Case No: A30BM337

Neutral Citation Number: [2016] EWHC 2155 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
Room 17, 5th Floor Counter
33 Bull Street, Birmingham, B4 6DS

Date: 9th June 2016

BEFORE:

MR JEREMY COUSINS QC, SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION

- -

BETWEEN:

FIRST PERSONNEL SERVICES LIMITED	**Claimant**
- and -	
HALFORDS LIMITED	**Defendant**

- -
- -

Tom Poole, Aidan Casey QC (instructed by **Pinsent Masons**) for the **Defendant**

Hearing dates: 7th, 8th and 9th June 2016

- -

JUDGMENT

RULING (APPROVED)

Thursday, 9th June 2016
(2.00 pm)

Ruling by MR JEREMY COUSINS QC

1. This is my ruling on the amendment application made on the part of the defendant in these proceedings, Halfords.
2. This case was originally listed for trial from 6 to 10 June inclusive this year. It is now necessary to decide whether to allow the re-re-amendment to the defence and counterclaim, pursuant to the defendant's application issued on 25 May 2016. The application has attached to it a draft re-re-amended pleading, which, if the amendment is allowed would introduce extensive amendments to the presently pleaded case for the defendant.
3. The case came before His Honour Judge Barker QC, sitting as a judge of the High Court, for directions last week. Amongst other directions given by him was a series of provisions for the preparation for final hearing of this case, and this application this week.
4. The background to this case is that the claimant is a recruitment agency which supplied personnel to Halfords, a well-known retailer of car parts, bicycles and other accessories. The personnel were supplied as temporary agency workers over many years. The claimant says that such staff were provided subject to its terms and conditions, which made provision for payment of charges for temporary workers so provided and for fees for such workers, who were to be paid in respect of workers subsequently engaged in specific circumstances.
5. Late in 2011 the defendant, to whom I shall refer as "Halfords", decided to source its temporary staff from a company called Staffline Group instead of from the claimant. The arrangement took effect from December 2011. The transfer of staff consequent upon this was subject to the

Transfer of Undertakings (Protection of Employment) Regulations 2006, to which I shall refer as "TUPE".

6. The claimant's claim has two elements to it: the first, £68,211.44 in respect of invoices in relation to the provision of temporary staff; the second, £557,789.44 in respect of transfer fees said to be payable upon the transfer of staff.

7. In answer to the particulars of claim which were subsequently amended, Halfords served and has ultimately re-amended a defence and counterclaim, to which I shall refer simply as "the defence and counterclaim".

8. In this ruling when I refer to "proposed amendments" it is to the amendments to that pleading, that is to say the existing current version of the defence and counterclaim, that I am referring.

9. In order to understand properly the issues arising upon this application, I need to refer to what is pleaded in the defence in some detail.

10. In paragraph 4.2 of the defence, it is pleaded that:

> "The claimant invoiced the defendant for services calculated by reference to the number of hours worked by the relevant employees with the rate per hour depending on the type of role being filled, and whether the work is during ordinary hours or overtime, and including elements to cover paid holiday entitlement accruing to the employees against the claimant under the working time directive ..."

11. That is defined as the holiday entitlement element of charge, the National Insurance liability the claimant will have to HMRC in relation to employees on pay and holiday accruals, that is referred to as the NI element of the charge, and a management fee or margin percentage. VAT was then charged by the claimant on top of those sums.

12. Paragraph 5 pleads that:

> "The claimant at all relevant times expressly explained its pricing to the defendant as being transparent, based upon and calculated as a formula from these elements, for example in its

e-mails breaking down its charges into these categories, dated 22 December 2004, 29 September 2005, 13 July 2009, 24 October 2011, and in its tender request for information document in autumn 2011. In particular the holiday entitlement element of the charge was represented and/or agreed to cover the paid holiday entitlement that would accrue to the employee as a result of its work for the defendant and the NI element of the charge was represented and/or agreed to cover the National Insurance liability the claimant would have to HMRC in relation to the employees."

13. Paragraph 6 stated that:

"As a result of matters set out in paragraphs 4 and 5:

"(i) the statements in paragraph 5 induced the defendant to enter into various contracts for service under which staff were provided. Moreover, the claimant owed a duty to the defendant to take reasonable care as to the truth of matters pertaining to their negotiations such as these; and

"(ii) it was promised and warranted by the claimant as part of the contract for services between the claimant and defendant, alternatively a collateral contract, that the holiday entitlement element of the charge would be used to cover paid holiday entitlement; and the NI element of the charge reflected the claimant's NI liability to HMRC in relation to employees; and if and to the extent that they were not, did not, these elements of the charge would be refunded to the defendant."

14. That is defined as the Charge Components Agreement.

15. Throughout this pleading, both in its current form and in accordance with the proposed amendments, there is reference back to the Charge Components Agreement, and that is a reference back to the passage which I have just read from paragraph 6.

16. Paragraph 13 of the defence and counterclaim effectively put the claimant to proof of the claim for the provision of temporary staff, but it also raised a set-off in respect of the counterclaim.

Paragraphs 15 to 25 took issue with the claimant's entitlement to any part of the claim for a transfer fee or interest upon the claim. For present purposes, it is not necessary for me to say more as to the nature of the issues in dispute in connection with the claim. As for the counterclaim, the defence and counterclaim asserts that Halfords was overcharged in respect of the holiday entitlement element of the charge, which though prepaid by Halfords to the claimant, was not in fact paid by the claimant to staff concerned. The result, it is said, was that Staffline paid staff accrued holiday pay and invoiced Halfords, who paid the invoiced amount of £69,000-odd in April 2012. Halfords now seeks as damages for breach of the Charge Components Agreement the sum paid over, or restitution in respect of unjust enrichment.

17. Next, in paragraph 31A, Halfords says that it was overcharged in relation to holiday pay because the claimant calculated the same by taking overtime into account when calculating entitlement, when overtime should have been left out of account for the purposes of the Working Time Directive. Recovery of that overpayment is sought on the basis of misrepresentation under the Misrepresentation Act 1967, negligent misstatement at common law, and as a breach of the Charges Component Agreement.

18. So far as the National Insurance element of the counterclaim is concerned, what is pleaded is that Halfords has been overcharged for the National Insurance element of charges invoiced to it essentially because of the claimant's failure to take into account the relevant threshold for earnings pursuant to which National Insurance contributions are liable to be made; and also because of a failure to take into account a Travel and Subsistence Salary Sacrifice Scheme ("the Salary Sacrifice Scheme"), agreed with HMRC, whereby part of the staff salaries was sacrificed by employees and deemed to be received as an expense of travelling to a temporary workplace.

19. It is asserted that Halfords was not able to plead its case fully in respect of the amount overpaid because Halfords did not have the underlying data as to the hours, rates and charges for relevant

workers during the relevant period, or the details of the Salary Sacrifice Scheme, and that Halfords will plead further, following full and proper disclosure of that information.

20. That plea as to the inadequacy of information available was contained in the originally pleaded defence and counterclaim, and it has remained there throughout. In the proposed re-re-amended pleading, it would be paragraph 35. In the re-re-amended form, it is said that the counterclaim is estimated to be in the region of at least £760,000, excluding VAT.

21. The recovery of overpayment in the case of the various elements in respect of which recovery is sought is pursued on the bases of claims under the 1967 Act, negligence and the Charge Components Agreement.

22. Against the case formulated by Halfords, the claimant maintains that a composite rate was agreed between the parties whereby staff would be provided by the claimant to Halfords. It is therefore the claimant's case that the various overcharge claims are simply unsustainable because there was no contractual term whereby the services to be provided would be provided on a cost plus basis, so that if, for example, the actual sums paid to staff prove to be less than Halfords might have anticipated, or if the National Insurance handed over to HMRC proved to be less than was anticipated, this would be irrelevant: there was a fixed charge in relation to what would be payable, and that sum is something which Halfords was and is liable to pay, irrespective of what particular costs might have been incurred by the claimant.

23. So there is a very sharp distinction drawn on the pleadings between the parties' contentions as to the nature of the agreement that underpinned their relationship. Was it to be, as Halfords have suggested, a costs plus approach, or was it to be a composite rate that was to be charged?

24. On 3 May 2016, the claimant, through its solicitors, Messrs Shakespeare Martineau, disclosed information which has been referred to throughout this hearing as the Tempaid data, so-called because of the name of the claimant's payroll and invoicing system. Halfords says that this information has enabled it to identify aspects of overcharging which it had not previously been

able to identify, and to reformulate its case in a fashion that it was simply not possible to do before the Tempaid data was provided.

25. Halfords says that the Tempaid data was provided late, in breach of the requirement to give standard disclosure, which should have been provided by 26 February 2016, and despite written requests for information of this very kind disclosed to the Tempaid data, which requests for information go back to January of this year. I should say that standard disclosure was purportedly effected by both parties on 26 February 2016.

