Neutral Citation Number: [2021] EWHC 571 (Admin)

Appeal No. M20Q279
Claim No. E55YX657

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Date: 10th March 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

MEDICAL CARE CLINICS LIMITED	**Applicant**
- and -	
WHITESTONE SOLICITORS	**Respondent**

- -
- -

Paul McGrath (instructed by Versus Law) for the **Applicant**

Hearing date: 10.3.21

Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is a renewed application (CPR PD52B paragraph 7.2) for permission to appeal against an order of HHJ Sephton QC ("the Judge") in Manchester County Court on 15 May 2020 following a hearing that day. By that order the Judge dismissed the Applicant's application for permission to amend the Particulars of Claim, awarding the Respondent the costs in relation to that application. The Judge went on to strike out the statement of case under CPR 3.4(2)(b) as "likely to obstruct the just disposal of the proceedings", awarding the Respondent the costs of the action to be the subject of detailed assessment, but with an interim payment of £15,000. Permission to appeal to this Court was refused by Turner J on 12 January 2021.

Mode of hearing

2. The mode of hearing was by Microsoft Teams. I am satisfied that that mode of hearing involved no prejudice to the interests of anyone. A remote hearing eliminated any risk to any person from having to travel to, or be present in, a court room during the pandemic. The open justice principle was secured. The case and its start time, together with an email address usable by any member of the press or public wishing to observe, were published in the cause list. This was a public hearing. It was recorded and this ruling will be available in the public domain.

The claim

3. The claim in this case was issued in 2018 and claimed £93,006 for "outstanding debt" referable to an attached schedule of some 116 invoices. The claim was based on a written agreement which Mr McGrath has helpfully summarised in writing and orally, dated August 2015 between the Applicant (as an agency providing rehabilitation services) and the Respondent (as solicitors specialising in bringing personal injuries claims arising out of road traffic accidents under conditional fee arrangements). The essential components within the written agreement included the following. There were to be referrals of cases to the Applicant by the Respondent (clause 1) to which referrals the terms of agreement were to be applicable (clause 15). The Applicant was to make the appropriate arrangements (clause 1) and issue invoices in relation to them (clause 3). The Respondent was to provide updates on request (clause 5). The invoices were to become payable in one of two ways. First, on a relevant event taking place. In particular, that involved 'Stage 2 of the Claims Portal' being reached (clause 4), with the invoice forwarded to a third party insurer (clause 7) and payment within 14 days of recovery from that third party insurer (clause 9), but with provision for the Respondent to seek from the Applicant an extension of payment (clause 12). The second way was upon a relevant breach, resulting in "the full account being payable immediately" (clause 16). The important point to note is that, on the face of the document, the invoices did not themselves constitute debts payable upon their being issued. I am expressing no view about the agreement. I am simply identifying essential features that appear on its face.

The original particulars of claim

4. The claim form incorporated particulars of claim for what was described as the outstanding debt of £93,006. The particulars stated that the Respondent was in breach

of clause 5 (failure to provide updates on request), clause 12 (failure to seek extensions of payment) and clause 16 (full account payable immediately upon breach). These particulars were, at best, ambiguous as to whether it was being said that any breach in the context of any referral meant all invoices globally became payable. Mr McGrath in oral submissions today says that such a 'global' claim is what was being indicated. He also accepts that, based on the agreement, there could not be a sustainable 'global' claim. A further, conspicuous problem with the particulars was a complete lack of any clarity, bearing in mind the duty (CPR 16.4(1)(a)) to provide "a concise statement of the facts on which the [Applicant] relies". There was no specificity at all as to "breaches": what breaches were being relied on; in relation to which referrals; of which duties; on which date; and in which circumstances.

The 'unless order' at the PTR

5. The trial had been fixed for 6 April 2020. On 3 March 2020 a pre-trial review (PTR) took place before the Judge. Both parties were represented by Counsel. The upshot was that the Judge decided to vacate the trial and made an 'unless order': the claim be struck out unless by a specified date the Applicant made an application for permission to amend the particulars of claim. The Judge reserved to himself the hearing of such application.

'Not raised earlier'?

6. Mr McGrath who appears for the Applicant in the context of this proposed appeal – but who was not involved as Counsel in the hearings before the Judge or other previous stages – stated in his skeleton argument for today's hearing that "the issue as to the adequacy of the pleading was first raised at the PTR"; that the Respondent "had not taken any issue with the [Applicant's] pleading prior to the date of the PTR itself", that it "knew the case it had to meet"; and that it "did not raise any issue with the way in which the [Applicant's] claim was pleaded until the PTR". That point was not repeated in his oral submissions. It was demonstrably wrong.

