



GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

NEUTRAL CITATION NUMBER [2025] CIGC (FSD) 46

CAUSE NO. FSD 300 of 2023 (CRJ)

IN THE MATTER OF THE COMPANIES ACT (2025 REVISION)

BETWEEN:

ASCENTRA HOLDINGS INC. (IN OFFICIAL LIQUIDATION)

PLAINTIFF

AND

- (1) RYUNOSUKE YOSHIDA
- (2) SHANG PENG GAO KE, INC. SEZC
- (3) SPGK PTE LTD
- (4) GROWTH TODAY INC.
- (5) SCUDERIA BIANCO PTE LTD

DEFENDANTS

Appearances: Ms. Blair Leahy KC, Mr. Guy Cowan and Ms. Yuan Wen of Campbells LLP
for the Plaintiff

Mr. Vernon Flynn KC, Ms. Jessica Williams, Ms. Caitlin Murdock and Mr.
Greg Coburn of Harney Westwood & Riegels (Cayman) LLP for the
Defendants

Before: The Hon. Justice Cheryll Richards KC

Heard: 15th May 2025

Draft Judgment: 27th May 2025

*Civil Procedure – pleading – amendment Grand Court Rules O.20 r.5, potential disruption to proceedings
and closeness to trial date to be balanced.*

250603 Ascentra Holdings Inc. (in Official Liquidation) v Ryunosuke Yoshida and Others - FSD 300 of 2023 (CRJ) – Ruling

RULING

1. By Summons filed on the 22nd April 2025, the Plaintiff Ascentra Holdings, Inc (In Official Liquidation), (“the Company”) applies for permission to amend its Amended Statement of Claim dated 10th October 2023 (“ASOC”) in terms of the draft Re-Amended Statement of Claim (“RASOC”) which is attached to the Summons.
2. The Defendants consent to some of the amendments sought but oppose the Plaintiff’s application in three main areas. These have been helpfully summarised by Counsel under the headings, the Original Understanding, the Cancellation Agreement and Unconscionability.
3. In broad terms the Plaintiff submits that these amendments do not introduce any new causes of action and arise on the basis of and are necessary to correct the factual position following documents and materials identified and reviewed during the discovery exercise.
4. The Defendants in opposition say that the timing of the application, a matter of weeks from the start of the evidence in the trial on the 9th June 2025 and the nature of the amendments sought would cause extreme prejudice to them which cannot be remedied by costs.

THE DISPUTE

5. The Plaintiff is an exempted company which was incorporated in the Cayman Islands in December 2013 under its former name Interush Holdings Inc. On 1st June 2016 it changed its name to Ascentra Holdings, Inc. It entered into official liquidation in September 2021 following a period of voluntary liquidation which commenced in June of the same year. Its Joint Official Liquidators (“JOLs”) are Graham Robinson and Ivy Chua Suk Lin.
6. Prior to its liquidation, the Company operated a cross-border e-commerce business to the Asian market through its subsidiaries. One of its subsidiaries was HEC International Ltd (in Official Liquidation), (“HEC”).
7. HEC is a Cayman Islands exempt company which entered into official liquidation in December 2021. Mr. Robinson is its Official Liquidator. The Company held 100% of the issued shares of HEC.

8. The First Defendant Mr. Yoshida was a director of both the Company and HEC at various points in time. The Second Defendant Shang Peng Gao Ke, Inc. SEZC (“SPGK Cayman”) was incorporated in June 2016. According to the Plaintiff, its purpose was to conduct the Company’s business in the People’s Republic of China, (“the PRC”). The Third Defendant SPGK Pte Ltd, (“SPGK Singapore”) was incorporated in May 2019. SPGK Singapore was a wholly owned subsidiary of SPGK Cayman. The Fourth Defendant Growth Today Inc., is the registered owner of the entire issued share capital of SPGK Cayman. The Fifth Defendant Scuderia Bianco PTE Ltd was incorporated in May 2019. According to the Plaintiff, it provided cash management services to the Company and HEC. Mr. Yoshida is its sole shareholder and a director. SPGK Cayman is legally owned by Growth Today Inc., which in turn is legally owned by Mr. Yoshida.
9. In summary the dispute relates to the beneficial ownership of certain funds, some US\$250 million, (“the Funds”) which were held by various financial entities as at the date on which the Company’s liquidation commenced.
10. By its ASOC the Company’s claim as to the Funds is set out in three broad headings of Breach of Trust, Unjust Enrichment and allegations of Breach of Duty and Knowing Receipt.
11. The Company claims that any interest in the Funds held by the Second Defendant, SPGK Cayman, SPGK Singapore and Scuderia Banco is held in trust for it on the basis that these three Defendants acted as the Company’s agent or fiduciary, the Company was the undisclosed principal of the three Defendants and/or that SPGK Cayman held various assets, including an Affiliates List (which belonged to the Company), which List enabled it to conduct business in the PRC on trust for the Company. The Company says that the relationships of agent or fiduciary arise from the arrangements entered into between them and can be inferred from surrounding circumstances. It is also averred that the Fourth Defendant Growth Today holds its shareholding in SPGK Cayman on trust for the Company, or alternatively that the First Defendant holds his shareholding in Growth Today on trust for the Company.
12. Personal relief is sought against the First Defendant for breach of fiduciary duty for knowing receipt of trust property.
13. The Defendants’ case by Defence and Counterclaim filed on the 22nd December 2023 is that the Funds do not belong to the Company, that SPGK Cayman was an entirely separate and independent entity from the Company and traded in business in its own right.

14. The central area of factual dispute appears to be the nature of the relationship if any between the Company and SPGK Cayman and whether there was a common intention on the part of the Majority Shareholders of the Company with respect to SPGK Cayman.

THE CHRONOLOGY

15. The Plaintiff replied to the Defence and Counterclaim on the 2nd February 2024. The pleadings were closed on the 8th March 2024 when the Defendants filed a Reply to the Defence to Counterclaim.
16. By judgment dated the 23rd May 2024, a Proprietary Injunction was granted by the Grand Court (Parker J) to freeze the Funds the subject of the dispute. The Court ordered the Funds paid into an escrow account pending the resolution of the proceedings. A settlement agreement was negotiated between the parties by which the Defendants say that they agreed not to appeal the making of the Injunction but understood that there would be an early trial of the matter in the first half of 2025. By Directions Order dated 31st July 2024 in part, a trial was listed for eight weeks commencing on the 28th April 2025 with prior dates for discovery and the exchange of witness evidence.
17. The Plaintiff's submission is that the settlement negotiations were protracted which made the trial timetable unworkable. A new trial window was sought. By a Directions Order made 3rd March 2025, the date of discovery was moved from 29th November 2024 to the 28th February 2025 and the trial was moved from April to June 2025.
18. It is part of the case for the Defendants on this application that the Plaintiff has been dilatory and missed the first discovery deadline and is now seeking to further delay matters.

THE AMENDED STATEMENT OF CLAIM AND DEFENCE

19. The ASOC alleges that the Company had three Major Shareholders, Mr. Motohiko Homma, Mr. Yoshio Matsuura and Mr. Martin Matthews. It is said that Mr. Matsuura and Mr. Homma entered into business in about 2004 and operated through various entities. Mr. Matthews joined the business initially as an employee in January 2010 and became the Company's Chief

Executive Officer and President from about July 2014. Mr. Yoshida was one of four additional directors appointed in December 2013 as part of what is described as the “Reorganisation of the Business”. The three Major Shareholders planned an initial public offering of the Company’s shares on the Hong Kong Stock Exchange.

