Neutral Citation Number: [2019] EWHC 3229 (Ch)

Case No: CO3NE104

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
HIGH COURT APPEAL CENTRE LEEDS

The Combined Court Centre, Oxford Row,
Leeds, LS1 3BG

Date: 26/11/2019

Before :

THE HONOURABLE MR JUSTICE BUTCHER

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Between :

RAYMOND ANTHONY SHEPHERD	**Appellant**
- and -	
(1) HELEN CHRISTINE CAIL **(2) SUSAN VALERIE GELLEY**	**Respondents**

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- -

Chris Buttler (instructed by Raymond Anthony Shepherd) for the Appellant
The Respondents appeared in person

Hearing date: 30 October 2019

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Approved Judgment

Mr Justice Butcher :

Introduction

1. This is an appeal by the Claimant / Appellant, to whom I will refer as Mr Shepherd, against an order of DJ Loomba, to whom I will refer as "the District Judge", dated 11 May 2018, whereby the District Judge struck out Mr Shepherd's claim in this action on the basis that as it was statute barred and disclosed no reasonable ground for bringing the claim. Permission to appeal against that order was granted by O'Farrell J on 5 June 2019.

2. The Claim Form in the present action was issued on 19 July 2016 in the Newcastle County Court. The Brief Details of Claim which are there set out are as follows:

> "1 By an agreement made between [Mr Shepherd] on the one part and Alan Blair deceased on the other part Alan Blair agreed to pay [Mr Shepherd] 50% of the increased value of the land situated at and known as 630 Whessoe Road Darlington County Durham when planning issues relating to the lawful use of the Land had been resolved with the local authority.
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> 2 On the 20th July 2010 [Mr Shepherd] received by post a notification from the Local Authority Darlington Borough Council confirming that the Enforcement Notice issued against the land had been withdrawn and thus the lawful use of 630 Whessoe Road Darlington County Durham under the planning acts had been established by [Mr Shepherd]."

3. In Rider B to the Claim Form it is stated that the value of the claim was estimated to be £10 million "on the basis that the increased open value of 630 Whessoe Road Darlington County Durham with the planning issue as to the lawful use of that land having been resolved by [Mr Shepherd] is twenty million pounds."

4. The Claim Form states that the claim is brought against the Defendants, Mrs Cail and Mrs Gelley, who are Mr Blair's daughters, as "Personal Representatives of Alan Blair deceased". I will refer to Mrs Cail and Mrs Gelley as "the Respondents".

5. By application notice dated 4 January 2018, the Respondents applied to strike out the claim or for summary judgment on the basis that it was an abuse of process, and in the alternative, was time barred.

6. That application was heard by the District Judge in March and April 2018. A number of points were argued before him. He decided the case on the sole basis that the claim was time barred. He did not decide the other points. It is against that decision that Mr Shepherd now appeals. The Respondents contend that the decision should be upheld

for the reason given by the District Judge, or alternatively on the basis that the action is an abuse of process, a point which was raised in a Respondents' Notice.

The History of the Litigation

7. Before considering the judgment of the District Judge and the points which are raised on this appeal, it is necessary to say more about the history of this matter. It is a long and involved one, and has involved a tangled series of proceedings.

8. One of those earlier proceedings was action 0NE90046 / A2/2012/2980, commenced in 2010, in which Mr Shepherd and a company of his, Albert Hill Skip Hire Ltd, were Claimants, Robert Gelley and Nor-Dem Ltd, were Defendants, and Collect Investments Ltd and Comvecs Intell Ltd were Part 20 Claimants. I will call that action "the First Action", for convenience, while recognising that there had been yet earlier related proceedings. A significant part of the history can be summarised by reference to the judgment in the First Action of HHJ Walton, sitting as a Judge of the High Court, dated 2 November 2012, and the judgment of Sales J (as he then was) in the Court of Appeal in the appeal from HHJ Walton's decision, dated 7 October 2013.

9. As appears from those judgments, the land at 630 Whessoe Road had originally been purchased by Alan Blair in the late 1960s. He had later transferred it to a limited company which he owned, Alan Blair (Darlington) Ltd. In the 1990s an argument arose with Darlington Borough Council's Planning Department, which took the position that there was no planning permission to tip on the land. That disagreement was unresolved when, in May 1996, the land was transferred by the receiver of Alan Blair (Darlington) Ltd to another company in which Mr Blair had an interest, which was identified simply as Collect Investments Ltd. Issues subsequently arose as to what corporate entity that actually was. It was resolved by HHJ Walton in the First Action that the relevant company had been Collect Investments Ltd incorporated in the BVI ("CILBVI"), and that it was that company which was the owner of the land after 1996.