26. The claimant resists the proposed amendments, maintaining that it is not credible that the proposed amendments arise from the suggested late disclosure. First it is said that Halfords intended to amend even before the Tempaid disclosure, and reliance is placed on a letter of 22 April 2016. Secondly, it is said that there was no failure to give standard disclosure at all, because there was no obligation to disclose the Tempaid data in respect of the pleaded issues, and that a new case had not previously been pleaded, which would have caused the Tempaid data to become relevant. Thirdly, it is said the Tempaid data has not actually assisted in the pleading of the case, as is demonstrated by the proposed amendments, which would substitute for precise figures in some instances mere estimates but in higher figures than are presently pleaded.

27. Before describing the proposed amendments and the parties' respective cases as to whether or not they should be allowed, I need to describe more fully the background to the Tempaid disclosure and its significance. There is no doubt that Halfords has long maintained its inability to formulate precisely its overpayment case, because it did not have underlying data as to hours, rates, charges and so on for relevant employees; and, as I have observed already, this has been pleaded at least since the inception of this litigation.

28. The request for fuller disclosure of information, which substantially mirrored information actually disclosed later in the Tempaid data, began in correspondence in January of this year.

That correspondence was actually “without prejudice” correspondence, although no issue is taken as to the fact that the subject matter of the request for disclosure of further information would not in itself attract privilege.

29. It is not necessary for me to go back to the January correspondence because similar requests for disclosure of information were pursued in open correspondence in February 2016, and some time before standard disclosure was purportedly effected.

30. On 12 February Halfords solicitors wrote to the claimant's solicitors, Messrs Shakespeare Martineau, and in their letter they said, amongst other things:

> "Thank you for confirming that your client will also be ready to exchange disclosure documents by 26 February 2016. Please also confirm that your client's disclosure documents will include the following information, in order to enable us to calculate the full quantum of our client's counterclaim:
>
> "1, the full names of each worker supplied by your client to our client from 1 October 2008 to 31 December 2011.
>
> "2, their dates of birth or employee reference numbers or other method of ensuring we can accurately identify each worker.
>
> "3, the basic hours worked by each worker each week.
>
> "4, the overtime hours worked by each worker each week.
>
> "5, the hourly rate.
>
> "6, the management fee.
>
> "7, which NI category applied to each worker."

31. This letter was followed up on 18 March 2016 by Pinsent Masons and the request made in the earlier letter was repeated at paragraph 1.2 of the later letter. This produced a response from Shakespeare Martineau on 30 March 2016, and it is clear from the letter from Shakespeare Martineau that by this time the claimant and its solicitors were well aware of the Tempaid data and their availability because in the letter concerned, the solicitors stated this, in numbered section 2 of the letter:

> "At the point our client entered into this litigation in or around March 2012, it took a copy of its software data. Therefore, the detailed timesheet data that our client has in relation to each worker is only capable of going back as far as 7 November 2010. Therefore, if our client is willing to consent to release the data it has retained, it would only be able to do so for the period from 7 November 2010 to December 2011. We are currently taking instructions in relation to this data and will revert to you in due course."

32. I have to say, having spent several days considering this application, I am in no doubt whatsoever that those references were to the Tempaid data, and it will be apparent from what I say later, which emerges from the claimant's evidence of Mr Pepall, that indeed the Tempaid data were known about by Mr Pepall, one of the claimant's intended witnesses, certainly from the autumn of 2015.

33. A point in my view fairly taken by Mr Casey QC, learned counsel for Halfords, is that it really was not, at the time of writing this letter in March 2016, a matter of the claimant's willingness to consent to the release of anything which might be subject to standard disclosure; there was an obligation to deal with a request for such disclosure which had subsisted certainly by 26 February of this year.

34. The letter to which I have just referred was followed by a letter from Pinsent Masons for Halfords on 22 April. This letter repeated that a demand for disclosure had been made in

previous correspondence, and it gave a clear warning at paragraphs 2.10 and 2.11, and given the significance of this correspondence, it is appropriate that I read it in full:

> "We are currently unable to quantify our client's counterclaim from the documents disclosed to date since they are limited to only certain workers for one tax year and do not include data regarding basic hours, overtime hours and/or relevant management fee applicable overtime. Please therefore provide documents evidencing the information set out in paragraph 2.4 above from August 2008, six years prior to the date your client's claim was issued, as soon as possible and by no later than 4.00 pm on 29 April 2016. We reserve our client's right to request such documents from earlier time period if appropriate. Your client should already have disclosed these documents two months ago. If you do not provide copies of documents enabling us to quantify our client's counterclaim by 4.00 pm on 29 April 2016 our client will apply for an unless order that your client's defence to counterclaim be struck out unless these documents are disclosed in sufficient time for us to quantify our client's counterclaim prior to filing our client's amended defence and counterclaim prior to trial."

35. The claimant's solicitors responded on 3 May 2016, and they said at paragraph 4.2:

> "We accept that our client has a duty to disclose documents relating to your client's counterclaim, however misplaced our client believes that counterclaim to be. However, the issue here is not an unwillingness to provide disclosure of the documents but an inability to provide all the documents that you require. Our letter of 30 March 2016 informed you that our client is only able to provide detailed data for all of the workers that it can identify as having worked for your client as far back as 2010. It is this information that can be disclosed and we will disclose this separately, given that it is in an Excel format."

36. I observe at this point that whilst it was being said that that information was available and was about to be disclosed, it is not clear why the information was not disclosed sooner than in fact it was, even in immediate response to the letter threatening an unless order application on 22 April.

37. At paragraph 4.8 the letter continued:

> "Our client extracted data from its Tempaid system in March 2012 (snapshot extract). At that point in time the earliest date for which detailed payroll data could be extracted was November 2010. It is this data that will be disclosed in an Excel format. This data contains the majority of information you require save for the NI category and management fee, but for the period identified above."

38. Then at paragraph 4.11, and this is significant in relation to matters that I have to deal with later on, the letter stated the following:

> "Our client has disclosed P11 and P60 documents to you relating to the transferred workers for the tax year 2010/11. It would take a disproportionate and unreasonable period of time for our client to go through the process of printing P60 and P11s for each worker for the complete period you have requested. Furthermore, as we have previously informed you the data in the P60 and P11 will be misleading. This data does not identify hours worked solely for your client, the data covers all hours worked by the worker which could be for any number of our client's customers. For this reason this data is unreliable and flawed for the reasons/purposes your client intends to use it for."

39. So - and the significance of this will become more apparent later in the course of this ruling - the P60 and P11 data was said at this time by the claimant's solicitors to be unreliable and flawed.

40. Later that day, on 3 May, the Tempaid data was duly provided. It is important, in fairness to everyone concerned in this case, that I make this observation at this stage: there is no suggestion that the late provision, as I shall explain I find it to be, for reasons given later, of this information

was brought about by bad faith in any form. That is not the case advanced by Halfords, and nothing that I say is intended to suggest that I consider that there was any misconduct or bad faith by anyone. The criticisms are criticisms of a failure of process, a failure to comply with the rules of court, no more, no less.

41. The claimant's witness statements served in May 2016 addressed the content and significance of the Tempaid data. Mr Lewis Pepall, an accountant and the claimant's finance director, provided a witness statement - his first witness statement - the purpose of which was, amongst other things, to address the claim and counterclaim. It was not prepared for the purpose of answering an application to amend, which at that stage had not even been made.

42. Mr Pepall's evidence, which was intended for trial rather than this application, is, however, in my judgment, highly relevant to the matters with which I am presently concerned. He said at paragraph 12:

> "My first involvement with Halfords and the dispute was in around November 2015, when I was asked by Matthew and Laurence Reddy [those are officers of the claimant] to review Halfords' counter-schedule of loss which was prepared in response to First Personnel's claim for transfer fees. To enable me to be in a position to review Halfords' position, I needed to investigate whether I could extrapolate data from First Personnel's invoicing and software, Tempaid. Tempaid is the pay and charge system that First Personnel have used for many years. This system takes all the timesheet data and collates hours paid, pay rate and charge rate for a given pay reference period to calculate a worker's pay and the corresponding charge to the client. It is this system that collates and stores all statutory record keeping data for payroll.
>
> "I was doubtful whether Tempaid contained detailed payroll data going back to the point that First Personnel's contract was terminated with Halfords in December 2011. I say this because Tempaid holds timesheet data for a period of 17 months. This is the default system

setting. I believe it is possible to alter this default setting. Timesheet data is information and data relating to the hours, pay and charge rate for each timesheet received from a client for any given employee. This means that if an employee worked for more than one client, then the same employee could have a number of different timesheets which were provided by different customers.