20. From the end of 2013 through to mid 2015, there were major events in which the Hong Kong authorities alleged that the Company violated Pyramid Schemes Prohibition Ordinances and brought charges against Mr. Matthews. These charges were subsequently dismissed. Mr. Matthews resigned in June 2015 as CEO and President of the Company. The Company was also advised that its business model and marketing method was in contravention of PRC law. There was a fall out between the Major Shareholders.
21. It appears to be common ground that in 2016 the Company sought to rebrand or make changes as a result of these events. This led to the name change of the Company. On the Plaintiff’s case, the Company sought to incorporate a new company, the Second Defendant SPGK Cayman to conduct its PRC business.
22. It is a fair summary to say that an important if not the most important aspect of the Plaintiff’s case is whether there were intentions, arrangements, negotiations and or agreements involving the Major Shareholders, the Company and its business which were held or took place in 2016 and thereafter and if so, the nature of these. The purpose behind the formation/incorporation of certain entities, their roles and relationships with the Company and the purpose behind the transfer of shares between persons and entities is in issue.
23. Paragraph 29 of the ASOC states that in June 2016, Mr. Homma indirectly held about 23% of the Company’s issued Share capital.
24. Paragraphs 30 and 31 et seq allege that there was an “Arrangement” among the three Major Shareholders, the purpose of which was for the Company to continue to operate the business in the PRC under the existing management structure and control but under separate legal ownership.
25. Paragraph 30 alleges that at the time of the incorporation of SPGK Cayman the intention of the Major Shareholders was that SPGK Cayman would account for 77% of the income which it

generated to the Company in exchange for conducting the PRC business and Mr. Homma would give up his indirect ownership stake in the Company.

26. Paragraph 32 alleges that some of the terms of the Arrangement were set out in a Memorandum of Understanding dated 15th November 2016 (“the MOU”) and an Exclusive International Distributor Agreement dated 1st October 2016. Additionally, that there were a number of Draft Agreements which were prepared following a period of negotiations between the Major Shareholders some of which were never executed.
27. The Plaintiff asserts that following this, SPGK Cayman operated the PRC Business on behalf of the Company and that it did so with the same management team, employees and service companies as it did previously.
28. Paragraph 40 alleges that in April 2018, SPGK Cayman, Mr. Homma and the Company executed a Cancellation Agreement and Acknowledgement which included confirmation that the MOU referred to above was never legally effected, that written and oral agreements relating to matters in the MOU were without force and effect and that Mr. Homma and SPGK Cayman would transfer all assets of whatever type of SPGK Cayman to the Company.
29. Paragraph 41 states: -

“No steps were taken to give effect to the Cancellation Agreement.”

30. The Plaintiff asserts that the fall out between the Major Shareholders which began on the commencement of the Hong Kong proceedings continued. In December 2018, Mr. Homma resigned as a director of the Company and agreed to transfer all of the issued shares in the Fourth Defendant, Growth Today Inc., to Mr. Yoshida in exchange for US \$1.
31. Paragraphs 63 to 67 assert facts and matters from which it is said that the relationships averred between the Company and the various entities and SPGK Cayman in particular can be inferred.
32. By its Defence and Counterclaim, the Defendants assert inter alia that the Company rebranded its business, suspended the operations in Hong Kong and commenced the supply of products to a new separate entity SPGK Cayman. It is asserted that SPGK Cayman was “an entirely new

separate and independent business”, a principal and not an agent in its dealings with the Company, owned and managed independently from the Company and entitled to receive on its own account all revenues and profits from its own sales (paragraph 4 (f)).

33. The Defendants deny paragraphs 30 and 31 of the ASOC and aver that: -

“At the time of SPGK’s incorporation the Major Shareholders did not have the intention, nor did they enter into (or execute any agreement or document to bring about) the Arrangement as alleged in paragraph 30 (or at all). The Defendants aver that, at that time the Major Shareholders did not have a clear common intent (alternatively no common intent, beyond the matters set out in paragraph 4), let alone that alleged in paragraph 30”.

34. The Defendants further aver that the MOU was created for the purpose of setting up a bank account for SPGK Cayman in the United States and was not a legally binding document. It is said that the Company ceased operating its business in Hong Kong and the Company’s active agents joined SPGK Cayman. The parties never agreed to the terms of the Draft Agreements which remained in draft only. SPGK Cayman’s business was since inception separate and distinct from the Company’s and did not represent or succeed it. The agreements which were executed evidence that SPGK Cayman dealt with each Ascentra group company at arm’s length and on commercial terms.

35. The Defendants also aver that the Cancellation Agreement which was signed on the Company’s behalf by Mr. Matthews in April 2018 was done without authority from the Company and was not subsequently ratified. Mr. Homma who had signed it on a conditional basis never gave his consent to it.

36. Paragraph 41 is admitted.

37. Much of paragraph 67 is denied and it is asserted that the matters set out in the sub paragraphs do not support the allegation as a matter of law.

38. The Defendants counterclaim for sums which they say that SPGK Cayman, SPGK Singapore, SPGK International and Scuderia Bianco paid to settle expenses and liabilities incurred by the

Company and its group of companies in the course of business. These sums were to be treated as loans.

THE LAW

39. The Plaintiff's application is made pursuant to Grand Court Rules, O.20 r.5. This provides in part: -

“5. (1) Subject to Order 15, rules 6, 6A, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend the plaintiff's writ, or any party to amend that party's pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

...

...

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

THE APPLICABLE PRINCIPLES

40. There is little dispute as to the applicable principles on an amendment application. There is an issue as to where the onus lies and the nature of that onus. The parties have helpfully provided an extensive list and copies of relevant cases for which the Court is grateful. I shall refer to some of these below.

41. A succinct summary of the relevant principle is provided by Henderson J in the cited case of *Bridge Trust Company Ltd. and The Attorney General of the Cayman Islands and Others*¹. The learned Judge referred with approval to the judgment of the Court in *G.L. Baker v Medway Building and Supplies Ltd*². The overriding principle is that an amendment ought to be allowed for the purpose of determining the real question which is in controversy between the parties. Henderson J said that: -

“The only limiting factor is the question of prejudice; where the amendments would pose a serious risk of prejudice to another party which cannot be readily alleviated by an adjournment or other measures, it may be refused.

Thus, as Lord Griffiths observed in *Ketteman vs. Hansel Properties Ltd.* [1987] AC 189 at 220, there is a distinction to be made between amendments which serve to clarify the issues already in dispute and those that advance a new claim or defence. Inevitably, the court must decide the question of prejudice after considering all of the circumstances in which the parties find themselves at the time the request is made.”

42. In *G.L. Baker Ltd. v Medway Building & Supplies Ltd*, Jenkins LJ reviewed several cases in which the power to amend was considered. I shall refer to some of these as helpful applications of the principles.
43. In *Lowther v Heaver*³ leave was refused in circumstances where the amendment sought appeared to be an “afterthought” or a mere clutching at straws without substance. It was contrary to the entire course of conduct of the defendant.
44. In *Edevain v Cohen*⁴ the party seeking the amendment during the trial had not alerted the other side to the possibility that an amendment would be sought. The question of an amendment was not raised until a late stage at the hearing. The Appellate Court upheld the trial Judge’s decision to refuse leave to amend and noted that the amendment was not necessary to bring out the real question between the parties.