10. Mr Shepherd was permitted to enter the land by an agreement with Mr Blair made in late 2007. There were issues in the First Action as to the nature and terms of that agreement. At paragraphs 8-9 of his judgment HHJ Walton summarised this dispute thus:

> "[8] In late 2007 Mr Blair, who by then was spending increasing amounts of time out of the country, met the first claimant, Mr Shepherd, and they spoke about the problems with the Council in relation to planning permission. Mr Blair was apparently also keen to see whether the Council had taken some of his land when they created Drinkfield Pond at the eastern end of the site. Over what Mr Shepherd said were a number of meetings they reached an agreement of some kind the terms of which are in dispute. The agreement was not

> recorded in writing. The only direct oral evidence comes from Mr Shepherd as Mr Blair is dead. His case, as advanced by Mr Stubbs, is that he was granted a lease for a term of five years, in consideration of which he would level the land, take up the planning dispute with Darlington Borough Council, and investigate potential claims for trespass against that Council. At the end of the five year term progress was to be reviewed and an extension discussed. As part and parcel of this agreement he was to use the land as a waste transfer and recycling centre to bring matters with the Council to a head.
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> [9] The Part 20 claimants deny an agreement in the terms for which Mr Shepherd contends. They do not rely on a written statement from Mr Blair dated 7 January 2009 in which he says he never gave any permission to Mr Shepherd to enter and operate a business on the land: they accept that cannot be right. They do rely on what Mrs Cail, Mr Blair's daughter, was told of the agreement by her father; and upon various letters and other documents which are said to evidence Mr Blair's intention. Their case is that it was agreed the first claimant could have access to the land to extract materials previously tipped by Mr Blair or his company, in order to form hardcore which could be sold to fund (a) an investigation into whether Mr Blair or his company had a claim against the Council for trespassing on the land and (b) an attempt to resolve the planning issues relating to the land. There would be a sharing of profit from compensation received from Darlington Borough Council in relation to the trespass claim if the issue was resolved in Mr Blair's favour."

11. HHJ Walton further described that, after Mr Shepherd was permitted to enter the land, there had come to be a disagreement between him and Mr Blair as to Mr Shepherd's activities on the land. Thus, at paragraphs 10-13 of HHJ Walton's judgment appears the following:

> "[10] Mr Blair was abroad for most of the following months, until late 2008 when he returned. It would appear that he then became concerned about Mr Shepherd's activities on the land. Mr Shepherd wrote to him a letter dated 3 November 2008 in which he referred to discussions a few days before. They had a further conversation on the 5th and Mr Shepherd wrote again on the 6th. There had been a fire on the land which resulted in the fire officer closing the site. Mr Shepherd referred in the letter of 3rd November to equipping the site in order to call what he referred to as the Council's bluff on the planning issues. He had commenced operations; the Council had threatened action and he had countered with the threat of a claim for compensation if his operations were stopped.

> [11] Mr Shepherd's letter did not seem to have reassured Mr Blair. He apparently alleged trespass and unauthorised tipping. Mr Shepherd wrote: 'I would refute your suggestion that I had trespassed and taken advantage of the situation by allowing John Wade and all and sundry to tip approximately 200,000 tones (sic) of waste on the site…'
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> [12] Again Mr Blair did not appear reassured. He instructed solicitors, Row & Scott, who wrote to Mr Shepherd on 15th December 2008 demanding that he leave the land within 7 days. The letter alleged that Mr Shepherd had tipped waste without permission and claimed compensation in the sum of £100,000 reflecting the alleged cost of tipping the waste legitimately. The same solicitors also wrote to the Environment Agency and Darlington Borough Council saying that what was happening on the site was unauthorised.
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> [13] It appears that Mr Blair went abroad again in the first half of 2009. However, by July 2009 he was back in the UK and arranged for a security firm to retake possession of the land. That appears not to have been successful and a further letter dated 14th August 2009 was sent by Row & Scott. They said they were writing on behalf of "Collect Investments" and Mr Shepherd was trespassing. 'You have occupied the land by force and with the use of considerable violence and have continued to carry out unlawful activities there.'"

12. HHJ Walton referred (in paragraph 15 of his judgment) to the fact that on 25 August 2009 Darlington Borough Council served an Enforcement Notice on Mr Shepherd - as well as upon Mr Blair as owner of the land - for breach of the planning legislation, contending, inter alia, that Mr Shepherd had unlawfully used the land as a waste transfer and recycling centre, and had imported controlled waste onto the land. At paragraph 16 of HHJ Walton's judgment it is recorded that Mr Blair had commenced possession proceedings against Mr Shepherd in September 2009 in the name of "Collect Investments Ltd". It appears that that was a reference to Collect Investments Ltd, incorporated in Panama, which was the wrong company. In any event, that action appears to have been struck out for non-compliance with a case management order.

13. Mr Blair died on 13 November 2009, leaving the present Respondents to inherit his estate under an intestacy. Soon after her father's death Mrs Gelley sought to remove Mr Shepherd and Albert Hill Skip Hire Ltd from the land, which they were continuing to occupy and use. There followed a "wrestling match" over possession of the land, in which Mrs Gelley's husband, acting for his wife, and with some but limited authority from Mrs Cail, sought to eject Mr Shepherd, and in June 2010 caused the company instructed by the Gelleys', Nor-Dem Ltd, to remove some of Albert Hill Skip Hire Ltd's equipment from the land.