7. The Respondent's pleaded Defence in 2018 repeatedly took the points that the particulars of claim were unclear, unparticularised and non-compliant (as well as not constituting a legally recognisable claim). The pleaded Defence included these passages: "The [Respondent] is embarrassed by the particulars of claim as they fail to comply with Part 16.4 of the Civil Procedure Rules"; "Due to the lack of detail and particularity within the [Applicant's] Particulars of Claim the [Respondent] has been hampered and prejudiced in the preparation of its defence"; "The [Respondent avers] that the… Claim is fundamentally flawed. The [Applicant] has failed to set out the legal cause of action and/or alternatively establish the basis on which [its] claim is based. The [Respondent] does not understand the basis of the [Applicant's] claim"; "The [Respondent] avers that the claim is cursory and fundamentally flawed as a matter of law and doomed to failure".

At the PTR

8. At the start of the PTR when the Judge asked Counsel for the Applicant about the inadequacy of the particulars of claim, her candid response – in my judgment plainly correctly, sensibly and realistically – was, when asked "how is the court supposed to know what this case is about?":

> ***Yes, Your Honour, I see Your Honour's point … The particulars of claim are brief, the invoices are not attached and there is no breakdown of what those invoices are either… That would need to be rectified if this matter is to proceed forwards… The trial date that's fixed for 6 April 2020 would need to be vacated… [T]he [Applicant] would seek to amend the particulars of claim to give fuller pleadings and attach all the necessary documents that would be required for the court to understand the case and for the matter to proceed forwards in the correct manner… That would be to provide fully pleaded particulars of claim.***

The Judge said this: "I cannot simply say you will get permission to serve whatever you come up with, it needs to be considered". The Judge, as I have said, made the 'unless order' and reserved the hearing of any application for permission to amend to himself.

The new pleading

9. The Amended Particulars of Claim were dated 25 March 2020 and the application was made, within the time-frame given in the Judge's 'unless order'. The new pleading was a 4½ page document drafted by the instructing solicitors who, Counsel had told the Judge at the PTR, had drafted the original particulars. Half of the document was taken up with summarising the terms set out in the agreement document. Most of the rest of the document referred generally to referrals and arrangements and invoices, and then to meetings and chasers and a debt action letter before claim, before explaining that the claim now pursued was in the sum of £66,373 (£26,633 worth of invoices having been paid by the Respondent).

10. The particulars of breach, in the middle of the new pleading, were as follows:

> ***In breach of the said agreement:***
>
> ***PARTICULARS OF BREACH***
>
> ***(a) The [Respondent] has failed to respond to the [Applicant]'s requests for updates within 48 hours in breach of Clause 5 of the Agreement.***
>
> ***(b) The [Respondent] has failed to pay the [Applicant]'s treatment costs at the end of Stage 2 of the RTA claims portal in breach of Clause 4 of the Agreement.***
>
> ***(c) The [Respondent] has failed to seek a written extension for payment from the [Applicant] where payments have been delayed in breach of Clause 12 of the Agreement resulting in those invoices, as claimed, being due and owing to the [Applicant].***

11. The Amended particulars of claim, in my judgment, involved the same ambiguity as before as to whether it was being said that there was a breach in relation to each individual referral giving rise to an obligation to pay the invoice relating to that referral; or whether it was being said by reference to clause 12 that the whole account was payable in respect of all outstanding invoices (as listed) as a 'global' consequence of any breach or breaches relating to any referral or referrals. Mr McGrath has submitted today that it was "clear" or "sufficiently clear" from the new pleading – and in particular the reference to the relevant clauses of the agreement – that the claim now being made was that there were a series of individual contracts, to which the terms of the written document applied, and in the case of each of them there had been a relevant breach arising out of either (i) an event triggering entitlement to payment or (ii) a breach triggering entitlement to payment. I cannot accept, even arguably, that that clarity or sufficient clarity arises out of the new pleading. The first time, in my judgment, that

there has been any such clarity in this case was in Mr McGrath's own skeleton argument for this appeal. It contains a "summation" of the claim, that: "Each instruction created a contract between the [Applicant], [Respondent] and the injured person, on the agreed terms as set out in the document signed in August 2015"; going on to say "the [Applicant's] primary case was that all of the invoices … were due for payment due to one or other of the aforementioned breaches". The footnote in that skeleton to that description records that at first instance there had been "confusion" about whether the agreed terms formed a single contract. The only reference to recognition of the "true claim" is the reference, there footnoted, to what the Respondent's counsel had said below. That is a reference to a skeleton argument which had pointed to the ambiguity and the two different possible cases being advanced (global and individualised), while complaining – as the Respondent had throughout – of the lack of clarity in the pleading. In relation to breach, the particulars – set out in the passage in the middle of the new pleading document which I have quoted – were hopeless. They failed in each and every one of the ways which I have previously described in relation to breach and the original particulars of claim (ie. what breaches were being relied on; in relation to which referrals; of which duties; on which date; and in which circumstances). There was no detail or particularity at all.