¹ Grand Court Cause No. 264/94 Unreported Judgment dated 26th November 2003

² [1958] 1 WLR 1216

³ Ibid, page 1232

⁴ Ibid page 1233

250603 Ascentra Holdings Inc. (in Official Liquidation) v Ryunosuke Yoshida and Others - FSD 300 of 2023 (CRJ) – Ruling

45. In *Tildesley v Harper*⁵ Thesiger LJ said: -

“I am also of opinion that it is important that the rules of the court as to pleading should be enforced, but this may be done at too great a price. The object of these rules is to obtain a correct issue between the parties, and when an error has been made it is not intended that the party making the mistake should be mulcted in the loss of the trial.”

46. In the case before the Court, the learned Judge concluded that the trial Judge fell into error and said that it would have been apparent that the amendments sought was a vital point in the case and that “unless it was adjudicated upon, the real matter in issue between the parties would not be decided.”

47. In *Swiss Bank and Trust Corporation Limited v Iorgulescu*⁶, the Cayman Islands Court of Appeal dismissed the appeal against the grant of leave to amend a claim in respect of which the disputed transaction had occurred some thirteen years previously. The amendment involved a fresh cause of action relating to secret commission. The Court held that in principle an amendment should always be permitted unless it caused injustice to the other party or was a useless claim because no evidence was available to support it.

48. In *Grupo Torras and Torras Hostench London Limited v Bank of Butterfield International (Cayman) Limited and Five Others*⁷, the Grand Court said that although a new cause of action could be added if it would clarify the issues and avoid multiple proceedings, the court would not permit an amendment which would alter the character of the proceedings altogether. Any prejudice to the defendants could be compensated in costs. It was held that: -

“Under the Grand Court Rules, an amendment to pleadings would be permitted to assist in determining the real question in controversy between the parties or to correct an error or defect, unless the party proposing the amendment was not acting *bona fide* or the defect was such that the amendment could not be made without causing injustice to another party which could not be compensated for by costs. Whilst the court had a duty

⁵ Ibid page 1234

⁶ [1994-95] CILR 149

⁷ [2001] CILR 9

250603 *Ascentra Holdings Inc. (in Official Liquidation) v Ryunosuke Yoshida and Others - FSD 300 of 2023 (CRJ) – Ruling*

to assist the plaintiffs, it would not do so if that would unduly prejudice the defendants. Although a new cause of action could be added if it would clarify the issues and avoid multiple proceedings, the court would not permit an amendment which would alter the character of the proceedings altogether and which should be brought in fresh proceedings. Nor would an amendment be allowed to add a claim which was bound to fail.”

49. In the case of *Cayman Hotel and Golf Incorporated v Resort Gems Limited*⁸ Smellie Ag. J summarised five relevant principles including the following: -

“(a) Generally speaking, all amendments ought to be allowed which are for the purpose of determining the real question in controversy between the parties to any proceedings or for correcting any defect or error in any proceedings (*per* Jenkins, L.J. in *G.L. Baker Ltd. v. Medway Building & Supplies Ltd.* (1) ([1958] 1 W.L.R. at 1231).

(b) Leave should be given to amend unless the court is satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise. However negligent or careless may have been the omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs (*per* Bramwell, L.J. in *Tildesley v. Harper* (18) (10 Ch. D. at 397) and *per* Brett, M.R. in *Clarapede v. Commercial Union Assn.* (4) (32 W.R. at 263).

(c) An amendment ought to be allowed if thereby ‘the real substantial question’ can be raised between the parties and multiplicity of legal proceedings avoided: see *Kurtz v. Spence* (10).

(d) On the other hand, it should be remembered that there is a clear difference between allowing amendments to clarify the issues in dispute and those that provide distinct defences or claims to be raised for the first time (*per* Lord Griffiths in *Ketteman v. Hansel Properties Ltd.* (9) ([1987] A.C. at 220)).

⁸ [1992-93] CILR 372
250603 Ascentra Holdings Inc. (in Official Liquidation) v Ryunosuke Yoshida and Others - FSD 300 of 2023 (CRJ) – Ruling

(e) Furthermore, the court will always look at the materiality of the proposed amendment; inconsistent or useless amendments will not be allowed nor will amendments be allowed to raise a case which must fail: see 1 *The Supreme Court Practice 1991*, para. 20/5 – 8/23; *Jones v. Hughes* (8) ([1905] 1 Ch. at 187 *per* Vaughan Williams, L.J.) and the judgment of the Court of Appeal of the Cayman Islands in *Iorgulescu v. Swiss Bank & Trust Corp. Ltd.* (7).”

50. It is accepted that since the introduction of the Civil Procedure Rules (“CPR”) in the United Kingdom the approach of the English Courts to allowing amendments may have changed in emphasis. Adherence to the Overriding Objective focuses consideration on the disruption caused to litigants in the case and to other litigants by last minute adjournments.
51. In the case of *Daniel Alfredo Condori Vilca and Others v Xstrata Limited and Others*⁹, Stuart-Smith J reviewed several cases which are collectively described as the modern authorities before concluding that they can all be seen as applications of the Overriding Objective. The conclusion was that in attempting to strike a fair balance on an application such as the present, it is essential for the court to bear in mind the principles inherent in that Objective.
52. The learned Judge summarised what was described as the emerging strands from the cases of *Swain-Mason and others v Mills & Reeve LLP*¹⁰, and *Worldwide Corpn Ltd v GPT Ltd*¹¹ as follows: -

“ i) Orders for costs may not adequately compensate the other party, particularly where that other party is “totally 'mucked around’”;

ii) The Court is now much 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 to be brought into the scales;

iii) Accordingly, a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the Court;

⁹ [2017] EWHC 2096

¹⁰ [2011] EWCA Civ 14

¹¹ [1998] EWCA Civ 1894

250603 Ascentra Holdings Inc. (in Official Liquidation) v Ryunosuke Yoshida and Others - FSD 300 of 2023 (CRJ) – Ruling

iv) The significance of the amendment to a party's position is capable of being brought into the scales, but is not of itself determinative; and

v) It is always a question of striking a balance after weighing all relevant factors.”

53. The learned Judge also cited with approval the principles distilled by Carr J in the case of *Quah Sy-Ling v Goldman Sachs International*¹² to include the following: -

“b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

...

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;”

54. The approach taken in *Daniel Alfredo Condori Vilca and Others* was that the court must endeavour to strike a fair balance and that the explanation or justification for the delay in seeking an amendment is one of the factors to be considered in deciding where the balance falls.

¹² [2015 EWHC 759 (Comm)]

250603 Ascentra Holdings Inc. (in Official Liquidation) v Ryunosuke Yoshida and Others - FSD 300 of 2023 (CRJ) – Ruling

55. In 2015 in the case of *Lemos and others v CIBC Bank and Trust Company (Cayman) Ltd.*¹³, Smellie CJ considered an application by the plaintiffs to re-amend their pleadings to include an alternative claim. The defendants' objections included the vagueness and unparticularised nature of the amendments sought and that the amendments would result in the postponement of the trial and was in reality a new and separate claim which could be separately brought.
56. The learned Chief Justice noted the test propounded in the cases of *Swain- Mason and Others* and in *Worldwide Corp. Ltd* in both of which leave to amend at or after the start of the trials had been refused. The English Court of Appeal had referenced the heavy onus on the party seeking leave to amend where there were very late or last minute amendments which could cause the trial to be delayed.
57. Smellie CJ referenced the local case of *Bodden v Thomas*¹⁴ in which Williams J had declined to follow the new approach now adopted in England and Wales.
58. It was noted that the pre-CPR approach has been followed in the Cayman Islands since the Court of Appeal's decision in *Swiss Bank and Trust Corp. Ltd. v Iorgulescu*. The learned Chief Justice expressed the view that the dictum from Brett MR later approved by the House of Lords in *Ketteman v Hansel Properties Ltd*¹⁵ as referenced above still represents good practice despite the change in emphasis in the more recent case law.
59. The learned Chief Justice stated that: -

“And so, where the more recent case law cited above speaks of a “heavy onus” resting upon an applicant seeking leave to amend (here pursuant to Grand Court Rules Order 20 rule 5), the primary question must still be – however late in the day the application may be – whether or not injustice or prejudice will result from leave to amend being granted. As Lord Griffiths declares in [*Ketteman v Hansel Properties*]

¹³ Grand Court FSD 12 of 2015 Unreported Judgment dated 15th February 2015

¹⁴ [2011] (2) CILR 320

¹⁵ [1988] ALL E.R. 38

250603 *Ascentra Holdings Inc. (in Official Liquidation) v Ryunosuke Yoshida and Others - FSD 300 of 2023 (CRJ) – Ruling*

“Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by the assessment of where justice lies.”