14. With a view to assisting in removing Mr Shepherd and Albert Hill Skip Hire Ltd from the land, Mrs Gelley arranged for a company called Comvecs Intell Ltd ("Comvecs") to be incorporated on 13 April 2010, and then purported to effect a transfer of the title in the land from CILBVI to Comvecs and applied for Comvecs to be registered by the Land Registry as the new proprietor of the land. The Land Registry asked for confirmation that CILBVI was an extant company. A certificate of incumbency was sent to the Land Registry on 29 June 2010, which appeared to show that CILBVI was in existence and in good standing. That was a forgery. In fact, CILBVI had been struck off the register of companies in the BVI in 1991 and dissolved in 2001.

15. In the meantime, as set out in paragraph 27 of HHJ Walton's judgment:

> "Concurrently with these efforts, the solicitors instructed by Mr and Mrs Gelley, Dickinson Dees, had been working to obtain planning permission for the land and on 7th July 2010 Darlington Borough Council granted full planning permission for waste transfer, waste recycling and processing operations, importation and excavation of waste, excavation and landfill tipping to an engineered level and erection of associated buildings. The Council withdrew the enforcement notice and indicated it would take no further action on the appeal."

16. On 24 August 2010, Albert Hill Skip Hire Ltd commenced the First Action claiming damages against Mr Gelley and Nor-Dem Ltd for conversion of its property on the land. On 7 October 2010, Mr Shepherd commenced a claim against Mr Gelley and Nor-Dem Ltd for possession of the land. As I understand it this was then consolidated with Albert Hill Skip Hire Ltd's claim.

17. In January 2011 Banister J in the BVI Court made an order restoring CILBVI to the register. On 19 April 2011, CILBVI and Comvecs were added as Part 20 Claimants in the First Action, each counterclaiming for possession of the land, and for a declaration that Mr Shepherd had no right to possession of it.

18. The First Action then proceeded. One particular matter to which the Respondents called attention in the present hearing is that in one of his statements of case in the First Action – namely the "Reply to Amended Defence of the First and Second Defendants, Reply to the Purported Defence of the Part 20 Claimant's and Further Part 20 Claim against the Part 20 Claimants", which was served on 10 May 2011 - the following was pleaded on behalf of Mr Shepherd:

> "… the Claimant's primary case is that the interest granted to the 1st Claimant was a tenancy. The 1st Claimant had exclusive possession of the site from the beginning of his agreement with Mr Blair. The arrangement included entitlement to 50% of any increase value in land if the First Claimant was able to obtain/receive confirmation that the land had/was to receive planning permission to be operated as a waste

> transfer/recycling centre or was immune from any prosecution for such use due to the passage of time (the increase being calculated on the assumption that it had no permission/immunity prior to the agreement between the First Claimant and Mr Blair/Collect Investments). The agreement further included importing materials onto the land with a view to levelling the site for industrial purposes and to look into potential claims against Darlington Council arising out of the Council's alleged trespass on the western boundary of the site. The First Claimant was not required to investigate the claims re the council referred until such time as the planning position was resolved in accordance with the above and he had received payment in accordance with the uplift to be calculated."

19. The First Action came before HHJ Walton in April 2012 for the trial of three preliminary issues: (1) whether Mr Shepherd was entitled to possession of the land or alternatively whether one or other of the Part 20 Claimants was entitled to possession; (2) whether Mr Shepherd's right to possession had been lawfully terminated and if so when; and (3) if the Part 20 Claimants had a right to possession of the land superior to that of Mr Shepherd, were they entitled to remove the property of Albert Hill Skip Hire Ltd from the land, or was that a conversion?

20. For the purposes of determining these issues HHJ Walton heard oral evidence from Mr Shepherd and from Mrs Cail and Mrs Gelley, as well as others, apparently over a period of four days. It is obvious from HHJ Walton's judgment that there was extensive evidence in relation to the terms of the agreement between Mr Shepherd and Mr Blair, and I have been told that there was consideration of all the documentation that existed as to what the nature and terms of that agreement were.

21. At paragraphs 64-76 of his judgment, HHJ Walton set out his findings on the nature of that agreement. What he found may be summarised as follows:

    (1) That Mr Blair and Mr Shepherd had entered into an arrangement whereby Mr Shepherd and Albert Hill Skip Hire Ltd would have the use of the relevant land. In return Mr Shepherd was to work on clarifying the planning position in relation to tipping/recycling. He was also entitled to remove the existing hardcore and use it to level the site and to sell any not so used, and would be entitled "to a share of the enhanced value of the site if adjustment with the local authority could be agreed" (para. 71).

    (2) That Mr Blair had only granted Mr Shepherd a licence. The licence had no specific duration.