The hearing on 15 May 2020

12. At the hearing on 15 May 2020 the Judge was addressed by the same two Counsel who had appeared at the PTR. There is a 14-page transcript of the hearing and a 16-paragraph Judgment dismissing the application for permission to amend and striking out the claim. Counsel for the Applicant is recorded in the transcript as having accepted that the original particulars of claim had been "poorly drafted" and having accepted that "the [Applicant] would have difficulty in establishing its claim off the back of that claim form which contains a few paragraphs that doesn't set out the claim in its entirety". She went on to contend that "on the face of it, this is a simple debt claim in that this work has been carried out by the [Applicant] and it has been invoiced by the [Applicant]". However, as the Judge put to her, that did not begin to deal with the case as based on breach and the lack of particularity in relation to alleged breach. The Judge said, of the contention that the claim was really "the non-payment of the invoices":

> ***That is not what this, these particulars of claim says, is it? It is not saying, 'We are claiming for work done and this is the amount'. They are saying, 'There is a breach of contract' and they do not say when the breach was?***

Counsel for the Applicant went on to address the Judge as to "the overriding objective", and "proportionality", as to the Respondent's position, and as to the consequences of refusing permission to amend and of striking out the claim.

Permission to appeal a case-management decision

13. As Turner J pointed out when refusing permission to appeal on the papers, and as Mr McGrath accepts, this is a challenge to a case-management decision. In such cases, absent a misdirection, "it would be inappropriate for an appellate court to reverse or otherwise interfere with [the decision], unless it was 'plainly wrong in the sense of being outside the generous ambit where reasonable decision-makers may disagree'" (Global Torch Ltd v Apex Global Management Ltd [2014] UKSC 64 [2014] 1 WLR 4495 at paragraph 13). Mr McGrath rightly recognises that, for the purposes of today,

he needs to satisfy the Court that the appeal "would have a real prospect of success" (CPR 52.6(1)(a)).

Analysis

14. In my judgment, there is no realistic prospect that this appeal could succeed at a substantive hearing. Mr McGrath has advanced 8 grounds of appeal, 7 of which he has developed orally.

The need for particularisation

15. The essential position taken by the Applicant on the appeal is this: permission to appeal should be granted, in the light of which the Applicant would then formulate a new pleading to put before this Court at the substantive hearing, and this Court would then be invited to allow the appeal and give permission to amend or that new pleading.

16. Mr McGrath recognises that particularisation of breach is necessary and appropriate in this case. He says it could be achieved, not necessarily through the main body of a pleading, but in a pleaded detailed annex to particulars of claim. He says in his skeleton argument: "the [Applicant's] primary case was that all of the invoices… were due for payment due to one or other of the aforementioned breaches." He also says in his skeleton argument:

> ***it is accepted that to determine the precise breach in each case further particularisation would be required.***

That is clarity that has always be needed in this case. It was never provided.

Refusing permission to amend

17. The first three grounds of appeal relates to the Judge's refusal to grant permission to amend. Mr McGrath submits that the new pleading was "clear enough to allow justice to be done in due course", and that permission should have been granted for the new pleading, to be followed with further particularity or further information. Mr McGrath says the new pleading "brought additional clarity" and "would have assisted the Court". I find that characterisation impossible to accept.

18. Ground one is this: that the Judge only considered the lateness of the attempt to particularise the claim (and whether there was a good reason for the timing), together with the question of whether the claim as pleaded had a real prospect of success; that the Judge failed to have regard to the overriding objective and the relevant factors needing to be taken into account in the necessary balancing exercise of discretion by reference in particular to CPR 1.1. In my judgment, it is very clear that the Judge was well aware of the relevant factors in the balancing exercise and the exercise of his discretion. It is quite wrong to say that the Judge's reasons focus only on timing and prospect of success. Both Counsel addressed the Judge at the hearing in relation to the "overriding objective". The Respondent's skeleton argument had specifically drawn the Judge's attention to the relevant passages in the White Book relating to the balancing exercise. Questions relating to the just disposal of the case were up-front and central in the Judge's consideration. Indeed, just disposal was at the heart of what the Judge ultimately did because he was very clear that the ultimate and consequential strike-out of the claim was on the basis that the statement of case was "likely to obstruct the just

disposal of the proceedings". That was the relevant part of rule CPR 3.4(2)(b) on which he based the strike-out. The Judge did not, for example, say that the pleading – albeit now adequate – was far too late. He did not say that the claim being put forward was one that lacked any prospect of success. What he said was that the pleading was "clearly unsatisfactory", having originally been "woefully deficient", in the context of the Applicant having been given "a last chance to put its house in order", in a context that had required a trial to be vacated. He made clear that he was exercising his "discretion".