60. The learned Chief Justice expressed the view that on closer examination the practical difference between the two approaches is likely inconsequential and that there was nothing inconsistent between the later approach and the principles laid down in earlier case law as adopted in this jurisdiction in the *Iorgulescu* case. The Court said that where an amendment would be unjust, doomed to fail or otherwise improper, it will not be allowed.
61. The amendment was granted in the case with the Court noting that the trial was still some three months away.
62. A second legal issue in the instant case is whether the proposed amendments give rise to any new cause of action as the Defendants assert.
63. In the case of *Co-operative Group Limited and Birse Developments Ltd*¹⁶, the English Court of Appeal stated that in determining what constitutes a new cause of action, the essential factual allegations upon which the original are based and on which the proposed new or different claims are reliant must be compared. The addition of further instances or better particulars do not amount to a new cause of action. The question for the court is whether there is a change in the essential features of the factual basis. The Court said: -

“In the quest for what constitutes a “new” cause of action, i.e. a cause of action different from that already asserted, it is the essential factual allegations upon which the original and the proposed new or different claims are reliant which must be compared. Thus “the pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action” – see *Paragon Finance v Thakerar* [1999] 1 All ER 400 at 405 per Millett LJ. “So in identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading”— see per Robert Walker LJ in *Smith v Henniker Major* [2003] Ch 182 at 210.

¹⁶ [2013] EWCA Civ 474
250603 Ascentra Holdings Inc. (in Official Liquidation) v Ryunosuke Yoshida and Others - FSD 300 of 2023 (CRJ) – Ruling

The court is therefore concerned with the comparison of “the essential factual elements in a cause of action already pleaded with the essential factual elements in the cause of action as proposed” – see per David Richards J in *HMRC v Begum* [2010] EWHC 1799 (Ch) at paragraph 32. “A change in the essential features of the factual basis (rather than, say, giving further particulars of existing allegations) will introduce a new cause of action” – *ibid*, paragraph 30” (my emphasis).

64. The Court said that the question to be resolved is one of fact and degree. If a duty which was not previously pleaded is asserted, this will amount to a new claim. If what is alleged is a different breach of some previously pleaded duty it will be a question of fact and degree whether this constitutes a new claim: -

“ I would not therefore dissent from the following distillation of the principles by Jackson J, as he then was, in *Secretary of State for Transport v Pell Frischmann* [2006] EWHC 2909 (TCC) at paragraph 38:— “(i) If the claimant asserts a duty which was not previously pleaded and alleges a breach of such duty, this usually amounts to a new claim.

(ii) If the claimant alleges a different breach of some previously pleaded duty, it will be a question of fact and degree whether that constitutes a new claim.

(iii) In the case of a construction project, if the claimant alleges breach of a previously pleaded duty causing damage to a different element of the building, that will generally amount to a new claim.”

65. The Appellate Court disagreed with the trial judge in his conclusion that a further allegation of further defect to concrete slabs even though involving separate and distinct allegations of breaches were nonetheless part of the same cause of action.
66. In the local case of *In the Matter of Omni Securities Limited (No. 4)*¹⁷ the Court refused the plaintiff’s application for leave to amend a statement of claim to include new claims which were outside the limitation period.

¹⁷ [1999] CILR 126

250603 *Ascentra Holdings Inc. (in Official Liquidation) v Ryunosuke Yoshida and Others - FSD 300 of 2023 (CRJ) – Ruling*

67. The Court adopted the definition of new cause of action as set out in *Marshall v London Passenger Transp Bd*¹⁸ that it involves a quite different set of ideas or allegations of fact which if allowed would give rise to new considerations and new causes of damage or injury.

68. The Court held that: -

“A new cause of action was defined as a new allegation giving rise to a new loss of injury and for which a new remedy was sought,…”

69. Additional reasons which led to the refusal of the application to amend were that there was insufficient similarity between the two factual positions pre and post amendment and the proposed amendment would require the defendants to answer new allegations which would call for new factual inquiries to be made.

70. The Court permitted the plaintiff to amend to restore its claim in contract despite the time bar because it arose out of similar facts to those already pleaded and it was in the interests of justice.

71. It was held that: -

“The court, in the exercise of its discretion, had to balance the interests of the plaintiff in raising all arguable issues for the court’s consideration at trial, against the burden on the defendant of responding to the restored claim, any consequent disruption to the proceedings and whether any such disruption could be adequately compensated for by an order for costs against the plaintiff. The closer to the proposed trial date, the more disruptive such amendments were likely to be. Since the amendment could be made in this case without injustice to the defendant or other litigants from delay, the court would allow it.”

72. The Court recognised that to grant the amendment to reinstate, that part of the claim would visit renewed strain and expense on those alleged to have acted improperly but stated that this is only one side of the balance to be struck. The Court thought that on balance the amendment would not greatly disrupt the procedural steps remaining until trial and that given the similarity of issues to be pleaded there would be no need for a fundamental change in approach to the preparations for the trial.

¹⁸ [1936] All ER at 88
250603 Ascentra Holdings Inc. (in Official Liquidation) v Ryunosuke Yoshida and Others - FSD 300 of 2023 (CRJ) – Ruling

73. I approach this application with these principles in mind.

THE EVIDENCE

74. The Plaintiff's application is supported by the First and Second Affidavits of Yuan Wen dated 22nd April 2025 and 9th May 2025 and the Seventh Affidavit of Graham Robinson dated 9th May 2025. I shall focus on the essential aspects for the purpose of this application. Two other issues raised as to the payment of certain interest on the Funds and a case management issue have since been resolved and I do not propose to refer further to these aspects.

75. Ms. Wen states that in the course of attempting to agree a List of Issues which remains unagreed, it became apparent that the Defendants were continuing to mischaracterise the Company's case. This was despite the ruling on the Proprietary Injunction. The Company therefore proposed to make certain amendments to the ASOC and advised the Defendants of this on the 1st April 2025. There was no agreement to the amendments thus the Summons was filed on the 22nd April 2025 on an urgent basis.

76. It is said by the Plaintiff that the amendments seek to correct factual inaccuracies which have come to light during the discovery process. The Plaintiff disclosed some 333,000 documents and the Defendants disclosed about 121,000 documents. The Plaintiff has since identified additional documents which require to be disclosed. It is also said that even if the Defendants need time to amend their pleading and or file supplemental evidence there is sufficient time within the timetable to allow for this to be done.

77. The Plaintiff says that it is the Defendants who have insisted on an abridged trial timetable and that while the reasons for the urgency are stated to include the Proprietary Injunction, the Defendants have already received sums to pay for legal and business expenses and have the ability to seek the release of additional funds if needed.