    (3) That, at some point after initially being permitted to use the land, Mr Shepherd had started to use it in ways going outside (indeed "way beyond" (para. 76)) what he was entitled to do under the licence, in particular using it for waste disposal.

(4) The use to which Mr Shepherd was putting the land by dumping waste on it, was a breach of the licence. It entitled Mr Blair to instruct his solicitors to give Mr Shepherd notice to quit. Such notice was given in December 2008. From that time onwards, Mr Shepherd was a trespasser.

22. What complicated the case was that HHJ Walton considered that, notwithstanding these findings, Mr Shepherd had a better title to possession than either the Part 20 Claimants. The reason for this was that he found that the purported transfer of the property from CILBVI to Comvecs on 8 June 2010 was ineffective, in that Mrs Gelley had not then been a director of CILBVI, and that it was tainted by fraud; and further that although CILBVI had, by Banister J's order of 11 January 2011, been restored to the register of BVI companies, and deemed never to have been dissolved, that order was "tainted by fraud" and ineffective.

23. The latter aspect was subsequently reversed on appeal: [2013] EWCA Civ 1172. The Court of Appeal held that the order of Banister J had been effective to restore CILBVI. At the end of his judgment on the appeal, Sales J said this (paragraph 85):

> "In broad terms, the effect of the analysis in this judgment and the order I would make on the on-going proceedings and the relations between the parties is that (i) subject to any other defences which might be available, the Respondents [Mr Shepherd and Albert Hill Skip Hire Ltd] are likely to be successful in their claim for wrongful interference with their goods, on the basis that Mr Gelley and Nor-Dem did not have proper authority from CILBVI, the owner of the Land, to exclude them from the Land and seize their goods located on the Land; (ii) it is likely that CILBVI, as owner of the Land, will now be able to claim possession of the Land from the Respondents, provided that Mrs Gelley and Mrs Cail (who together own the entirety of CILBVI) both authorise a claim to that effect; and (iii) it is possible that CILBVI may have a claim against the Respondents for payment of a reasonable fee or rent for their use of the Land, CILBVI's property, on the grounds of the Respondents' use of the Land without CILBVI's consent since the end of December 2008…"

24. Before that decision of the Court of Appeal, on 21 August 2012, Mr Shepherd and Albert Hill Skip Hire Ltd had been convicted at the Teesside Crown Court of 8 Counts of operating a regulated facility without a permit. As I understand it, 6 of those counts related to their unlawful use of the land at Whessoe Road. Mr Shepherd was subsequently convicted of further similar offences at other sites. He was apparently sentenced to 18 months imprisonment, and Albert Hill Skip Hire Ltd was fined £100,000. Mr Shepherd was also, ultimately, made the subject of a Confiscation Order in respect of this offending in February 2017. He was found to have benefited from a criminal lifestyle in an amount of £316,232 in respect of his criminal activity on the land at Whessoe Road.

25. The judgment of the Court of Appeal in the First Action was not the end of the civil litigation which there has been about the occupation of the land consequent upon Mr Blair's agreement with Mr Shepherd. On July 2014, CILBVI began an action against

Mr Shepherd in the Darlington County Court, claiming possession of the land, and also damages for the costs of removing the waste unlawfully tipped by Mr Shepherd onto the land, and in the amount of the revenue lost by reason of his unauthorised occupation thereof. For convenience I will call this action “the Second Action”.

26. An order for possession in favour of CILBVI was made in the Second Action on 12 September 2014. Mr Shepherd attempted to appeal that order, but the application for permission to appeal was dismissed as totally without merit in January 2015.

27. The remainder of the Second Action continued after the order for possession was made. It is significant to note that in Mr Shepherd’s “Responce (sic) to the Claim for Damages to Meet 4) of Order Dated 28 October 2014”, served on 3 December 2014, Mr Shepherd pleaded, in paragraph 5, “It was agreed that I would be entitled be paid 50% increase in value of the Site on receipt of confirmation resolution/realignment of planning matters as opposed to the value of the site with no planning title. Similarly, would also be entitled to half increase of the value of the site as a whole on completion of remediation, peripheral obligations land disputes damage claims…”. Further, in his “Defendants Further Additional Statement in Compliance with Order Dated 28 October 2014”, served on 25 February 2015, Mr Shepherd dealt with a number of matters concerning his original agreement with Mr Blair. These included:

    (1) “All matters, concerning the nature and validity of the agreement between the Defendants and Mr Blair “CILBVI” were before the High Court in proceedings brought under claim no. ONE90046 and judgment handed down on 2 November 2012 with findings of fact…” (para. 18)

    (2) That some 5 months after the agreement with Mr Blair, the Chief Planning Officer of Darlington Borough Council had acknowledged “the adjustment of the planning position”, and there was then legal confirmation on behalf of Darlington Borough Council of an entitlement to industrial waste activities land usage in a memorandum dated 11 June 2008. (para. 22) This represented an “achieved adjustment” of the planning position (para. 23)

    (3) That it would be “grossly unfair and unreasonable” to make an award of an interim payment in favour of the Claimant, CILBVI, inter alia “Because of the successful confirmation of the adjusted planning issue … [Mr Shepherd] is now entitled to **50% share of the enhanced value of the land**. On the 23/09/2014 letters to this effect were sent by recorded delivery to [the Respondents] … requesting payment of moneys due… The net result of the of the (“CLEUD”) entitlement … fiscally is now believed to be worth between £20 - £36 million as apposed, to No planning permission … valued £10,000. (sic)” (para. 28) Mr Shepherd further stated that there were other sums said to be due to him.