19. Ground two is that the Judge was wrong in concluding that the newly-pleaded claim had no real prospect of success. I asked Mr McGrath to assist me with where in the judgment the Judge had made that finding (in relation to the newly-pleaded claim or in relation to the original claim). In my judgment, it is impossible – even arguably – to derive such a finding from the Judge's reasons. In the judgment the Judge expressly said, having considered the nature of the particulars of claim: "It seems to me that both prongs of the [Applicant]'s arguments are not completely unarguable. However, they are clearly inchoate. They need further considerable refinement". He went on to then ask whether it was "appropriate", at a stage "when the trial court ought already to have taken place", to allow a further opportunity to amend particulars of claim to "put forward a document which is clearly unsatisfactory". Moreover, when he came to the strike-out the Judge did not invoke CPR 3.4(2)(a): "that the statement of case discloses no reasonable grounds for bringing or defending the claim". That ground had been raised by the Respondent in one of its submissions at the PTR. In my judgment there is clearly nothing in ground two.

20. Ground three is closely linked to ground one. Mr McGrath in his skeleton argument submits that it was unreasonable for the Judge not to give permission to amend to rely on the new pleading, and that the Judge's refusal to do so was "the very opposite of serving the interests of justice". Mr McGrath there says that the Judge's refusal to give permission to amend gave rise to a "windfall" for the Respondent in relation to costs and meant, in light of the strike-out, that the Applicant would have to start all over again. In oral submissions Mr McGrath submitted that the decision to refuse permission to amend was unreasonable because the pleading was, as I have said, "clear enough to allow justice to take place in due course", and that the Judge should have granted permission and then made provision for further particularity or "further information". In my judgment there is nothing, even arguably, unreasonable about the Judge's refusal to permit the amendment to put forward "clearly unsatisfactory" particulars in circumstances where a "last chance" had been given and the deficiencies were – as the Judge put it – "exactly the same deficiencies as the original particulars of claim in that it fails wholly to state when these breaches took place or the consequences which are alleged to flow from those breaches". There was nothing unreasonable, even arguably, in the Judge declining to grant permission, with a yet further opportunity to provide particulars, whether in the form of a new pleading or schedule to a pleading or further information.

Striking-out the claim

21. The remaining grounds that Mr McGrath advanced orally all relate to the Judge's decision to strike out the claim. One problem with them is that there was a clear and obvious link between the refusal of permission to amend and the consequence for the claim. Indeed, in the context of the challenge to the refusal to permit amendment, Mr McGrath in his skeleton argument says this "given the Judge's earlier findings

regarding the original Particulars of Claim, it was obvious that by refusing the amendment, it would lead to the [Applicant] having its valuable claim struck out leaving it to re-issue a fresh set of proceedings".

22. Ground four of Mr McGrath's eight grounds of appeal is that the Judge misdirected himself in concluding that the original claim, which was what was left having refused permission to amend, was one which lacked any reasonable prospect of success. However, as I have already said, the Judge made no such finding; and the Judge deliberately and carefully did not strike out under that part of the rule (CPR 3.4(2)(a)) based on "the statement of case disclos[ing] no reasonable grounds for bringing … the claim". The problem was the impedance of just disposal of proceedings (CPR 3.4(2)(b)) arising from having missed a "final chance" to give proper particulars.

23. Ground five complains about the Judge's conclusion that the original claim, with its original particulars, was "likely to obstruct the just disposal of the proceedings". In the first place, the complaint is made that the Respondent had not taken any issue prior to the PTR. I dealt with that point earlier in this judgment. It is not a well-founded criticism. The rest of the criticism, in essence, is that "a fair trial was an achievable alternative" in this case, and the claim should have been allowed to continue, but with some "alternative" to the new (and rejected) pleading. In my judgment, that is a hopeless position because it amounts to the contention that where there could eventually be a fair trial, if full and proper particulars are at some stage given, it is wrong in principle to strike out the claim.