78. The Defendants in reply rely on the First Affirmation of Greg Coburn dated 6th May 2025. Mr. Coburn states that the Company has raised the issue of mischaracterisation of its Claim since April 2024 but has failed to take any steps to resolve the issue until April 2025. The Plaintiff's application to amend is said to be pleading a new case and an attempt to delay if not derail the trial.

79. Mr. Coburn states that the Defendants will be prejudiced by what is an extremely late application where the trial is less than one month away. It is asserted that if allowed it would result in unacceptable and irredeemable prejudice to the Defendants who have prepared their case on the basis of the current pleading with extremely limited time remaining before the trial.
80. It is asserted that the Company now seeks to plead what is described as an “Original Understanding” as the primary factual basis for its claim. As part of this newly asserted Understanding, it is now said that an agreement would be put in place between the Major Shareholders in relation to the control of SPGK Cayman including in relation to the right to appoint directors of SPGK Cayman. This has not previously been alleged. As to the Cancellation Agreement, the Company now seeks to say that steps were taken to give effect to it.
81. The Company also seeks to plead new particulars and raise new alternatives as to a resulting and constructive trust which may well require substantial further discovery and written witness evidence from both sides on the eve of the trial.
82. Mr. Coburn does appear to allege bad faith on the part of the Plaintiff in the following way:
- “70. The Defendants have a real concern that the JOLs are, for whatever reason, either (i) inadequately preparing for the trial in a serious manner, in accordance with their duties to the Court or, (ii) purposefully seeking to delay the trial, while (due to the injunction) the Defendants are kept out of the funds of which, on their case, they are the beneficial owners. In either case, the Defendants would be prejudiced by the JOLs’ conduct”.
83. These allegations are rejected by the Plaintiff by the Seventh Affidavit of Mr. Robinson who explains that the amendments are sought for the stated reasons. Mr. Robinson says that the Plaintiff has previously raised that the trial timetable is a tight one and that discovery was being done on a similar basis. He states that the timetable is one which the Defendants insist on due to the unavailability of their Counsel in September/October.
84. The Plaintiff says that the Defendants have had the opportunity to consider any necessary amendments since 1st April 2025 and by the Second Affidavit of Ms. Wen that the proposed amendments do not raise any new issue that could call for any further discovery.

THE GENERAL SUBMISSIONS

85. In general, the Plaintiffs' broad submission is that the proposed amendments are necessary because of documentary material identified during the discovery process and do not raise any new issues not already pleaded.
86. The Defendants oppose the application on the stated basis that the amendments are "extremely late and cannot be made at this stage without injustice". It is submitted that by the amendment application the Plaintiff "*did not want to be held to its pleaded case and has sought (at the last minute) to supplement or change the factual allegations on which it has relied up to this point with entirely new allegations.*"
87. The submission is that if permitted the amendments would cause irreparable prejudice to the Defendants. The prejudice is stated to be that the Defendants would be required to consider and amend their Defence, revise or supplement witness statements and potentially undertake further discovery on the eve of the trial. The Defendants say that if allowed they would not have an adequate opportunity to test the new case which is put forward against them. Counsel submits that it would be manifestly unfair for there to be allegations at trial in respect of which the Defendants have not had an adequate chance to respond.
88. The Defendants also say that the timing of this application "could not be worse because it has the effect of maximum disruption of the preparation of witness statements and for trial". The disruption caused will undermine the fair and timely disposal of the proceedings and no order can adequately compensate for that prejudice.
89. It is submitted that the case has been prepared on the basis of the current pleadings with discovery having been exchanged on the 28th February 2025 and witness statements which were exchanged on the 1st May 2025. The deadlines had to be extended from 29th November 2024 and 31st January 2025 respectively because the Plaintiff failed to begin first-level review of their discovery pool until November 2024.
90. Counsel for the Defendants states that the trial has already been adjourned once from 28th April 2025 to 2nd June 2025 and the Plaintiff has failed to comply with key procedural deadlines. No order for costs could adequately compensate for any further delay in the trial against the

background of the settlement which had been reached between the parties that there would be a trial in the first half of this year by reason of which the Defendants did not pursue its appeal against the grant of the Proprietary Injunction.

91. It is also submitted that Plaintiff has not provided any satisfactory explanation for the lateness of the proposed re-amendments and that these are without merit and are insufficiently particularised. Thus, the Defendants say that the Plaintiff has failed to provide justification for the application and to discharge its burden to satisfy the Court that it is just to grant leave.
92. There is said to be concern at what is described as the Plaintiff's delayed and unsatisfactory discovery. On the 15th April after the discovery deadline, the Plaintiff notified that there may be additional documents. An additional 3,341 documents were provided on 29th April 2025 and an additional 1,188 documents on 8th May 2025.
93. Counsel submits that: -

“[...] In particular, the Defendants are concerned that the Plaintiff may have documents yet to disclose which are relevant to its proposed re-amendments regarding the alleged “Original Understanding” or the Cancellation Agreement, but which the Defendants will not have sufficient opportunity to interrogate before trial. Even in the most recent tranche of documents disclosed by the Plaintiff, there continue to be documents relevant to the Cancellation Agreement (including documents which the Plaintiff's witnesses do not address, [...]) This further compounds the prejudice suffered by the Defendants as a result of the Company's extremely late re-amendments.”

THE PROPOSED AMENDMENTS- THE ORIGINAL UNDERSTANDING

94. There are proposed amendments to paragraphs 29, 31, 63, 67 and 68 of the ASOC. While quantity is not a reliable indicator, the scope of the proposed amendments is perhaps best illustrated by the summary that paragraphs 29 to 31 of the ASOC altogether presently consist of eight lines. The new paragraph 29B in the RASOC alone consists of 16 lines.
95. Paragraph 29 is in Section B.3 of the ASOC under the heading SPGK's Incorporation and Subsequent Negotiations. Paragraph 28 refers to the date of the Company's name change on

the 1st June 2016 and the incorporation of SPGK Cayman on the 14th June 2016. Thereafter paragraphs 29, 30 and 31 state: -

“29. In June 2016, Mr Homma indirectly held about 23% of the Company’s issued share capital.

30. At the time of SPGK Cayman’s incorporation, the Major Shareholders’ intention was that, in exchange for conducting the PRC business, SPGK Cayman (which was indirectly wholly owned by Mr Homma) would (i) account for 77% of the income it generated to the Company and (ii) Mr Homma would relinquish his (indirect) ownership stake in the Company (the “Arrangement”).

31. The Arrangement’s purpose was to maintain the economic benefit to all three Major Shareholders of the Company continuing to operate its PRC Business, and the existing management structure and control, but to do so under separate legal ownership.”

96. The proposed amendment by a new paragraph 29B is sought within the context of agreed amendments to insert as 29A that on the 5th August 2016, a firm providing corporate services, on the Company’s instructions, entered into a Nominee Shareholder agreement with Mr. Homma by which it agreed to hold its shareholding in SPGK Cayman in trust for Mr. Homma. The new agreed paragraphs 29C refers to the incorporation of Growth Today in the Republic of Seychelles on 12th August 2016, the transfer of the shareholding in SPGK Cayman to that entity on or about 5th September 2016 and the incorporation of Growth Toady in October 2016 and the transfer of shares to Mr. Homma.

97. The proposed amendment to insert paragraph 29B which is not agreed refers to an alleged intention or agreement between the Company and the Major Shareholders on the newly inserted date of **5th August 2016**.