28. The Second Action came for trial before HHJ Raeside QC in October 2015. In his judgment, HHJ Raeside QC said this:

> "[3] This case has a long history and it is seldom since this court has found such a large court file, with so many orders, applications, judgments, appeals which may, as a result of this judgment, bring the continuing disputes between these parties to an end and permit this court to close their files."

29. Mr Shepherd and Mrs Gelley, amongst others, gave evidence in that trial. In his judgment, which is dated 8 October 2015, HHJ Raeside QC proceeded to find that Mr Shepherd had sought to reargue various issues about the agreement with Mr Blair, and in particular the issue of whether he had been given a lease or a licence and when his right to possession vis à vis CILBVI had been terminated, which had been decided against him by HHJ Walton or by the Court of Appeal. HHJ Raeside QC held that he was not entitled to do so (paragraphs 81-84, 98). During the course of his judgment, HHJ Raeside QC reviewed the matters set out in paragraphs 21-28 of Mr Shepherd's statement of 25 February 2015 and concluded that they were not relevant to the decision he had to make (paragraph 113). In the upshot, HHJ Raeside QC decided that CILBVI was entitled to the sum of £287,500 as loss of revenue during Mr Shepherd's unlawful occupation of the land.

30. Mr Shepherd appealed the decision of HHJ Raeside QC, but the appeal was dismissed in February 2018: [2018] EWCA Civ 162.

<u>The present claim</u>

31. It will be apparent from what I have already set out that Mr Shepherd's present action was commenced after HHJ Raeside QC's judgment in the Second Action. I have already quoted the brief details of the claim set out in the Claim Form.

32. In the Particulars of Claim, which were dated 15 November 2016, Mr Shepherd pleaded various instances of "forgery and fraud" carried out by Mrs Gelley which had been discovered during the course of the First Action. At paragraph 27 it was said that "as a result of the fraud and forgeries [set out earlier] the Claimant has suffered loss and damage." At paragraph 28 it was pleaded that "By reason of those frauds and forgeries the Claimant has been defrauded of the monies due to him under the 2007 Agreement." On any view it is difficult to see how the latter plea was in any way arguable, as the frauds and forgeries had been discovered, and had not prejudiced Mr Shepherd's ability to claim any sums which he contended were due under the agreement with Mr Blair.

33. The principal claim, however, was for 50% of the enhanced value of the land, which, Mr Shepherd pleaded, he became entitled to on 20 July 2010, when Darlington Borough Council indicated that it was withdrawing the Enforcement Notice.

34. On 24 October 2017, DJ Kramer, as he then was, sitting in the County Court at Newcastle Upon Tyne, transferred the case to the High Court, and gave certain further directions.

35. The Respondents then applied to strike out Mr Shepherd's claim, as they had told DJ Kramer that they would. The hearing of this application took place on 19 March and 24 April 2018, in front of the District Judge sitting in the Newcastle upon Tyne District Registry. Mr Shepherd and Mrs Gelley appeared in person.

The judgment of the District Judge

36. On 11 May 2018 the District Judge gave the judgment which is appealed from. In the course of that judgment he said this:

> "[13] In 2007 the late Mr Blair and the claimant entered into an agreement whereby the claimant (and his company Albert Hill Skip Hire) would have use of 630 Whessoe Road ('the land') in return for providing assistance to Mr Blair in respect of certain planning issues he had with the local authority, Darlington Borough Council. In proceedings under the claim numbers ONE90046 and A2/2012/2980 HHJ Walton found that such an agreement had been made between the late Mr Blair and the claimant. Although the claimant in those proceedings claimed he had a five-year lease of the land, HHJ Walton found that to be a contractual license. He also found that it was likely to have been agreed between the claimant and Mr Blair that the claimant would receive 50% of any increase in the value of the land upon planning issues being resolved. He further found that as a result of alleged breaches by the claimant of the use to which he could put the land, the contractual license was terminated at the latest by a letter dated 15 December 2008 from Mr Blair's then solicitors, Row and Scott. Although that judgment was a subject to an appeal before the Court of Appeal, there was no appeal from the findings of HHJ Walton on the agreement which the parties continue to be bound by."