"The presentation of this data is further complicated because the same employee could have worked in different departments, shifts or roles for a single customer and at different pay rates, for example overtime. The upshot of this is there could be a number of lines, timesheet data for any one employee for any given pay week."

43. He defined that as primary data. Then he continued in paragraph 16:

"Tempaid collates and consolidates the primary data into a single data record for that week for that employee. It is this data which comprises part of our statutory record-keeping requirements. It is also this level of data which is used to calculate what I referred to below as 'secondary data', that is the workers' tax and National Insurance liabilities, both employer and employee, along with any other salary benefits and/or deductions.

"17. Tempaid produces a payslip based on the secondary data. The secondary data is also what is reflected in P60 and P11 documents.

"18. In addition to Tempaid only being able to automatically consolidate the primary data for a period of 17 months, Tempaid is also unable to reproduce payslips for a period going back longer than beyond 17 months. In respect of the secondary data, as this forms part of our statutory obligations, it is retained indefinitely."

"19. When I accessed Tempaid in or around November 2015 I suspected that the primary data had been purged due to the 17-month automatic retention policy for primary data. Upon looking in detail, I realised that this was, indeed, the case.

"20. The primary data is the only accurate source of data for the workers that First Personnel provided to Halfords."

44. I interpose here this observation: Mr Casey stresses that those are Mr Pepall's words - "the only accurate source of data for the workers that First Personnel provided to Halfords".

45. I return to the text:

> "Without the primary data it is not possible to identify which workers worked for which client.
>
> "21. However, by searching the electronic server files, I discovered, shortly after the point of transfer, in March 2012, Paula Charlesworth, credit control and worker payments manager of First Personnel, had run an extract from Tempaid of all of the primary data relating to Halfords at the time, and saved it in an Excel spreadsheet (snapshot data). Presumably this was done as a result of the ongoing dispute at the time to preserve the data in anticipation of any legal proceedings. When I looked at this data, it only went back to 7 November 2010, which was as a result of the automatic system consolidation process. The snapshot data is the only source of primary data that First Personnel have for Halfords. This is the only data that First Personnel has available to it accurately to consider, review and be able to analyse and/or reconcile the allegations made by Halfords.
>
> …
>
> "24. To enable me to consider Halfords' arguments on First Personnel's claim for transfer fees I needed to obtain the primary data for all workers who worked at Halfords for the period in question.
>
> …
>
> "38. The first time I looked at the counterclaim was shortly after I completed my initial analysis on Halfords' counterschedule on the transfer fees.
>
> …

"43. In an attempt to demonstrate the liability that could accrue if Halfords' assertion that a costs plus agreement had been entered into with respect to NI charges I have used the primary data to calculate accurately what Halfords are trying to demonstrate using the snapshot data for each payroll year."

46. He then stated certain assumptions, and then in a table set out a pro rata calculation based on actual sales, which table concluded by setting out that there had, indeed, been an overcharge of £72,275. I observe, significantly less than is suggested on the part of Halfords, but nevertheless an overcharge.

47. I should also refer to the second witness statement of Mr Pepall, dated 2 June 2016. This was made in response to Halfords' application of 25 May for leave to amend its pleadings. Mr Pepall said at paragraph 5 in this second statement:

"I used the invoice and charge rate data contained in the Tempaid data to analyse the defendant's counter-schedule of loss in response to the claimant's claim for transfer fees in December 2015. I used the Tempaid data to cross-reference the invoice analysis presented by the defendant's solicitors so as to identify errors and omissions. I understand that my analysis, which identified errors and omissions, was disclosed to the defendant's disclosures in December 2015 as part of without prejudice discussions".

48. Then in paragraph 10:

"I used the pay rate information in the template data to make the comments at paragraph 43 of my witness statement [which I drew attention to a moment ago]. I believe that I would have originally carried out this calculation in or around March 2016, although I cannot be certain."

49. The requirements of standard disclosure are set out at CPR 31.6, which provides as follows:

"Standard disclosure requires a party to disclose only: (a) the documents on which he relies, (b) the documents which (i) adversely affect his own case, (ii) adversely affect another party's case, or (iii) support another party's case, and (c) the documents which he is required to disclose by a relevant practice direction."

50. Obligations as to search are set out at CPR 31.7, which it is not necessary for me to read extensively but I do draw attention to CPR 31.7.3 which provides that:

> "Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document."

51. Now, it seems to me perfectly clear what is the reason that lies behind CPR 31.7.3 and that is that if a party decides that it is unreasonable or disproportionate to carry out a search for a document, then that party must make it clear to the opposing party that that is the case so that the opposing party has the opportunity of taking issue with the judgment made by the disclosing party, and, if necessary, having the matter determined by the court. It is not for the disclosing party to police whether or not something shall be given in the course of standard disclosure, or shall be the subject of a search.

52. Other provisions of the CPR do make provision in that regard, for example CPR 31.5 specifically provides that the court may limit the scope of standard disclosure. It may even dispense altogether with standard disclosure.

53. In my judgment, the Tempaid data clearly fell within the scope of standard disclosure. Mr Pepall's evidence discloses that the snapshot data is, as he describes, the only source of primary data that the claimant has for Halfords. In the form of an Excel spreadsheet, it identified the worker, his reference, where he worked, his rate of pay, whether his work was basic rate or overtime, the hours that he worked in the course of a week, the applicable pay rate, which could vary, the applicable charge rate, which also could vary, the pay total for the week and the charge total for the week. This material, quite plainly, could support Halfords' case or adversely affect the claimant's case as to

whether there had been an unexplained discrepancy as to what an employee had been paid and what was charged to Halfords for that employee's services after making any appropriate adjustments for National Insurance or, indeed, anything else.

54. Mr Pepperall QC for the claimant, in the course of his able and admirably clear submissions, maintained that disclosure of the Tempaid data could have led to disproportionate costs. He suggested that much of what is in the Tempaid data could have been gleaned by Halfords from other sources, for example, Halfords' own Kronos time-recording system, or TUPE data which had been provided to Staffline; or on the transfer of staff.

55. However, as I pointed out to Mr Pepperall in the course of argument, no application to limit standard disclosure was made by the claimant in this case, and no issue as to the proportionality of any search for Tempaid data arose because, as Mr Pepall's evidence revealed, he had gained access to the data in November 2015 and discovered the snapshot had indeed been saved.

56. Mr Pepperall suggested that I should approach the matter of non-disclosure on the basis of whether an application for limiting disclosure had been made at an appropriate time the court would have been likely to accede to it.

57. I am perfectly prepared to approach the matter on that basis, but if I do so, I have no doubt at all that such an application would have been refused. The court would not have been prepared to permit non-disclosure of a document which the claimant had already retrieved and which clearly fell within the scope of standard disclosure, and upon which the claimant's witness was working for the purposes of a witness statement; it could not possibly be fair, or just, to deny Halfords access to a highly pertinent document actually being deployed by the claimant in the course of preparing its responses to Halfords' case, the very purpose for which Mr Pepall used it.

58. For these reasons, I consider that the claimant was in breach of its disclosure obligations and in a significant respect.

59. Whilst I do not consider that there is, as I have mentioned already, any basis at all for saying that the failure to disclose was affected by bad faith on the part of the claimant or its advisers, it would, I consider, have been obvious, if anyone had thought about it, that should the time come when the Tempaid data was disclosed, then it would be highly likely that Halfords would wish to use that material for the purposes of revisiting the case if it were to present a case to the court, both as to pleadings and as to evidence. The later the disclosure, the more likely it would be that the anticipated trial date might be affected, to say the least, or jeopardised.

60. The conclusion that the disclosure of the Tempaid data was late and constituted a breach of the claimant's disclosure obligations, does not by itself, of course, operate as a licence to Halfords to seek to make major amendments to its pleadings. What has to be considered is the significance of the late disclosure for the purposes of Halfords' preparation of its case, and whether independently of the Tempaid data Halfords could and should have been able to identify the matters which it now seeks to introduce by further amendment.

61. Before considering the issues in relation to each of the proposed amendments, it is appropriate to assess the overall significance of the Tempaid data in the context of other information sources which were available, or said to be available, to Halfords prior to the time when the Tempaid data was finally disclosed.

62. Halfords' position is that the Tempaid data was crucial to the identification and evaluation of the case in that it brought together in a readily accessible format much of the information which Halfords had been seeking since well before the disclosure in late February.

63. Now, it is convenient for me at this point to make this observation: I have said already that I do not consider that the way in which disclosure actually came about was affected by bad faith. In the same way it seems to me that the way in which the information has subsequent to disclosure been dealt with by Halfords is equally capable of a perfectly respectable explanation, and that is that

Halfords genuinely wanted that information before it was disclosed, and it has not latched upon the late disclosure as a justification for trying to make wholesale amendments to its pleadings.