98. Paragraph 29B as proposed would state: -

“At that time (i.e., on 5th August 2016), it was intended by and/or agreed between the Company and the Major Shareholders that:

29B.1 Mr. Homma would become the ultimate beneficial owner of SPGK Cayman, in exchange for the following;

29B.2 Mr. Homma would give up his (indirect) shareholding in the Company.

29B.3 the PRC Business would, in future, be carried on by SPGK Cayman, and/or entities owned by SPGK Cayman;

29B.4 an agreement (the terms of which were not yet agreed) would be put in place between the Company and SPGK Cayman which would make provision for the Company to share in the revenue or profits of SPGK Cayman or some other arrangement for the Company to receive financial consideration from SPGK Cayman in respect of the transfer of the Company's PRC Business to SPGK Cayman; and

29B.5 an agreement (the terms of which were not yet agreed) would be put in place between the Major Shareholders in relation to control of SPGK Cayman, including in relation to rights to appoint directors of SPGK Cayman;
(together the "Original Understanding")."

99. Proposed new insertions as paragraphs 63.2, 67.1.2A, 67.3, 68 and 68A would refer to the "Original Understanding".
100. Paragraphs 63 and 67 of the ASOC are under the heading Trust claims.
101. The proposed amendment at 67.1 would aver that Growth Today or alternatively Mr. Yoshida holds its or his shareholding in SPGK Cayman on a resulting or constructive trust for the Company. This would particularise the form of trust but also seeks to add that in the alternative SPGK Cayman holds all of its assets (including the Funds) on a resulting or constructive trust for the Company.
102. Three new circumstances are proposed as a basis from which this can be inferred. These include the circumstances attendant upon the transfer of shares by Mr. Homma to Growth Today and the nature of the consideration for the transfer.

103. The proposed new paragraphs 67.1.2A and B would now include reference to the “Original Understanding” and that this was rescinded by the relevant party’s decision not to execute the Exclusive Distribution Agreement or the Draft Agreements and/or the Cancellation Agreement.

104. A proposed new Paragraph 67.3 would state that: -

“Insofar as may be relevant, the Majority Shareholders acted at all times in reliance on either (i) the Original Understanding or (ii) the Original Understanding having been rescinded so that the beneficial interest in SPGK Cayman remained with the Company.”

105. Paragraph 68 of the ASOC under the heading Unjust Enrichment states: -

“In the alternative, SPGK Cayman, SPGK Singapore and Scuderia Bianco have been unjustly enriched by the assets that enabled the operation of the PRC Business which they received in anticipation of the Draft Agreements that, in the event, were not entered into.”

106. The proposed 68A would state: -

“The Original Understanding having been rescinded or otherwise not given effect to, and the Draft Agreements having not been executed, there has therefore been a total failure of basis for the transfer of the PRC Business to SPGK Cayman, which renders its enrichment unjust.”

107. The Plaintiff submits that the most significant of these proposed amendments at 28.2, 29A and 29C-F arise from the fact that the Company was not previously aware of the details of the incorporation of SPGK Cayman and the transfer of the shares in it to Mr. Homma and subsequently to Growth Today. What has come to light is that it was not until 5th August 2016, two months after incorporation, that Mr. Homma, received any share in SPGK Cayman.

108. Counsel says that the actual facts are now pleaded by these new paragraphs. Counsel submits that the Defendants must have known the true facts given that the First Defendant was a director of the Company at the time of the events and for almost the entirety of the period yet the Defendants did not seek to correct the position in their Defence. In contrast the JOLs do not have firsthand knowledge of the events and would be reliant on the documentation. It is said

that it was only following the discovery exercise that the Company came to understand the true position in relation to the incorporation of SPGK Cayman.

109. Counsel submits that the reference to the Original Understanding is a minor amendment to the Company's case in terms of the intentions of the parties at the time when Mr. Homma first obtained an interest in SPGK Cayman. Counsel submits that the proposed amendment to paragraph 29B is simply more "specific as to those intentions and pleads a different later date by which such intentions were performed".
110. Counsel said that it became necessary to plead intentions as at the date of the transfer of Mr. Homma's interest in SPGK Cayman which would not necessarily have been the same as the intentions as at the date when that Company was incorporated.
111. As to the proposed paragraph 68A, Counsel for the Plaintiff submits that this is a reference to the Original Understanding and is a reflection of the Company's updated state of knowledge after the discovery exercise. The Company had not been aware that the Draft Agreements had not been prepared until March 2017 "sometime after SPGK Cayman took over operations of the PRC business".
112. Counsel submits that it is therefore appropriate that the failure of basis should also refer to the time period before the Draft Agreements which period is said to be the Original Understanding.
113. Counsel argues that the Defendants must have known the time period of the Draft Agreements and failed to indicate this.
114. Counsel's overall argument is that the Original Understanding relates to the intentions of the Major Shareholders at the time of the incorporation which intentions are already in issue. The intentions of the Major Shareholders at the time of the formation of SPGK Cayman is already in issue and is already well within the scope of the issue in dispute. It is submitted that how the Original Understanding is said to have been understood and was to be implemented is already pleaded.
115. Counsel submits that the Company has been assisted by this documentation as to the intentions of the relevant parties. Counsel produced two examples of documentation which the Company

became aware of during the discovery exercise which are said to be relevant to identifying the intentions of the parties. These are a corporate structure diagram and an email exchange shared with Mr. Homma and Mr. Matsuura on 28th July 2016¹⁹. The submission is also that these amendments could not have taken the Defendants by surprise as they would have been in a position to know the true facts.

116. The criticisms as to the issue of particulars of the Original Understanding are said to be inappropriate where the Understanding is not being relied on as a contract and the Company does not have first-hand knowledge of the events.
117. Counsel submits that the other proposed amendments under this heading are consequential upon the proposed amendment to paragraph 29B.
118. The Defendants submit that all references to the Original Understanding should be disallowed. Counsel submits that the Plaintiff seeks to plead an entirely new factual case, that there was an “Original Understanding” that was agreed or intended in August 2016 and that the Plaintiff has not previously alleged that an agreement would be put in place between the Major Shareholders in relation to control of SPGK Cayman.
119. Counsel submits that there is a change from an alleged intention of the Major Shareholders to now add some form of agreement between them and the Company. Counsel submits that there is inconsistency in the pleaded case between 77% of the profits alleged to have been intended in June and an agreement to agree intended in August 2016.
120. The more fundamental objection, says Counsel, is that as the Original Understanding gave way to the Arrangement which is pleaded in paragraph 30, the Arrangement replaced the Original Understanding. Thus, the reference to the Original Understanding is irrelevant and unnecessary.
121. The third objection on this aspect is that the proposed re-amendments are not particularised to indicate how the agreement was made, who agreed, the nature of the agreement and whether oral or written. Counsel submits that there would be substantial factual disputes about the existence of this Original Understanding, the existence and details of it in respect of which witness statements, and oral witnesses and documentary evidence would be essential.