37. The main reasoning of the District Judge was as follows:

> "[19] The claimant's pleaded case on the claim form is that the 50% increase in value would be payable 'when planning issues relating to the lawful use of the land had been resolved with the local authority.'
>
> [20] On 25 August 2009 an Enforcement Notice was served upon the claimant by Darlington Borough Council alleging a use of the land in breach of planning control. I do not need to go into the details of the alleged breaches. Since the breaches identified in the enforcement notice were continuing,

Darlington Borough Council served a Stop Notice on 13 November 2009 to Collect Investments Ltd (being the owner of the land which was occupied by the claimant and/or his company under the 2007 agreement) requiring that all activities specified in the notice cease.

[21] It appears (although I have not seen the relevant documents) an enforcement appeal was launched by the claimant's company Albert Hill Skip Hire Ltd as is recorded in a letter dated 18 June 2010 from the Endeavour Partnership being the solicitors for the company. It appears that the appeal was based on an established use which was permitted or immune from prosecution presumably because of the continued use over a period of time. Following a report to the planning committee of Darlington Borough Council recommending a grant of planning permission and withdrawal of the enforcement notice, planning permission was granted by the local authority it appears on 23 June 2010. Notice of the grant of the planning permission dated 7 July 2010 was sent by the local authority to Dickinson Dees LLP the solicitors who lodged the application on behalf of Culsmore Limited (which I understand is a company controlled by the defendants).

[22] On 5 July 2010 Dave Coates from Darlington Borough Council sent an email to David Smale at the Planning Inspectorate in relation to the appeals against the Enforcement Notices. This was copied to the solicitor, Alex Smith, at the Endeavour Partnership. The email attached the report and conditions that were reported to the planning committee on 23rd June 2010. It went on to confirm that planning permission was granted. It further stated that he would contact the Inspectorate again in the coming days to advise you further how the council wish to proceed with this matter.

[23] On 6 July 2010 Mr Smith sent an email to David Coates in which he states, 'I note your email and the reference in the report to the committee that the enforcement notices would be withdrawn'.

[24] On 20 July 2010 the Planning Inspectorate wrote to Mr Smith confirming that the council have withdrawn the Enforcement Notice and have notified Mr Smith of the same. It went on to confirm that the Inspectorate would take no further action on the appeals and the inquiry had been cancelled.

[25] The question then arises as to when the planning issues relating to the lawful use of the land had been resolved with the local authority which gave rise to the claimant's entitlement to 50% of the increased value of the land.

[26] The defendants' contention is that the planning issues were resolved on 23 June 2010 when, following the report to the committee (a copy of which I have not seen) planning permission was granted and the decision was taken to withdraw the Enforcement Notices as is mentioned in the email of 5 and 6 July. The notice dated 7 July 2010 was merely a notice of the decision taken by the planning committee on 23 June 2010 and that is when the cause of action accrued for the purpose of section 5 of the Limitation Act 1980 and the claimant's claim which was issued on 19 July 2010 is a statute barred.

[27] The claimant's contention is that the planning issues were resolved when Mr Smith received the letter from the Planning Inspectorate dated 20 July 2010. Therefore, the claim that has been issued by the claimant on 19 July 2010 is just within the limitation period as set out in section 5.

[28] The limitation period for the purpose of section 5 runs from the date on which the cause of action accrued. In my judgment the date on which the cause of action accrued in this case was 23 June 2010 when the planning committee of Darlington Borough Council granted planning permission in respect of the activities as specified in the Enforcement Notice which was then withdrawn. The letter dated 20 July 2010 from the Planning Inspectorate was merely a confirmation that the appeals against the Enforcement Notice were now effectively redundant as the Enforcement Notice had been withdrawn and no further action would be taken in relation to the appeals. That of necessity is something that the Inspectorate had to do as the appeals had previously been launched. In no sense can it be said that the confirmation in relation to the appeals from the Inspectorate was a resolution of the planning issues with the local authority which, in my judgement, happened on 23 June 2010 because of the grant of planning permission and the withdrawal of the Enforcement Notice.

[29] Therefore, I am of the clear view that the claimants claim was issued outside the limitation period as specified in section 5 of the Limitation Act 1980 and for that reason the claimant's claim should be struck out and I make an order accordingly. Further as the claimant knew or ought to have known when the cause of action accrued but having chosen not to pursue any claim until 19 July 2016 notwithstanding that pre-protocol letters were sent to the defendants dated 23 September 2014, in striking out the claim I do so on the basis that the claim is totally without merit.

[30] I am aware from the second defendant's oral submissions on 24 April 2018, the defendants would be asking me to make a ruling on the estoppel issue on the issue of the claimant being precluded from pursuing a claim in these proceedings which he

> could have, should have and failed to do in earlier proceedings. I specifically decline to do so on the basis that, given my ruling in this judgment that the claimant's claim is statute barred, such a ruling would be entirely academic whatever merit there may be in the defendant' submissions. It is not the function of this court to embark on such an exercise simply for the satisfaction of the defendants."