64. In my judgment, that is demonstrated by the fact that since January this information, this kind of information, was being sought.

65. Halfords submits that without the Tempaid data, much of the material required was simply not available at all, or to the extent that it was available, it was looking for needles in haystacks, and even when the needles were found, they painted an inadequate picture that did not enable the now proposed amendments to be properly formulated.

66. The claimant's case is that other available information sources were adequate to enable Halfords to prepare its case properly so that the late amendments should have been avoided. Mr Pepperall submitted that this case would always involve a degree of extrapolation, since even with the Tempaid snapshot data, there is no complete set of information available.

67. Mr Pepperall identified many sources of information which he submitted were an adequate alternative and were sources from which Halfords could have prepared its case. These consisted of, first, Halfords' Kronos data, taken from Halfords' clocking-on system. Mr Pepperall suggested it contained details of hours worked and holidays for each employee. Secondly, invoices, which would identify employees, what they had done, whether the hours worked had been basic or overtime, and rates charged. Thirdly, there was what Mr Pepperall called the August Tempaid disclosure, or August Tempaid, to be found in the hearing bundle, or trial bundle, in fact, at C3/686 to 695. It formed part, Mr Pepperall says, of the original disclosure. He took me to this source of information in some detail in the course of his submissions. The August Tempaid related only to the month of August 2011, but it did identify certain employees, whether time was basic or overtime, hours worked, pay rate, charge rate, pay total and charge total. (Later in submissions Mr Pepperall said that on further checking the matter, it appeared that the August Tempaid had in fact been provided under cover of an e-mail of 21 September 2011 to Halfords, so that in fact it was being

provided very much earlier than February 2016. That is correct as a matter of fact. It does not, for reasons that I shall have to come to later, paint the full picture.) Much reliance was placed by Mr Pepperall on the August Tempaid material. Forthly, there were TUPE data, also known as employer's liability information, or ELI. This was provided to Staffline at the time of employee transfers, and formed part of the February disclosure. This covered 190 employees and disclosed pay rate information. Fifthly, there transfer fee claim data, referring to a document which is at C7/1966 in the trial bundle. This listed employees, sites, dates of birth, dates of work, rates, net salaries and working time directive information, a fee percentage, a permanent introduction fee charge, and related fee charge information. Sixthly, there were data provided to Mteq, a business that had worked with Halfords in trying to assist in cutting agency workers' costs. The chief figure from Mteq involved in this process was a Mr Gardner, who has provided a witness statement for trial for Halfords. Mteq's representatives have liaised closely with the claimant concerning costings in 2011 and in the course of such communications were provided with four weeks of sample payslips. However, it must be remembered that Mr Pepall has pointed out that payslips cannot now be retrospectively recreated. I mention that because, as I shall return to the point later, it is said on the part of Halfords that those payslips are simply now not available, or what's become of them is not known, but it is said that neither Mr Gardner nor Halfords have them. Seventhly, there were P11s for 190 workers for one tax year. This is said to be a reliable indicator as to what was actually paid to HMRC. Eighthly, there were P60s which formed part of the February disclosure.

68. Mr Casey went through these various sources of information systematically in the course of his reply yesterday afternoon, dealing with them in the same order.

69. First, Kronos. Mr Casey referred to the evidence filed in support of the application to amend by Mr Jason Kirwin, a solicitor with Pinsent Masons, and he took me in particular to paragraph 41.15 of Mr Kirwin's first witness statement. Mr Kirwin said this:

"While Halfords could possibly determine the number of basic overtime hours for its time-recording system Kronos, Halfords did not have access to data regarding pay rate, holiday pay paid and charged, management fee charged or composite rate data, in sufficient detail to enable quantification of the overcharge prior to disclosure of the Tempaid date on 3 May 2016, and all this information is still outstanding.

"Halfords' Kronos records are incomplete and inaccurate. In addition the payslips provided to Mteq as part of their audit only cover a four-week period rather than a whole year which would be necessary in order to identify a possible holiday pay overcharge. Furthermore, First has already criticised Halfords' hard copy invoice records as being significantly incomplete and the electronic invoice data held by First and Halfords does not contain sufficient information to obtain quantum calculations because it does not distinguish between basic and overtime hours; nor does it provide data on a week by week basis."

70. In his second witness statement at paragraph 24.4, Mr Kirwin reiterated the inaccuracy and completeness and limited nature of the data in the Kronos information.

71. Secondly, invoices. Halfords has only a proportion of the invoices sent to it by the claimant. That is something to which Mr Kirwin deposed in his second witness statement at paragraph 24.1, and it was a point that had been taken on the part of the claimant, as Mr Kirwin points out at paragraph 20.3 of his second witness statement. Furthermore, as Mr Kirwin pointed out, the records only show the amounts invoiced and paid and do not give detail as to pay rates, charge rates, basic hours or overtime.

72. Thirdly, August Tempaid. The August Tempaid data at C3/686 of the trial bundle and following pages were provided under cover of an e-mail which is to be found in the trial bundle immediately before that data. The e-mail was from Mr Crane, at the claimant, and sent to Mr Mark Shirley of Halfords, and said:

"Please find attached the costing proposal reference to the national minimum wage increase. Sorry for the delay in getting it to you."

73. Mr Casey - these were not his words, they are mine - makes the point that that e-mail, although clearly it was not written for that purpose, might well have had the effect on anyone going through the e-mails and looking at the description of the e-mails in any disclosure, of "throwing them off the scent", because it was said to relate to a proposal. Its significance, said Mr Casey, only dawned on the claimant's lawyers and witnesses much more recently.

74. He makes a further point, which I consider to be a fair one, and that is that it does not seem that the August Tempaid data was appreciated, or suggested to be as significant as the status now given to it on the part of the claimant until very recently indeed, because it was not mentioned, even in the skeleton submissions prior to this hearing, as being relevant to sources of knowledge; nor did it figure in the evidence in opposition to this application.

75. A further point in relation to the information called August Tempaid is that it is not clearly established in the evidence that it is from Tempaid at all, and the August Tempaid does not mention someone who appears elsewhere in the documentation who is known to have been an employee at the relevant time, a Mr McClusky, and therefore the completeness and the accuracy of the August Tempaid is not by any means a certainty.

76. Fourthly, as for the TUPE data, this only relates, submitted Mr Casey, to 190 workers who were transferred, and then only covers the period for the year beginning April 2011. But in the case of Mr McClusky, he points out - and this is just by way of example - the current pay rate stated in that documentation was £6.50 an hour, but as the Tempaid data shows, by contrast, he was often paid at different rates. Therefore, it is said, I consider with some force, that in relation to other employees the picture is quite likely to be equally partial, so that the TUPE data is no satisfactory substitute for the Tempaid data.

77. Fifthly, the transfer of fee claim data. This only relates to 190 employees, submitted Mr Casey, and then shows only what Halfords were told would be paid, or applied to employees, not what they actually were paid. This is an important feature of much of the dispute, with Halfords maintaining from the outset of this case, on aspects which were previously pleaded, though now it has sought to expand the area of claims, that there was a discrepancy between what it had agreed to pay on a costs plus basis, subject to representations and warranties, as set out in the parts of the pleadings which I have referred to already, that to the extent that actual payments made to or on account of staff, for example by way of employer's National Insurance, any surplus would be returned to Halfords. To ascertain and plead properly its case, Halfords needed, therefore, to know not merely what were agreed to be invoiced rates, but what were the sums actually disbursed by the claimant, whether in terms of salary, holiday pay, National Insurance or otherwise.

78. Sixthly, the Mteq data and payslips. This matter is dealt with in Mr Kirwin's evidence, submitted Mr Casey, in his second witness statement, paragraph 24.5, as to the limited period covered by the payslips and as to their non-availability, for reasons that I need not repeat.

79. Seventhly, the P11s only relate to 190 employees transferred and are only available for the period April to December 2011, and for reasons that it is not necessary for me to repeat again, it is the claimant's solicitors who have, in correspondence, described this source of information as unreliable, see paragraph 4.11 of their letter of 3 May 2016; and I repeat that observation in relation to Mr Casey's eighth submission in relation to sources of information concerning P60s.

80. In my judgment, whilst there were other sources of information, it is clear that they were partial, difficult to identify or locate, inadequate or not capable of being relied upon satisfactorily, in part, at least, for reasons identified by the claimant's own solicitors. It is not necessary for me to repeat the matters to which I have referred already when describing Mr Casey's detailed submissions. I have to say, for present purposes, I am satisfied that the Kronos information and the invoices record were incomplete; that they contained only limited data; that the August Tempaid was not readily

identifiable because of the content of the covering e-mail and the description of it given in disclosure; the TUPE data related only to 190 workers, as did much of the other information that was provided; it did not identify adequately differing rates paid to the same employees. The transfer claim data did not enable checks to the carried out as to the difference between what Halfords expected to be disbursed and what actually was disbursed, and the Mteq data is no longer available. And its extent, indeed, is unclear.