¹⁹ Attached as Appendix pages 18 to 33 to the Application
250603 Ascentra Holdings Inc. (in Official Liquidation) v Ryunosuke Yoshida and Others - FSD 300 of 2023 (CRJ) – Ruling

122. For my part I note that the ASOC refers to an intention of the Major Shareholders in June 2016, the date of the incorporation of SPGK Cayman, being that in exchange for conducting the PRC business that SPGK Cayman would account to the Company for a percentage of the income it generated. The proposed 29B refers to a nominee Shareholder Agreement and alleged specific intentions or agreements between the Company and the Major Shareholders. These appear to go beyond SPGK Cayman simply accounting for a percentage of its income. For example, there is proposed averment of a specific intention or agreement that the PRC Business would in future be carried on by SPGK Cayman.
123. I do not see how the proposed new reference to an “Original Understanding” could be described as minor. In my view it does introduce a new factual matrix.
124. However, I do accept as the Plaintiff submits that the facts surrounding the parties’ intentions as to the control of SPGK Cayman and the operation of the PRC Business by SPGK Cayman have always been in issue. Indeed, as I understand it this goes to the core of the Plaintiff’s case and the Defence raised. Thus, even if this is a new factual matrix, it is not so far removed from the existing issues and factual circumstances such as to place it into a separate category of a new claim.
125. The Defendants’ submission is in part that the proposed amendment is unnecessary because the Original Understanding was superseded by the Arrangement. I note that as put forward by the Plaintiff it was one step in the chain or background of alleged events. I can see how this may be important and or material to a determination of the ultimate outcome and the reason for this outcome. I do not consider this to be useless or immaterial. I accept the submissions of the Plaintiff that there is a need to look at the entire course of events to understand what the intentions were at the relevant time.
126. As to the proposed amendments to include specificity as to the nature of the trust claim, I consider this to be no more than clarification which is helpful in detailing the nature of the Plaintiff’s case. I accept Counsel for the Plaintiff’s submission that all this does is to make clear the type of trust but that a claim in trust was always alleged.

THE PROPOSED AMENDMENTS - THE CANCELLATION AGREEMENT

127. Paragraph 41 of the ASOC is referenced above. “No steps were taken to give effect to the Cancellation Agreement.” The proposed amendment would amend the paragraph to say that no steps were taken by Mr. Homma and SPGK Cayman to give effect to the Cancellation Agreement.
128. The proposed paragraph 67.1.2B would state that the Original Understanding which was the basis for the transfer of interest in SPGK Cayman to Mr. Homma and thereafter to Growth Today and other transfers was abandoned or rescinded by the relevant parties’ decision not to execute the Exclusive Distribution Agreement **and or by the Cancellation Agreement.** (my emphasis).
129. The proposed paragraph 67.4 is:
- “Further or in the alternative insofar as the assets of SPGK Cayman were not already held on trust for the Company, **by the Cancellation Agreement** (in particular, clause 2 thereof), SPGK Cayman transferred the beneficial interest in all of its assets to the Company.”
130. The Defendants say that this is an entirely new case because the representation made by the Company to the Court on the application for the Proprietary Injunction is as recorded in paragraph 42 of the judgment arising therefrom, that the Company accepted that the Cancellation Agreement was of no legal effect.
131. The Plaintiff submits that this is not an entirely new case because the Cancellation Agreement has always been pleaded and the Company is simply “spelling out more clearly what the legal consequences of it is in particular in the context of the trust claims.” It is said that it has always been pleaded that the terms of the Cancellation Agreement required that Mr. Homma and SPGK Cayman transfer and deliver all assets to the Company.
132. It is submitted that the amendment is appropriate in light of documentary evidence which is now available to the Company and the evidence of its witnesses which is to the effect that steps were taken that were intended to give effect to the Cancellation Agreement. Counsel has produced an extract from the witness statement of a former director of the Second Defendant

- and former Chief Financial Officer of the Company, Theodore Sanders. Appended to the submissions are also emails of 6th April, 10th April and 1st October 2018 which refer to the Cancellation Agreement.
133. Counsel highlights that paragraph 40.3 of the ASOC detailed the nature of the Cancellation Agreement and says that the proposed paragraph 67.4 merely spells out the legal consequences of obligations under that Agreement and cannot amount to a new cause of action.
134. Counsel for the Defendants submits that the new text to paragraph 41 changes the Plaintiffs case on the Cancellation Agreement from being one where no one gave effect to it to one where others gave effect to it but Mr. Homma and SPGK Cayman did not.
135. Counsel submits with some force that the proposed amendment is not clear and is not particularised, it lacks essential particulars for the Defendants to know what case to meet. It does not identify who took steps to give effect to it or what steps were taken or why Mr. Homma and SPGK Cayman ought to have taken those steps. To this I would add another question of when it is alleged that these steps were taken.
136. Counsel says that the new pleadings on the Cancellation Agreement would likely require further discovery and witness evidence.
137. It is not clear to me why this would require further discovery. The fact and existence of the Cancellation Agreement had already been raised. Surely all material in relation thereto will already have been disclosed.
138. Counsel submits that a more fundamental issue is that the Plaintiff now seeks to argue by paragraphs 67.1.2 B (b) and 67.4 that the Cancellation Agreement has or had binding legal effect such as to cause SPGK Cayman to transfer the beneficial interest in all of its assets to the Company.
139. It is submitted that the proposed re-amendments represent the Plaintiff's attempt to resile from its previous position that the Cancellation Agreement had no legal effect which position is set out in the judgment on the application for the Proprietary Injunction.

140. The response of the Plaintiff is that what is recorded in the judgment was perhaps a mischaracterisation of its case. Counsel said that the Plaintiff has never knowingly conceded this point. The Defendants say that the Plaintiff made no effort to correct the point made in the judgment.
141. The argument as to mischaracterisation may not be a particularly strong one for the Plaintiff. It does not appear that any position was previously taken as to the legal effect of the Cancellation Agreement in contrast to what is now being alleged by the new proposed paragraphs. The Defendants question whether the change has been shown to be made in good faith and refer to the principles set out in HKCP (Vol 1) paragraph 18/13/3 to which I have had regard. These include the reasons and justification for the change, the balance of prejudice to the parties and the prospects of success for any issue arising from the change from the former position. The question of bad faith is said to be an important consideration in the exercise of the Court's discretion.
142. It may be a somewhat stronger argument by the Plaintiff that documents have now been identified which show that steps were in fact taken to give effect to the Cancellation Agreement. Counsel for the Plaintiff says that in the face of these documents paragraph 41 as presently framed cannot stand and if it is not amended requires to be deleted all together. Counsel for the Defendants submits that there is an inadequate explanation of the reasons for the lateness of the amendments. Counsel says that these were documents which the Plaintiff had all along and did not advert to.
143. Counsel for the Defendants submits also that the Plaintiff has not demonstrated that this raises a triable issue and has not specified the documents or witness evidence in support. SPGK Cayman was not a party to the agreement.

PROPOSED AMENDMENT - UNCONSCIONABILITY

144. The Plaintiff proposes a new paragraph 67.5 to state:

“In all the circumstances it is unconscionable for Mr Yoshida and/or Growth Today to maintain that they are the indirect/direct beneficial owner of SPGK Cayman and therefore the beneficial owner of the Funds. In the alternative, it is unconscionable for SPGK

Cayman (and/or SPGK Singapore or Scuderia Bianco) to maintain that they are the beneficial owner of the Funds.”

145. In relation to unconscionability, the submission of the Company is that the trust claims which were already pleaded implicitly involve allegations of unconscionability and that the existing paragraph 81 expressly alleges unconscionability against the Second, Third and Fifth Defendants which are legally owned and controlled by the First Defendant.
146. Counsel for the Defendants submits that allegations of unconscionability are serious and that in any event the pleading does not provide sufficient particulars, and no reason is given as to why it was not presented originally.
147. I accept the Plaintiff’s arguments on this. This is no more than an additional detail to that which is previously raised and pleaded.

DISCUSSION

148. I have considered the detail of the amendments sought and the submissions of the parties against the background of the applicable legal principles.
149. I would allow most of the amendments which are sought for the following reasons:

i) The Documentation

150. I accept that if it is not very late as the Defendants’ urge, it is at least a late application. I accept that this does not of itself mean that the application should be refused but it is one factor to be weighed in the balance.
151. It is accepted that the later the amendment the more likely it is that there would be injustice to the other side, (See *Illiquidix Ltd. v Altana Wealth Limited and others*²⁰, on which the Defendants rely).

