply a matter of assessing the minimum contractual performance. As such it might not be unprincipled to have to show that the defaulting party "would" have terminated in order to limit the claimant's loss: see *Palmer Birch v Lloyd,* [2018] 4 W.L.R.164 at [239]ff; *Lonrho v Fayed (No. 5),* [1993] 1 W.L.R. 1489, 1505.

60. Again, this point seems to me to be eminently arguable and deserving of much more detailed argument than is possible on an application for strike out or summary judgment. I also note the comments of Sir Anthony Evans in *Mulvenna v Royal Bank of Scotland plc,* [2003] EWCA Civ. 1112; [2004] C.P. Rep. 8 (2003) that issues of causation and remoteness are notoriously fact-sensitive.

61. For all these reasons, I am unable to conclude that the Claimants' claim for loss of profits over 22 years is *bound* to fail so as to make it appropriate to determine the point summarily today.

62. A further critical point to my mind is that the Claimants' claim is for losses caused by the unlawful poaching of their customers (including loss of profits). The relevant counterfactual is accordingly one in which those customers were not enticed away. However, the Claimants were not bound to supply their customers only with eve products. They could equally well supply them with products from alternative suppliers. Their claim is accordingly that the alleged wrongful poaching of customers following termination deprived them of the opportunity to continue selling products of any sort to those customers, whether eve products or other products. That opportunity was not dependent on the continuation of the MSA and would have survived beyond its termination.

63. For this reason alone, it cannot be said that no claim for loss of profits beyond 28 February 2026 (or any necessary run-off period) is capable of being asserted.[3] Whether the opportunity to sell to the *ex hypothesi* unpoached customers would have lasted for 22 years is another question which is no doubt open to serious debate. For example:

    (a) The Defendants say that standard consumer contracts are generally only for 1-2 years and that it is inconceivable that any of them would have lasted for 22 years. The Claimants say that it is standard industry practice to roll contracts over repeatedly.

[3] This was also the Claimants' answer to the Defendants' reliance on internal correspondence showing that the Claimants had taken a strategic decision as early as June 2022 to stop selling eve products and to transfer their customers to alternative suppliers.

(b) The Claimants pointed to clause 22.4 of the MSA which obliged the Second Defendant to continue supplying services for the duration of each customer contract in existence at the date of notice of termination. The Defendants' riposte was to rely on the Second Defendant's right to suspend performance under clause 20 of the MSA which they say it was entitled to invoke as a result of the Hacking Incident and the Ongoing Portal Access issue. This was in turn disputed by the Claimants who asserted that no such right arose as the Hacking Incident had been waived.

(c) There is a further dispute as to whether ongoing damage was suffered as a result of alleged interference with the Claimants' ability to achieve an orderly transfer of customers to alternative suppliers before 28 February 2026. I had some difficulty in understanding why the Claimants would have wanted to do this at all given that the MSA continued indefinitely unless and until terminated by one party or the other. However, it may be related to the decision which was taken in 2022 to stop selling eve products: see footnote 3 above.

(d) The Defendants point to the assertion in the RRFI that a 22-year period was selected on the basis of comparable supply contracts with providers of equivalent services, and the Claimants' subsequent climbdown from that assertion: see paragraph 29 above.

(e) The Defendants say that insufficient account has been taken of churn or potential technological innovation, to which the Claimants' response is that these matters have all been taken into account in the DCF calculation through the choice of discount and growth rates.

64. There may be considerable force in some or all of these points. I express no view either way. However, what is abundantly clear is that they all raise factual issues which are hotly disputed and which are accordingly unsuitable for summary determination.

Abuse: CPR Part 3.4(2)(b)

65. Applying the principles set out in paragraph 38 above, I cannot conclude that the Claimants are behaving abusively, particularly in the face of evidence that they have made periodic payments to Mr Palmer as the quantum of their claims has fluctuated. On the face of it, this is inconsistent with the Defendants' case that they demonstrated an unwillingness to pay come hell or high water.

66. That is not to say that there are no serious questions to be asked about their claim and the way in which it has been advanced. A claim for loss of profits extending 22 years into the future is somewhat surprising, to say the least, and will require anxious scrutiny. But an ambitious claim which may or may not ultimately be established is not necessarily abusive unless the Claimants have no genuine belief in it. As to this, the Claimants' solicitor in his witness statement has testified that their advisory expert has confirmed the appropriateness of the methodology used to calculate the claim. The Defendants have sought to cast some doubt on the objectiveness of the expert, but in the light of this evidence, attested by a statement of truth, it is impossible for me to find that the Claimants have no genuine belief in the asserted claim for loss of profits.

Breach of court order: CPR Part 3.4(2)(c)

67. For the purposes of the present application, the Defendants' complaint is that, despite the O'Sullivan Order and the RRFI, the Claimants have still not provided sufficient detail of their methodology and the assumptions on which it is based to enable the Defendants to reproduce the calculations. The Claimants maintain that this is because the Defendants have misunderstood the nature of the calculation, although (as referred to above), they now accept that the RRFI incorporated arithmetical errors based on use of an incorrect formula.