The Grounds of Appeal

38. In his Perfected Grounds of Appeal, Mr Shepherd attacks the District Judge's decision to strike out the claim on four bases:

    (1) That the District Judge had failed to identify the terms of the contract between Mr Blair and Mr Shepherd with sufficient precision, including the extent to which planning issues had to be resolved before Mr Shepherd would be entitled to a share of the enhanced value of the land, the method by which the parties would calculate the enhanced value of the land, and the period within which payment had to be made following the resolution of planning issues.

    (2) That it was not open to the District Judge to identify the terms of the oral contract without hearing evidence.

    (3) That the District Judge was wrong to find that planning issues had been resolved by 23 June 2010 given that (a) planning permission was not granted until 7 July 2010, (b) the planning permission was subject to onerous preconditions which had not, and might never be satisfied, and (c) Mr Shepherd was not notified until 20 July 2010 that the planning enforcement notice was withdrawn.

    (4) That the District Judge did not address Mr Shepherd's claim for damages arising from the Second Respondent's fraudulent conduct in the First Action.

39. Once permission to appeal on these grounds had been granted by O'Farrell J, the Respondents filed a Respondents' Notice which bears the Court seal date of 18 June 2019.

The Basis for Striking out upheld by the District Judge: Limitation

40. I will consider first the basis on which the District Judge struck out the claim: limitation.

41. On behalf of Mr Shepherd, it is said that the District Judge's approach to the issue of limitation was flawed in a number of respects. Having considered the arguments, I accept that the District Judge's reasoning on the limitation point cannot be supported, and that that point cannot of itself constitute a basis for striking out the claim or giving summary judgment in favour of the Respondents. I say this for the following reasons:

(1) The District Judge treated as having been found by HHJ Walton a term of the oral contract between Mr Blair and Mr Shepherd that "the claimant would receive 50% of any increase in the value of the land upon planning issues being resolved." (Parenthetically, it should be noted that HHJ Walton had not in fact found that, but only that there had been an agreement, in the context of the grant of a licence, that Mr Shepherd should be entitled to an (unspecified) share of the enhanced value of the site "if adjustment with the local authority could be agreed" (paragraph 71)).

(2) Even making the assumption that the relevant term of the agreement was as the District Judge stated it, however, it was not possible to say, on the basis of the matters considered by him, that it was clear that planning issues had been "resolved" before 20 July 2010. It was at least arguable that the resolution of the Council's Planning Committee of 23 June 2010 did not constitute the grant of planning permission, and a fortiori that it did not constitute the "resolution" of the "planning issues" for the purpose of the (assumed) term. Furthermore, the planning permission which was granted, and was the subject of the Notice of Grant of Planning Permission dated 7 July 2010 did not on its own permit the use of the land as a waste transfer station. Under the planning permission, waste transfer would not be permitted unless and until the Council had issued a number of other approvals, which it was not certain would be given. Equally, it was arguable that the grant of planning permission did not explain the withdrawal of the Enforcement Notice, on the basis that the Council could have left the Enforcement Notice in place when the planning permission was granted, with the result that, by operation of s. 180(1) Town and Country Planning Act 1990, the Enforcement Notice would have operated to prohibit any use in excess of the planning permission.

(3) Furthermore, on the basis of the term as it was assumed by the District Judge to be, there was also an arguable point as to how and when the increased value of the land would be assessed and when there should be payment.

The Respondents' Notice: Abuse of the process

42. My conclusion that the narrow ground on which the District Judge struck out the claim is not supportable is, however, by no means the end of the matter because, as I have said, the Respondents issued a Respondents' Notice dated 18 June 2019. One "different or additional ground" for upholding the order is said to be that it is an abuse of process for Mr Shepherd to seek to re-argue the terms of the contract between him and Mr Blair because they are res judicata. As developed by Mrs Gelley before me, the argument, as I understood it, embraced the following points: (1) that the case which Mr Shepherd now sought to make as to the terms of the contract was inconsistent with the findings of HHJ Walton and was precluded by them; (2) that the present claim either was or should have been brought in the First Action, and that it could not be brought now; and (3) that the present claim either was or should have been brought in the Second Action, and that it could not be brought now.

43. Mrs Gelley referred me to the decision of the Supreme Court in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46, and in particular to paragraphs 17 to 25 of the judgment of Lord Sumption JSC.

44. Mr Buttler for Mr Shepherd accepted that the previous proceedings were between at least the "privies" of the present parties. He submitted, however, that Mr Shepherd had not previously brought the present claim; that there was no finding of HHJ Walton which was inconsistent with the existence of the contractual term now contended for; and that there was no basis for saying that Mr Shepherd should have made the present case in the previous proceedings.

45. In my judgment, the present claim is barred by the principles of res judicata and/or constitutes an abuse of the process of the court. My reasons for that conclusion are as follows.