81. As for the P11s and P60s, eighthly, I need not repeat the matters that I have now referred to more than once already.

82. In short, I find that the shortfall in information that arose from the failure to effect proper and timely disclosure of the Tempaid data was not made good from other sources that already were available to Halfords. The absence of the Tempaid data made it much more difficult to identify claims and particularise them and to prepare and present the case even when other sources were available. In many instances it made it impossible to check whether disbursements of monies were, as Halfords says, expected, to check the omission of information that necessarily had the consequence that the process of claim formulation would depend upon extrapolation to a greater extent, rather than calculation from actual records, because the less information that was available, the more there would be a need to rely upon or indulge in attempted after the event reconstruction.

83. I turn, then, to the proposed amendments. The first amendment to the counterclaim relates to what is described as the pay rate overcharge. This is an entirely new element in the counterclaim and did not figure in any way, shape or form in the original counterclaim.

84. The pay rate overcharge plea is at paragraphs 25(a) to 25(d) of the draft pleading. It refers back to paragraphs 4 and 5 of the pleading. Then at paragraph 25(b) it says:

> "It appears from the documents disclosed to date by the claimant, which remains inadequate and incomplete, that the claimant has not paid all of the pay rate element charged to the employees, for

example the most recent documents disclosed by the claimant show that some employees appear to have been paid approximately 50p an hour less than the agreed pay rate element of the charge."

85. I pause here to make this observation, because it is a point fairly made by Mr Pepperall in relation to a number of paragraphs in the proposed amendment, or proposed amendments. The thrust, I think, of Mr Pepperall's criticism, at least in part, is that some of these suggested amendments are too tentative an expression properly to be the subject of an amended pleading, in particular phrases such as "it appears from the documents ..." rather than simply an assertion that the claimant has not paid all of the pay rate element to employees. That does seem to me to be a fair point, and it is one which I bear in mind and I will return to at the conclusion of this judgment.

86. In paragraph 25(c) it is then asserted that, accordingly, the defendant - that is to say Halfords - is entitled to any amounts paid to the claimant in respect of the pay rate element of the charge that the claimant did not pay to employees in damages, and there is then resort to the same formula which appears earlier in the pleading with regard to liability for damages under the Misrepresentation Act, liability for damages in negligent misstatement, and a liability for damages pursuant to the Charge Components Agreement.

87. As to this proposed amendment, and in support of it, Mr Casey drew attention to paragraph 31 in Mr Kirwin's first witness statement, where Mr Casey said this:

> "In relation to pay rates, there were instances in which a comparison of the data in the P11 reports and Tempaid data appears to demonstrate that workers were paid an average hourly rate less than the agreed pay rate contained in the Tempaid data."

88. He then set out a table, which table contains mathematical errors on certain respects, but that does not detract from the principle of what he is asserting, because in some cases the mathematics are correct. What the table demonstrates, and it is cross-referred to documents in the case, is that there is a difference per hour between the total pay according to the Tempaid data and the total pay according to the P11 report.

89. Mr Casey drew attention also to paragraph 41.2 in the same witness statement, in which Mr Kirwin says:

> "In relation to the pay rate head of loss, the first time that First [the claimant] provided Halfords with data regarding the pay rates paid to the workers was in the substantial Tempaid data disclosed on 31 May 2016, six months after using the Tempaid data themselves to quantify the claim and counterclaim, four months after having been first requested to disclose it, two months after the deadline for standard disclosure, and only one month prior to trial. Prior to the disclosure of the Tempaid data on 3 May, Halfords was therefore unable to identify a possible overcharge in relation to pay rates and it was therefore impossible for Halfords to have made these amendments any earlier than it did on 11 May 2016 when Halfords' consent for the additional amendments was first sought."

90. Mr Casey, by reference to documents in the case, demonstrated in the course of his submission on this point that a Tempaid document, which is to be found in the application bundle at tab 7, page 18, shows an overtime rate as against a basic rate, that the employee's rate varied between a job done for £6.50 an hour or £5.93 an hour to £7 an hour. His submission was that he needed the P11 data to see what was paid and the Tempaid data to see what Halfords were charged. But he pointed out that the P11 information only included a global figure and could, as Shakespeares have pointed out in correspondence, include work done for someone other than Halfords.

91. Turning to holiday pay, the relevant proposed amendment is at paragraph 31(a) to (d) of the proposed amended pleading. What is said is that it appears from the documents disclosed that the claimant did not pay all of the holiday entitlement element of the charge to employees by way of holiday pay, and it is said that this can be inferred from a number of matters, including P60s and P11s; and, of course, by reference to the data now available.

92. It is then asserted at paragraph 31B that the holiday entitlement payment was charged notwithstanding such non-payment to others, and at 31C it is said that there is a liability to pay such

a sum by way of damages and resort, again, is had to the Misrepresentation Act negligence and charge components agreement formula.

93. Mr Casey took me to page 263 in the application bundle - an e-mail from a member of the claimant's staff, a Mr Moses, to Mr Matthew Reddy and Mr Laurence Reddy, which referred to Mr Gardner and said this:

> "Simon Gardner said that if we had agreed the pay rate and the margin fee figure we should rebate each month the difference in what we paid HMRC in NI. He stepped away from holiday pay. I think he believes we automatically pay it all out. He didn't ask me if this was the case, so I didn't tell him it wasn't."

94. Of course, that document is relied upon as underscoring Halfords' case. That particular document has been available since standard disclosure was given, but Mr Casey's point is that it is the Tempaid documents which reinforce that point, and underpin it by demonstrating that there were actual non-payments out of holiday entitlement, or at least appear to demonstrate that.

95. It is important that in this context I make this observation, and this applies generally to anything that I say at this stage: I am concerned with ruling upon amendments. No comment or observation that I make is in any way to be taken to be a final view that would be held by any judge following a trial, whether that judge is someone else or me. I am concerned at this moment with ruling upon an application to amend a pleading, and I am concerned on deciding whether there is a case properly made out for amendment. So no observation should be taken to be set in stone or anything like that.

96. Mr Casey relied upon paragraph 39 of Mr Kirwin's first witness statement for the same point. And also upon paragraph 40 of that witness statement, and page 364 in the bundle, all of which he relied upon for the purpose of demonstrating that holiday pay was not paid over unless there was a request by an employee that it should be so paid.

97. So Mr Casey makes the submission that it is only when the Tempaid documents are set alongside the P11s that one can see what was paid by the -- or what was paid by Halfords for holiday pay, and what was then not paid away to staff.

98. I come next to the National Insurance overcharge, which is the subject of paragraphs 32 to 34 of the proposed re-amended pleading. This part of the pleading, or draft pleading, is not so radically revised as the version of it in the hearing bundle suggests, because paragraph 34 was always in the original pleading; it has been wrongly coloured.

99. What is the subject of proposed amendment is the substitution of a figure at paragraph 33.4 of £500,000 in respect of overcharged National Insurance, and then there are various deletions in the remainder of that part of the pleading.

100. This aspect of the proposed amendment arises from a point which is mentioned several times, and which I have mentioned several times earlier in this judgment, and which Mr Kirwin has expanded upon in his second witness statement at paragraphs 13 and 14. What Mr Kirwin says in those passages is this:

> "By taking the pay rates and charge rates for a particular week in the Tempaid data, as well as the applicable management fee disclosed in other documents and applying the agreed charging formula, pay rate plus holiday pay plus National Insurance plus management fee equals charge rate, you can calculate how much First charged Halfords in relation to NI. You can then compare this figure to the amount of employer's NI in fact paid by First to HMRC in relation to that worker contained in the P11 reports in order to determine how much First overcharged Halfords in relation to NI for that work for that week.
>
> "For example, the Tempaid data shows that for the week ending 9 October 2011, Nicky Okoragi worked a total of 35.5 hours, consisting of 31.5 basic hours and 4 hours overtime. The basic charge rate was £9.02 per hour. The overtime charge rate was £12.51 per hour.

The employer's NI element of each charge rate is 61p and £1.45 respectively. This gives a total employer's NI charge of £25.02. The total hours recorded in this week and the actual employer's NI recorded in the P11 report are 35.5 hours and £11.79. This is an overcharge of £13.22."

101. The point is that when the Tempaid data are set alongside other data, including P11s of actual payments to HMRC, it is possible to establish whether there has been or may have been an overcharge. Mr Kirwin provides a worked example in his second witness statement at paragraph 14, suggesting an overcharge in relation to just one employee on one occasion. Extrapolating from the work already undertaken on the Tempaid data it is suggested that this would imply that the National Insurance overcharge, in global terms, could be quite substantial.