68. More specifically, Mr Strelitz submits that the RRFI does not adequately explain:

    (a) The basis for the selection of the chosen discount rate;

    (b) Why debt interest has been taken as an appropriate proxy for the cost of capital;

    (c) Why Q1/21-Q1/23 has been taken as the appropriate basis for calculation of the growth rate;

    (d) How churn has been factored into the growth rate.

69. While vigorously protesting that they were under no obligation to do so, the Claimants have nonetheless given some further details in their letter of 2 October 2026 as set out in paragraph 33 above. They have refused to provide any further explanations in writing and Mr Nourse was unable to enlighten me even orally as to quite how churn had been taken into account in the growth rate.

70. Nonetheless, in the light of all the various snippets of information that have been provided to date, whether belatedly or not, it seems to me that there has now been substantial compliance with the O'Sullivan Order. I do not propose to descend into the weeds of whether some or all of it should have been provided sooner. The fact is that the vast majority of the Defendants' queries have now been answered and while there has been no answer in terms to sub-paragraphs (1)-(3) of Requests 16 and 18, these no longer appear to be relevant questions given the methodology adopted.

71. Nor do I consider that the Claimants should be required to provide further answers to the points set out in paragraph 68 above. They have said what they have done and in my judgment they have given sufficient detail to enable the Defendants to take matters up with their own expert. To the extent that the Claimants' approach is challenged, that will be a matter for evidence and debate at trial.

72. In these circumstances, it would not be in accordance with the overriding objective to strike out any part of the Claimants' claim for non-compliance under CPR Part 3.4(2)(c). I return below to the separate question of whether I should nonetheless exercise my case management powers to require the Claimants to replead their case.

Impracticality

73. What I have said above is sufficient to dispose of the application as drafted but Mr Nourse raised a further objection on the basis that it was impossible to see how a strike out/summary judgment would work in practice. As he pointed out, the Defendants are not

seeking final judgment on any claim or issue, and they do not assert that the Claimants are not entitled to assert a claim for loss of profits at all; simply that 22 years is too long. In other words, the complaint is not that the claim is unsustainable, but that the figure advanced is too high. This is not a promising target for summary disposal. Indeed, Part 3.4(2)(a) is arguably not even engaged at all, since even if the court were to strike out the paragraphs of the pleading to which the Defendants object, there would still be a basis for claiming loss of profits – as is admitted. Furthermore, the order sought by the Defendants leaves it open to the Claimants to replead their case, so it is unclear to me quite what would be achieved by the order sought in terms of any saving of time or costs at trial. This in itself is a ground for dismissing the application.

Whither now?

74. I have considered and dismissed the possibility of ordering the trial of a preliminary issue. Even if an appropriate issue could be formulated (and the only viable candidate would be the "would/could" issue in relation to *Lavarack*), this would be of doubtful utility in circumstances where trial is listed for April 2027, the remaining timetable is already tight and there is a distinct risk that such a course would only serve as an expensive distraction and achieve nothing. For example, if the court concluded that it was necessary to undertake a factual investigation into whether the Second Defendant would have terminated the MSA, this is plainly something that could only be done at trial in any event.

75. All that said, I nonetheless consider that the Claimants' case on loss of profits has been advanced in an unsatisfactory and unclear manner and that they should be required to plead

it out fully on the basis of the position as it exists today. This will need to be done in very short order so that the Defendants can instruct their expert appropriately. The Claimants complain that the Defendants should simply have issued a further RFI, but I see no useful purpose whatsoever in requiring an unnecessary procedural step when I can simply make a direction now.

76. Subject to hearing counsel, I therefore propose to dismiss the application but direct that the Claimants should replead their case on loss of profits so as to include *as a minimum*:

(a) The factual assumptions on which the counterfactual methodology has been based. For example, if the Claimants assert that they would have been trying to migrate customers even without any breach by the Defendants, this should be pleaded and they should set out what proportion of those customers they are assuming would have been migrated by the date of termination and what proportion would not, since there is an obvious argument that any customers who had not been migrated from eve products would have had to be migrated after termination in any event.[4]

(b) At least a broad indication of how churn has been factored into the growth rate;

(c) The correction of any errors;

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[4] Note that the intention is for the pleading to set out *what* assumptions the Claimants have adopted, but not necessarily *why* they have been chosen. An example would be the use of debt interest as a proxy for cost of capital. The Claimants have said that this is what they have done. They do not need to explain why. The Defendants' expert should be capable of expressing an opinion as to whether this is a justified approach or not. Likewise, I do not consider that the Claimants should be required to explain why they have selected Q1/21-Q1/23 as the basis for calculating the growth rate. It is sufficient that they have identified that this is what they have done.

(d) The provision of up-to-date details in respect of any matters which have to date been left open, for example in relation to mitigation measures.