24. Ground six alleges a misdirection by the Judge for not considering alternatives and in particular "further information" under CPR 18.1. In his oral submissions Mr McGrath submitted that there was a "fairer balance" that the Judge could and should have struck, and which he failed to consider. Mr McGrath gave me a list of "alternatives". One of which was the ordering of "further information". Others included costs sanctions, interest sanctions and striking out "part" of the claim. In my judgment, there was no misdirection by the Judge and no failure to have regard to relevant factors or available alternatives. The Judge plainly had in mind the circumstances and options going forward. He did consider allowing the claim to proceed and he did explain that he was exercising a discretion as to whether that was appropriate. His judgment, moreover, made observations about whether the Amended Particulars could properly have been regarded as "an adequate pleading" which "kicked the ball off, as it were, in original particulars of claim". In the context of viewing them in that way, the Judge referred specifically to the new document being a pleading subject to "requests for further information". He plainly had in mind "further information" as a way of eliciting particulars. He also had in mind that he had dealt previously with the PTR at which he had considered what, at that stage, was the appropriate way forward and had made the 'unless order'. The Judge concluded, as an exercise of his discretion, that allowing the existing statement of case to stand and for the proceedings to proceed was likely to obstruct the just disposal of the proceedings. He considered that the appropriate and justified course was to strike out the statement of case. There was no arguable misdirection in doing so.

25. Nor (and this is ground seven) was there, in my judgment, any arguable unreasonableness. The Judge's decision to strike out the claim was plainly, in my judgment, within his case-management discretion in the circumstances of this case. He could not have been clearer, when reserving the matter to himself in the context of what

he had encountered at the PTR, that he was giving an important last chance to properly particularise the claim, as part of an 'unless order'. Although the 'unless order' meant that the absence of an application to amend would have the consequence of the claim being struck out, it made it very clear to the parties that this question of particularity of the claim, in the context of having lost a trial date, and when the problems in the claim had been recognised from the start, meant it was 'on the cards' that – absent an appropriate Amended Particulars of Claim – the claim would be struck out. Counsel for the Applicant sought to persuade the Judge that that course was not necessary or appropriate, having regard to "the overriding objective" and "proportionality". She failed and there is, in my judgment, no realistic prospect that this Court would overturn the Judge's conclusion that it was appropriate to strike out the claim.

Costs

26. The eighth ground related to costs and has not been developed in oral submissions. Since it was not formally abandoned, I must deal with it. Ground eight is that the order for costs of the action having struck out the statement of case was unreasonable. The points made by Mr McGrath in writing, in particular, are these: that some invoices (amounting to over £24,000) had been paid; that there was a problem arising out of the Respondent's own pleading which was never in the event resolved; that the Respondent had sought the trial being vacated; and that the Respondent did not raise any issue relating to the lack of particularity in the claim until the PTR. The final two points are simply plainly wrong. The transcript of the PTR shows Counsel for the Respondent seeking, if anything, to rescue the trial date and that it was Counsel for the Applicant who, in response to a question from the Judge, stated (as I quoted earlier) that it would be necessary, in the context of having proper particulars, to vacate the trial. As I have explained, the Respondent did raise the deficiencies of particularisation of the claim earlier, in its pleaded Defence. At the hearing before the Judge, Counsel for the Applicant expressly accepted that she could not – in light of the strike out of the claim – resist a costs order, in principle, involving the Applicant having to pay the Respondents costs of the proceedings. What she resisted was an assessment of those costs at that hearing, requesting the Judge to order that there be a detailed assessment. A central point made by her, in seeking a detailed assessment, was the point relating to the Respondent's own pleading. In circumstances where the costs order which the Judge made was not resisted by the Applicant at the hearing, and indeed was requested by its Counsel at the hearing, it is quite impossible on appeal to impugn the Judge's exercise of discretion and judgment in relation to costs. But, even had the matter been hotly contentious before the Judge, on the points subsequently raised by Mr McGrath in his skeleton argument, I am quite satisfied that there is no realistic prospect that this Court would overturn the – manifestly reasonable – exercise of judgment and discretion in ordering the Applicant to pay the Respondents costs of the proceedings, to be the subject of detailed assessment if not agreed. Having seen the transcript Mr McGrath candidly told me that, in the light of the position which the Applicant's Counsel had taken at the hearing, he did not wish to make any further oral submissions in relation to this final ground eight.

Conclusion

27. For all those reasons, this application for permission to appeal is refused. I agree with Turner J that the proposed appeal is not properly arguable and has no realistic prospect of success.