102. I turn then to the management fee overcharge, which is at paragraphs 34A to D of the proposed amended pleading.

103. The parties had originally worked to a management fee of 80p an hour, to be paid to the claimant, but over the years this was gradually reduced to 56p, which was applicable at the time of the transfer to Staffline.

104. The case for Halfords is explained in Mr Kirwin's first witness statement at paragraph 33, to which I was taken by Mr Casey. Mr Kirwin says this:

"In relation to management fees it was unclear from the data provided what management fee had been charged in relation to each hour worked because the total charge rate less pay rate less holiday pay less National Insurance did not equal a standard fixed amount, like the 56p an hour management charge that was in place at the time of the transfer."

105. Then he continued at 41.5:

"In relation to the management fee head of loss, Halfords could not have made this amendment until after receipt of the substantial Tempaid data on 3 May because it is only the Tempaid data that provides a sufficient level of detail in order to demonstrate whether

the formula [which I have mentioned already] has in fact been followed by First. The Tempaid data has revealed that the charge rate does not appear to be calculated solely with reference to these four elements of the formula because charge rate less pay rate less holiday pay less National Insurance does not appear to constitute a fixed management fee, but rather a variable amount."

106. I should add that the management fee overcharge is sought to be recovered on the bases that the other overcharges are sought to be recovered.

107. I turn, then, to the fixed charge rate overcharge. This is at 34(e) to 34(g) of the proposed amended pleading. 34(e) says:

"If, contrary to Halfords' primary case, pleaded at paragraphs 4 and 5, namely that the supply of employees was on a costs plus basis, employees were in fact supplied for fixed charge rates as contended by the claimant, then the Tempaid disclosure reveals that the amounts invoiced by the claimant to Halfords between November 2010 and December 2011 exceed those fixed rates, and therefore a return of the overcharge is sought."

108. This point is developed by Mr Kirwin in paragraph 30 of his first witness statement. His point, I think, can fairly be summarised in this way. He says that there were a number of charges that were agreed at agreed rates, for example £7.84, £8, £8.38, and so on, but then he says that the Tempaid data disclosed charges at completely different rates that were never agreed, and therefore it must follow that in some instances, at any rate, where rates are higher than any agreed rate, there were overcharges. This is most dramatically indicated in respect of rates of £15.58 and £16.67, which are higher than any of the said to be agreed rates.

109. It is convenient at this point for me to observe that Mr Pepperall in the course of his submissions pointed out that this assertion by Mr Kirwin simply is not correct as to some of the rates, at least, because by way of example the rate of £16.67, not mentioned by Mr Kirwin, was specifically

mentioned in an e-mail of 6 September 2011, which is in the trial bundle at C3/655. So, not surprisingly, Mr Pepperall says Mr Kirwin cannot be right, at least in relation to some of the basis for the supposed excess charging over agreed rates.

110. The proposed amended pleading then goes on at paragraph 35, using its numbering, to make various consequential amendments in respect of loss and damage which are, on the whole, said to be estimated, because it has not been possible yet to carry out proper calculations.

111. Then it is said at paragraph 35B that there has been effectively a breach of trust on the part of the claimant in relation to monies that have been paid over on the basis that they would be used for certain purposes, covering the hourly rate, covering holiday pay, covering National Insurance, *et cetera*, and it is said that the monies were paid over for those purposes, but have not been used for those purposes and, therefore, there is a plea for all accounts and inquiries to be taken in relation to what has happened to those sums.

112. That plea effectively puts the case on the basis of a *Quistclose* trust. In relation to it, Mr Casey says that this gives rise to a pure point of law, and determining whether or not there is anything in the *Quistclose* trust point would not materially add to the length of the trial.

113. Mr Pepperall on behalf of the claimant resisted all of the amendments which are proposed, and did so for eight reasons, which he articulated. The first two were that, first, the claimant had not been at fault in effecting the disclosure of the Tempaid data only on 3 May, and the second point was that Halfords should have identified the new claims from other material.

114. Those points, which were developed by Mr Pepperall, I have described, considered and rejected earlier in this judgment, and I need not, therefore, revisit them.

115. The third and fourth points made by Mr Pepperall were that the proposed amendments are misconceived and are not properly pleaded. With regard to the pay rate issue, and the same point arises in regard to the holiday pay issue, Mr Pepperall makes this point, and he made it simply, but attractively, and that is that if someone in the position of Halfords hands over money which an

agency is to use to pay its workers, then the claim for non-payment in relation to an underpayment contractually belongs to the workers, not to Halfords.

116. In my view, that question, however, actually depends just upon what the contractual terms were between the parties. The case for Halfords, which will have to be tested at trial, is, and always has been, that there was a contractual right to the return of monies not actually disbursed by the claimant for the designated purposes. If that is proved - and I stress if it is proved - that that was the agreement, and if it is proved - and again I stress if it is proved - that some monies charged and paid were not so utilised, then it seems to me that there would be a prima facie case of entitlement to reimbursement, and for present purposes it does not seem to me to matter very much whether that is analysed in terms of an entitlement to reimbursement, in terms of a claim for misrepresentation, or in common law negligence; different aspects of the formula, upon which return of the money is claimed, may face certain difficulties, to mention but one, whether there would be a common law duty of care subsisting alongside a contractual warranty as to what was to happen to certain money. It is not necessary for me at this stage to go into such matters, but it does seem to me that on one jurisprudential basis or another there could be a claim to reimbursement of overpaid monies.

117. Naturally, of course, it is the position that the payer of someone who has, as it were, subcontracted employees, cannot make a claim for reimbursement simply on the basis that the employer concerned has not paid his staff. Mr Pepperall, in ordinary circumstances, is quite right about that: the claim would be with the staff and not with the payer. But, in my judgment, that does depend upon precisely how the contract between the parties in this case was constructed.

118. What I do observe is that the terms originally pleaded in this case, and the allegations of misrepresentation and negligence and the claim in respect of the contractual right to reimbursement, were not the subject of any application for summary judgment on the part of the claimant, or strike-out. That, of course, is not conclusive in determining an application for permission to amend, but it

is something to which I have to say I have paid some attention in the course of looking at the pleadings and weighing the arguments in this case.

119. It is convenient at this point also to consider the *Quistclose* plea, which is closely linked to the reimbursement claim. I can see that Halfords may encounter difficulties in establishing a relationship of trustee and beneficiary in relation to the monies paid to the claimant, but it seems to me that in this case it is not satisfactory on facts not yet determined to decide this point summarily, and I do not consider that the *Quistclose* argument will materially add to the length of trial. It is, as Mr Casey submits, pretty much a self-contained point of law, and therefore I consider it inappropriate to shut out the argument at this stage.

120. Mr Pepperall also submitted that the management fee overcharged was similarly misconceived and not properly pleaded, and that it amounted to double-counting. In my judgment, that aspect of matters and inquiring as to whether it really did amount to double-counting is an exercise really that can only be satisfactorily undertaken when the numbers have been properly crunched and the material is examined in some detail by the court.

121. As to the fixed rate overcharge, I have already mentioned, but Mr Pepperall very properly pointed out the difficulties that might face Halfords in relation to the £16.67 per hour rate of charge. Mr Pepperall may have a very strong case in relation to that point. It does not seem to me, however, that his ability to identify one or two particular rates of charge in that respect necessarily negates the full force of the points raised in the evidence for Halfords, and I do not consider that it would be appropriate at this stage to shut out the arguments that have been raised in relation to the fixed rate overcharge. If Mr Pepperall is able, in relation to other figures, to draw similar points, it may very well be that Halfords will consider that such points are not worth pursuing, but it is not something which I feel able to rule upon safely at this stage.

122. For these reasons, I am not prepared to find, and do not find, that the pleas maintained are, for the reasons advanced by Mr Pepperall, misconceived or not properly pleaded.

123. Fifthly, Mr Pepperall submitted that there was no proper evidence in support of the applications to amend. He submitted that there was no evidence to support the pay rate overcharge claim, the management fee overcharge claim, or the fix rate overcharge, or indeed trust issues.

124. Mr Casey's response to this submission was that as a result of the late disclosure, the case cannot be tried in its entirety at this stage, and he suggests a split trial, with many aspects of the counterclaim which require further work consequential upon analysis of the Tempaid data, to be dealt with on a later occasion as part of the directions process, but in that regard additional orders would be made, or should be made, for extra evidence as might be required. In any event it seems to me that there is evidence - whether or not it is ultimately persuasive at trial is another matter - contained in documents as a basis for the amendment of the claim. I refer, for example, to the witness statement of Mr Gardner at paragraphs 18 and 19, where Mr Gardner says that he has looked at the claimant's responses to Halfords' requests for information raised in the course of a tendering process in 2009 and 2011, and Mr Gardner points out - and I have checked this against the documents, I should add - that the claimant said that in its standard pricing mechanism there is a hourly rate broken down into a transparent calculation based upon the following formula: pay rate plus working time directive percentage plus National Insurance percentage contribution plus management fee equals charge rate.