²⁰ [2024] EWHC 285, paragraph 26
250603 Ascentra Holdings Inc. (in Official Liquidation) v Ryunosuke Yoshida and Others - FSD 300 of 2023 (CRJ) – Ruling

152. However, in my view the Plaintiff has demonstrated a good and justifiable reason for the application. The reason put forward by the Plaintiff is the identification of documents during the discovery process. It is said that documents were identified, which suggest that the time period pleaded for various transfers was in part erroneous. The Plaintiff is also now aware that steps were in fact taken to give effect to the Cancellation Agreement.
153. The Plaintiff has provided copies of some of the documents which have come to its attention. I think the question of the existence of documentation is one which goes to answering in part whether the Plaintiff can discharge its burden to show why justice to it, the Defendants and other court users requires that it be granted permission to make the amendments.
154. I accept the submission that the JOLs would not have had first-hand knowledge of events over the years and would be reliant on the identification of documentation as to the factual circumstances.
155. Although the Defendants would no doubt urge that the Plaintiff ought to have adverted to these documents earlier, I don't think that the timing of it is such that it can be said that the Plaintiff either knew and sat on its hands or was negligent. According to Counsel in oral submissions, the Plaintiff had some nine million documents to be reviewed for discovery and the Defendants had some three million. I note the vast number of documents disclosed on both sides as set out above.
156. To my mind it makes little practical sense for there to be documents identified which say something different or raise a different timeframe from what is to be pleaded by either party.
157. The Defendants go so far as to agree to the changes as to dates of certain events, but it seems to me to be a legitimate question as to the import, if any, of those changes.
158. If there is documentation now identified which evidences that there were attempts to give effect to the Cancellation Agreement, even if the Plaintiff can be justly criticised for failing to previously advert to this, it surely would be wrong to proceed as if there were not.
159. I accept that as the Defendants submit this change is new such as to amount to a new factual basis which can be described as a new cause of action. The Plaintiff is now seeking to put a positive case that the Cancellation Agreement not only required certain things to be done but

steps were taken to give effect to it. While this area may require some additional work, again, I do not consider that it is clearly distinct from the issues already pleaded. The Cancellation Agreement has been pleaded as part of the chain of events. What is new is whether any steps were taken in relation to it and the proposed positive reliance on it in the way outlined above. Plainly this is an important aspect in line with the Plaintiff's already pleaded case. While the proposed paragraphs 67.1.2B (b) and 67.4 may not necessarily be criticised as to particularity, I think that the Defendants make a strong point in relation to the proposed new wording of paragraph 41. It is imprecise and vague.

ii) The Nature of the Proposed Amendments

160. I accept as the Plaintiff submits that the proposed amendments arise from substantially similar facts. They are such that I do not find a stark and obvious difference between the proposed issues and those already pleaded. There is a clear degree of overlap.

161. The intentions of the Major Shareholders, the arrangements made if any after the re-organisation and the ownership of SPGK Cayman is in issue. This is and remains the essence of the dispute.

iii) The Timing

162. The Defendants urge that the timing of this application, a matter of weeks before the trial is disruptive and would require more work and possibly additional discovery and that it is doubtful whether it can be achieved before the start of the trial.

163. The Plaintiff asks the Court to note that there is an expedited timetable with the trial being set a matter of two months after discovery, which would not ordinarily be the case.

164. I accept that whether it would place unfair pressure on the Defendants to prepare properly for trial is another factor to be taken into account.

165. I note that the Defendants suggested that the Plaintiff's application not be heard until the start of the trial. It was the Plaintiff who insisted that it be heard before the trial.

166. Counsel for the Plaintiff points out that the amendments were proposed on the 1st April 2025, only one month after discovery was concluded and before witness statements were due. I have seen the correspondence. On any view this is a significant period of time, some two months before the trial. Counsel for the Defendants has drawn my attention to the case of *Finastra International Limited v The CRDB Bank PLC*²¹ in which Henshaw J distilled the relevant principles to include: -

“iii) It is relevant to consider to what extent the case sought to be advanced by the amendment is one the parties have already been considering. However, the mere fact that the issue has received some attention in the preparation of the case and the experts' reports is not necessarily sufficient to make permission to amend appropriate.

iv) Consideration of whether the amendments should be allowed takes place as at the date of the hearing. There is no reason for a responding party to take steps to meet the case advanced in a contested amended pleading for which permission has not been granted.”

167. While the Defendants are not obliged to anticipate changes, they have had time to consider them. The evidence in this seven week trial is due to begin on the 9th June 2025. I also note that the initial draft of the timetable indicates that there may be some redundancy.

168. I do not think the timing would be unfair to the Defendants because the application has been foreshadowed and more particularly because of the nature of the amendments sought.

169. Given the nature of them and the already identified features of the dispute, I do not consider that there would be a wide extent of factual investigation which would have to be undertaken to meet the new allegations. The primary issues are already identified. I do not see why adding these would require extensive work such as to significantly delay the trial and make the timetable unworkable.

²¹ [2025] EWHC 509

250603 Ascentra Holdings Inc. (in Official Liquidation) v Ryunosuke Yoshida and Others - FSD 300 of 2023 (CRJ) – Ruling

iv) Other Considerations

170. There is no issue of the claims being statute barred or limitation issues. No issue of expert evidence arises. No issue is raised as to the availability of witnesses. The primary argument in response is the possible need to review documentation and make amendments to responsive pleadings.
171. Noting the volume of documentation in the discovery process, the absence of first-hand knowledge on the part of the JOLs and the procedural history of the case, I do not accept as the Defendants suggest that there is bad faith attendant upon this application.
172. I also place in the balance of factors to be considered that I do not think it is in either party's best interest to possibly open the door for multiple proceedings and satellite litigation. Plainly all the matters now raised can be conveniently tried at the same time to avoid this and are necessary to dispose fairly of the matter.
173. I respectfully adopt the words of Cooke J in the cited case of *Apache Beryl Limited and Marathon Oil U.K. LLC and Others*²²

“12. At the end of the day ,; the ultimate concern of this court is the interest of justice for both parties. The court would therefore wish the parties to be able to advance the cases that they wish to advance unless the factors which are set out in the judgment of Coulson J militate to the contrary.”

CONCLUSION

174. Having considered all the circumstances, those weighing in favour and those against I am satisfied that the Plaintiff has discharged the onus upon it and that balancing the various considerations, the balance is in favour of permitting the proposed amendments to include the references to the Original Understanding, the Cancellation Agreement (except for the proposed amendment to paragraph 41), and the references to resulting or constructive trust and unconscionability.

²² [2017] EWHC 2462
250603 Ascentra Holdings Inc. (in Official Liquidation) v Ryunosuke Yoshida and Others - FSD 300 of 2023 (CRJ) – Ruling

175. The Parties will likely seek consequential directions arising from this. In addition to any timeframe for other amendments, I would have thought for example that it would be appropriate for the Plaintiff, if not already done, to provide a complete and detailed listing of all the documentation which has given rise to the changes.

COSTS

176. By its draft Order, the Plaintiff accepts that in the usual way it should bear the Defendants' costs occasioned by the amendments. Should either party wish to make any additional submissions on costs they may do so.

Dated this the 3rd day of June 2025

A handwritten signature in blue ink, appearing to be 'Cheryll Richards', written in a cursive style.

The Hon. Justice Cheryll Richards KC
Judge of the Grand Court