125. In response, Mr Gardner’s evidence continues, to the questions that were raised of the claimant whether it had ever priced on a costs plus basis and, if so, how cost was broken down, in 2009, the claimant said that "We feel that the transparent calculation is effectively costs plus", and in 2011 it said that its standard pricing arrangement was "costs plus, as illustrated below", and then it repeated the formula.

126. It seems to me that those documentary records do afford a basis from which it can properly be argued that the terms for which Halfords contend are made out. It is a basis for it. Of course it does not necessarily lead to that conclusion; that is a matter for trial. And if the Tempaid records are set

alongside other data, those records may show, and for reasons which have already been developed in the statement of Mr Kirwin, tend to show - of course not conclusively, these are matters that have to be argued and there is substantial evidence and argument going the other way - that not only were terms agreed, but that they have been breached. For these reasons, I do not accept Mr Pepperall's fifth submission. It seems to me that there is some material already before the court to justify the amendments and, furthermore, of course there will not be evidence already before the court fully developed to deal with matters; that will only be ordered consequentially upon the order for amendment.

127. Sixthly, Mr Pepperall submits that the application for a split trial is, in reality, an application brought for the purpose of getting around the need for relief from sanctions. It is convenient to consider this alongside his seventh submission as to late and very late amendments. He submits that I should refuse the application to amend.

128. Having drawn my attention very thoroughly - when I say that, I mean it without any criticism at all since Mr Pepperall's submissions were very focused and he did not unnecessarily draw out his reference to authorities - he began his reference to the relevant authorities by taking me to the well-known case of *Worldwide Corporation v GPT* [1998] EWCA Civ 1894. Mr Casey also, I should say, took me to many authorities in relation to amendments, late amendments and principles related to those topics, but I shall focus in the main part upon the submissions made by Mr Pepperall.

129. Mr Pepperall took me to page 11 in *Worldwide* where Lord Justice Waller said this:

> "There is no doubt that the amended pleading presented a very different case to the defendants and those advising the defendants. Furthermore, it can hardly have come as a surprise to those advising the plaintiffs that a new amendment that completely reformulates the claim would be resisted. Equally, when a case has been prepared with witness statements and expert reports on one way of putting the case, it is harsh to criticise the

advisors of the defendants for asserting they would need some period in which to examine the extent to which the amendments affected them and their witnesses. The periods laid down for the production of witness statements are there so that they can be served on the other side in good time and so that the conduct of the trial can be as expeditious as possible. Forcing a party to look again at those statements at the same time as conducting the trial is not fair or conducive to the efficient conduct of the trial."

130. Later in the judgment the learned Lord Justice continued:

"We are doubtful whether even applying the principle stated by Lord Justice Bowen [that was a reference to the well-known former approach set out by Lord Justice Bowen in *Cropper v Smith* (1883) 26 Ch D 700], the matter is as straightforward as Mr Brodie would seek to persuade us. But in addition, in previous eras it was more readily assumed that if the amending party paid to its opponent the costs of an adjournment that was sufficient compensation to that opponent. In the modern era it is more readily recognised that in truth the payment of the costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time and may not adequately compensate him for being totally -- and we are afraid that there are no better words for it -- mucked round at the last moment. Furthermore the courts are now more conscious that in assessing the justice of a particular case, the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales."

131. Mr Pepperall took me to *Swain-Mason v Mills & Reeve* [2011] 1 WLR, 2735, beginning at paragraph 73 Lord Justice Lloyd said:

"A point which also seems to me to be highly pertinent is that if a very late amendment is to be made, it is a matter of obligation on the party amending to put forward an amended text which itself satisfies to the full the requirements of proper pleading. It should not be

acceptable for the party to say that deficiencies in the pleading can be made good from the evidence to be adduced in due course, or by way of further information if requested, or as volunteered without any request. The opponent must know from the moment the amendment is made what is the amended case that he has to meet with as much clarity and detail as he is entitled to under the rules."

And at paragraph 74:

"The *Worldwide* decision was made under the Rules of the Supreme Court not the Civil Procedure Rules which only came into force some five months later, but it seems to me that it reflects the tenor of the CPR which was no doubt in the minds of the judges who will have been familiar with the terms of Lord Woolf's reports that led to the reform of the rules. As appears from the passage quoted above from *Savings & Investment Bank v Finken* [2004] 1 WLR 667, it has been endorsed as appropriate under the CPR."

And at paragraph 85:

"Since the judge did not have the benefit of the *Worldwide Corporation* case, nor any of the more recent cases in which it has been followed, it is understandable that he should not have required the claimants to have justified more strongly the lateness of their application. His reliance on what Lord Justice Peter Gibson said in *Cobbold's* case [1999] Court of Appeal transcript no. 1406 was in my judgment mistaken and wrong in law, though understandable because of the limited citation to him".

132. It is not necessary for me to cite further from that paragraph, but what that paragraph does is signify that the Court of Appeal was very consciously moving away from the earlier procedure, or the earlier approach, of the court that had prevailed for well over a century, certainly from the 1880s, namely that late amendments that could be compensated for in costs (and in costs alone), should be allowed.

133. Next, Mr Pepperall took me to the decision in *Brown v Innovatorone* [2011] EWHC, 3221, a decision of Mr Justice Hamblen upon which Mr Casey had also relied. Mr Justice Hamblen very helpfully and succinctly, if I may say so, set out certain governing principles, under the modern approach, in relation to late amendment. His Lordship, at paragraph 14, said this:

> "As the authorities make clear, it is a question of striking a fair balance. The factors relevant to doing so cannot be exhaustively listed since much will depend on the facts of each case. However, they are likely to include: one, the history as regards the amendment and the explanation as to why it is being made late; two, the prejudice which will be caused to the applicant if the amendment is refused; three, the prejudice which will be caused to the resisting party if the amendment is allowed; four, whether the text of the amendment is satisfactory in terms of clarity and particularity."

134. To which list Mr Pepperall adds, in my judgment correctly, that is to be added, as is apparent from many other authorities, the question of prejudice to other litigants. Mr Pepperall took me to *Hague Plant v Hague* [2014] EWCA Civ 1609, at paragraphs 25 to 28. Lord Justice Briggs said this at paragraph 25:

> "The judge's conclusion that the proposed re-amended pleading was disproportionate was illuminated by his citation of a single passage of one of the judgments of Master McCloud under appeal in *Mitchell v Newsgroup Newspapers* [2014] WLR 795, cited at paragraph 17 of the judgment of the Court of Appeal:
>
> > "Cases are usually important to the parties but if such considerations weighed too heavily one would be unable to implement the objectives of the new rules. One would be unable to prevent some claims from taking unfair amounts of judicial resources away from other claims at the very moment when it is common knowledge that budgetary constraints may lead to fewer judges in the courts and to reduced non-judicial resources to operate those courts. Judicial time is thinly spread and the

emphasis must, if I understand the Jackson reforms correctly, be upon allocating fair share of time to all as far as possible and requiring strict compliance with rules and orders even if that means that justice can be done in the majority of cases but not all."

Briggs LJ continued:

"26. In the light of the summary of the burden thus far imposed by the Hague family dispute upon Leeds District Registry, it is in my view entirely understandable that the judge made reference to this valuable passage.

"27. Mr Christopher Parker QC for the appellant describes this as an error of law because, he says, the Mitchell case was about non-compliance with rules, practice directions and court orders, whereas the present case is nothing of the kind. In my judgment that criticism is misplaced for two reasons. The first is that Master McCloud dictum, approved by the Court of Appeal, was a general description of the profound effect of the Jackson reforms and the consequential amendment of the overriding objective in tempering the traditional dedication of the courts in case management to achieving perfect justice between particular parties by the need to allocate to those parties no more than a fair share of the court's limited resources. This principle appeared in the CPR from the outset, but its application is by no means limited to cases of breach of the rules, practice directions or orders. It has for example been applied by this court in connection with the need to encourage parties to engage with proposals for mediation or other forms of alternative dispute resolution: see *PGF 2 II SA v OMFS Company 1 Limited* [2013] EWCA Civ 1288 at paragraph 27. It was specifically applied in the context of late amendment in *Swain-Mason and ors v Mills & Reeve LLP* [2011] EWCA Civ 14 at paragraph 70"

"28. Secondly, the criticism is misplaced because a primary reason for the judge's rejection of the draft pleading was that it conspicuously failed to comply with the fundamental rules of pleading, in particular the rule that particulars of claim should contain a concise statement of the facts relied

upon for the purposes of clarifying the issues between the parties. See paragraph 70 of the judgment in Part 16.4.1(a)."

135. Mr Pepperall also referred at this point to paragraph 30 of his submissions, and I can take matters conveniently from the written submission which he had provided.

136. He submitted that if one applies the principles from the cases to which he had referred, first, late amendments were already in train before the Tempaid data was disclosed; secondly the amendments do not arise from late disclosure but, rather, Halfords' eleventh hour decision to consider potential further heads of claim that if they are to be pursued should have been considered many months ago, there therefore is no good explanation for Halfords' suggested default; thirdly, the new heads of claim are not properly pleaded, they need clarification both by further information and further evidence; fourthly, the amendments are not supported by evidence to be called at trial; and fifthly, it is common ground that the amendments cannot be tried without further disclosure and evidence.

137. I will come back a little later to those points made by Mr Pepperall, but before moving on to his later submissions, he took me to further authority in *Denton v White* [2014] 1 WLR 3926, particularly paragraph 24, where Lord Dyson, Master of the Rolls, and Vos LJ, in a joint judgment, to which they both contributed, said this:

> "We consider that the guidance given in Mitchell remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order which engages rule 3.91. If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate all the circumstances of the case so as to enable the court to deal justly with the application including factors (a) and (b). We

shall consider each of these stages in turn, identifying how they should be applied in practice. We recognise that hard pressed first instance judges need a clear exposition of how the provisions in rule 3.9 should be given effect. We hope that what follows will avoid the need in future to resort to the earlier authorities."

138. There is very helpful guidance set out in the paragraphs which follow, but for present purposes it does not seem to me that I need to go further than the overview to which Mr Pepperall helpfully took me yesterday afternoon.

139. Finally, by way of authority, Mr Pepperall took me to *Chartwell v Fergies Properties* [2014] EWCA Civ, 506. In particular, Mr Pepperall drew my attention to paragraphs 23 and 24. In paragraph 23 of the judgment Davis LJ dealt with the provisions for the serving the witness statements pursuant to CPR 32.10, the provisions of the CPR paragraph 3.1.2(a) dealing with extending time for compliance with rules, practice directions et cetera, the provisions of the CPR at paragraph 3.8.1 and 3 which are concerned with the failure to comply with rules, practice directions and orders, and 3.9, applications for relief from sanctions.

140. In paragraph 24, the learned lord justice said this:

"It can, therefore, be seen that CPR 32.10 provides its own sanction for failure to serve a witness statement within the time specified by the court, that is that the witness may not be called to give oral evidence unless the court gives permission since the rules have determined the applicable sanction unless the court gives permission there can, accordingly, be no available argument that the sanction prospectively to be imposed is of itself unjust or disproportionate, as stated in paragraph 45 of Mitchell, on an application for relief from a sanction, therefore, the starting point should be that the sanction has been properly imposed in compliance with the overriding objective.

141. Lord Justice Davis continued:

"The question thus is not whether the sanction proscribed by CPR 32.10 is of itself disproportionate or unjust, but whether the sanction should be disapplied in the particular case."

142. So, Mr Pepperall submitted, the position of Halfords was that it was making a very late amendment, which would prejudice the conduct of this litigation as well as prejudice the position of other litigants, and that the position of Halfords was that Halfords effectively needed relief from sanctions because it had not put in evidence which it would require to develop its amended case, and this was not a case for relief from sanctions.

143. As to the cases upon which Mr Pepperall has relied, I have to observe that not one of them is addressing the situation in which the party seeking to amend, as Halfords is now so doing, was justifiably doing so, even at a very late stage, in response to very late disclosure by the opposing party. Those observations apply with force just as much to the points taken about the need for relief from sanctions.

144. The reason that Halfords finds itself in the position in which it finds itself is not that it failed to get on properly and timeously with the preparation of its case, but that its preparation of the case was hampered and disrupted by the late production of information which should have been provided long ago.

145. The whole question of whether to give permission as to the serving of additional evidence connected with the amendments has to be viewed in a context in which the amendments come to be sought. If they are sought because of late disclosure, justice, it seems to me, requires that evidence to deal with such amendments must be admitted.

146. I do not consider that Halfords is in effect trying to side-step rules of court for relief from sanctions, or the more rigorous approach suggested by authorities such as *Denton* or *Chartwell* in

relation to late amendment or late evidence. Its application for the amendments and the need to put in further evidence, and its suggestion of a split trial, stem from the late disclosure.

147. I should add that Mr Casey has made it plain that in relation to those parts of the case which he submits could be tried immediately, and he identified them in some detail, he does not seek to adduce any new evidence at all.

148. I therefore do not accept the submissions which are made, or which were made, by Mr Pepperall in relation to his sixth and seventh points.

149. Dealing with his written submissions at paragraph 30, and I will deal with them, albeit briefly, one by one, it seems to me that it is not fair to say that late amendments in relation to the subject matter of the Tempaid data were already in train when the Tempaid data was disclosed. What, as I said earlier in this judgment, seems to me to be plain from the history, is that it was Halfords who were pressing repeatedly for disclosure of what has turned out to be the Tempaid data from at least January in order that they could get their case properly in order.

150. The second numbered point in paragraph 30, that the amendments do not arise from late disclosure but an eleventh hour decision on the part of Halfords, I need not elaborate further on matters that I have mentioned already in this judgment.

151. The third point, that the new heads of claim are not fully pleaded, I have dealt with that matter already.

152. The fourth point, that the amendments are not supported by evidence, similarly I have addressed that point. Clearly further evidence would be needed, but that is a direct consequence of amendments brought about by late disclosure.

153. Fifthly, it is indeed common ground that the matters which are the subject of the amendments cannot be tried without further disclosure and evidence, but that is a matter which it seems to me can properly be dealt with by a direction, to be given later today, or possibly at the end of a trial of

certain issues, but I will hear submissions from counsel about that in due course. I have rejected Mr Pepperall's sixth and seventh points for reasons just given.

154. Eighthly and finally, Mr Pepperall submits that I should refuse the application for a split trial, and in that regard he referred me to the decision of Neuberger J, as he then was, in the case of *Steele v Steele* [2001] C.P. Rep 106.

155. Mr Pepperall helpfully summarised the principles enumerated by Neuberger J at paragraph 33 of his written submissions. Neuberger J identified ten relevant factors, which Mr Pepperall summarises as follows: first, would the determination of preliminary issues dispose of the case or an aspect of the case; two, would a split trial significantly cut down the time and cost of trial; three, how much effort would be involved in identifying the relevant facts with the trial of the preliminary issue; four, to what extent can preliminary issues be determined on agreed facts; five, where the facts are not agreed, to what extent would that impinge upon the value of preliminary issues; six, would determination of such issues unreasonably fetter either or both parties or the court in achieving a just result; seven, would the determination of preliminary issues increase costs and/or delay the trial; eight, to what extent might the determination of the issues be irrelevant; nine, to what extent might the determination of the issues lead to an application to amend so as to avoid the consequence of a ruling; ten, taking account of all of those matters, is it just to order a preliminary issue or issues to be tried.

156. I can well see that in this case, had the Tempaid disclosure been effected sooner, revealing the extent of the consequential work that would be required upon it, the court might well have directed that if the matter had come before the court, that a split trial was desirable, not least to dispose of the composite rate issue, to which I have referred already, which has been raised by the claimant as part of its claim, or rather in answer to the counterclaim, because if the claimant succeeds on that point, then much of the, I suspect, costly and time-consuming analysis of the Tempaid data might become redundant. That consideration is highly pertinent, as is the good sense that since the parties are now

before the court and able to deal with parts of the case that are already are fully prepared, the available time set aside for this case should be used to determine what can usefully be dealt with at this point.

157. I do not at this stage intend to rule upon the extent to which a split trial should be heard in the immediate future. It is a point upon which I would wish to hear further argument from counsel, but it seems to me that the court could, in the week or so ahead, conveniently deal with the claim and also the composite rate issue.

158. In short, I shall allow the amendments as drafted, save that - and I promised earlier that I would return to this point - it does seem to me that, as Mr Pepperall pointed out in the course of his submissions, the present draft does use phrases such as "it appears that", for example at paragraph 31(a), which is not a satisfactory form of pleading, and therefore I would require any draft before it is finally approved to be cast in a proper form, making actual assertions rather than tentative suggestions. That matter of putting the pleading into a proper form, it seems to me, can be dealt with in very short order indeed, if not overnight then certainly within a matter of days, and I most certainly would not refuse to allow an amendment because of the, if I may say so, slightly inappropriate wording that the draft contains.