46. In the first place, I consider that the case which Mr Shepherd now wishes to advance is one which is barred by the principle of issue estoppel in the sense referred to as the fourth principle in paragraph [17] of Lord Sumption's judgment in Virgin Atlantic, namely an issue which is common to both the present and the earlier action was decided on the earlier occasion, even though the cause of action being considered may have been different. In the trial of the First Action, HHJ Walton was faced with an issue as to what were the terms of the oral agreement, and in particular as to the terms relating to what Mr Shepherd would get out of the bargain. As Mr Shepherd has himself put it (see paragraph [27(1)] above), "All matters concerning the nature and validity of the agreement between [him and Albert Hill Skip Hire Ltd on the one hand] and Mr Blair [and] CILBVI were before the High Court [in the First Action]."

47. One of the terms for which Mr Shepherd had been contending, as set out in paragraph [18] above, was one whereby, in the context of the tenancy which he alleged, Mr Blair had agreed that Mr Shepherd might have 50% of the uplift in the value of the land, depending on his having obtained / received confirmation that planning permission would be granted, or that there would be no prosecution; and that then, following that and the calculation and payment of the share of the uplift, Mr Shepherd would investigate claims for trespass against the Council.

48. HHJ Walton made findings as to the terms agreed, insofar as they could be established. Those findings did not include one that there was the term which Mr Shepherd contended for. More specifically, it is apparent that the term which Mr Shepherd was contending for - which would have entailed ongoing obligations on both sides, on his part to get resolution of the planning issues and then after that to investigate the allegations of trespass, and on Mr Blair's part to agree and pay a share of the uplifted value of the land - was intimately bound up with his case that there was a tenancy. Such obligations might be said to have made sense in the context of a

relationship which was going to endure for a significant period. It would, however, have been a rather unusual arrangement for there to have been such obligations in the context of a licence of no fixed duration, and where those obligations were intended to continue notwithstanding a breach by the licensee which permitted the termination of the licence and his ejection. Had such an agreement been made it would have needed to be expressed with a degree of clarity. In rejecting Mr Shepherd's case as to tenancy, and in not finding there to have been any such term of an obligation which would continue notwithstanding the termination of the licence, HHJ Walton, in my judgment, decided that the term which is now sought to be relied upon had not been agreed.

49. Secondly, and even if I am wrong as to the first point, I am clearly of the view that to the extent that Mr Shepherd has not brought forward his present claim before he should have done, in one or other of the actions which there have been, and his attempt to raise the claim now, after the two trials there have been, is an abuse of the process of the court. In Johnson v Gore-Wood & Co [2002] 2 AC 1, in a passage cited by Lord Sumption in Virgin Atlantic, Lord Bingham said (at 31):

> "The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. … It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

50. In my judgment it is clear that Mr Shepherd could and should have brought any claim he had as to a contractual entitlement to a share of the enhanced value of the land in the First Action. It was obvious that that case would involve a hearing which would have to consider "all matters concerning the nature and validity of the agreement". There was every reason, in the interests of efficient litigation and use of resources, why Mr Shepherd should have made a claim, in that action, for any breach of that agreement by Mr Blair or CILBVI for which he contended.

51. Even if that is wrong, however, Mr Shepherd could and should have brought his current claim in the Second Action. He could have brought it by way of a counterclaim, if necessary joining the current Respondents under CPR 20.5. He was clearly aware of the case he wished to make (see paragraph [27] above) and indeed was saying in his witness statement that his alleged entitlement to a 50% share of the increased value of the land was of significance as a defence or cross-claim (see paragraph [27(3)] above). If and insofar as he failed to bring it properly before the court for determination, that is not a good reason for permitting him to attempt to do so again now. As the judgment of HHJ Raeside QC itself expressed, the trial before him should have allowed the parties and the court to close their files on this matter.

52. If Mr Shepherd were permitted to bring the current claim, the result would be that there would, presumably next year, be a yet further trial which considered the terms of an oral agreement which was concluded in 2008, where one of the parties to that agreement is dead, and where the other, Mr Shepherd, was said by HHJ Walton as long ago as 2012 to be "someone for whom the dividing line between what actually happened and what he thought ought to have happened, was not at all clear" and who had apparently, even by 2012, been involved in "reinterpretation" of the agreement, and was a person where there was "considerable difficulty in assessing the reliability of what he said." (para. 67). Such a trial would give rise to obvious dangers of inconsistency with what has already transpired and a risk of injustice.

53. Applying a broad, merits-based approach, and considering the public and private interests involved here, and the history of the matter, I am in no doubt that Mr Shepherd is misusing or abusing the process of the court in seeking to bring forward a claim for a share of the enhanced value of the land at this juncture rather than as part of the earlier proceedings.

54. The other aspect of Mr Shepherd's appeal relates to his claim for damages in respect of the "forgeries and frauds" which he has pleaded were perpetrated by Mrs Gelley and which were referred to in HHJ Walton's judgment in the First Action.

55. As I have already set out, one of Mr Shepherd's Grounds of Appeal was that the District Judge had not addressed this claim in his judgment. Mr Shepherd's argument was that this was a proper claim, brought within time, and could not have been struck out on the basis of the limitation point on which the District Judge based his striking out of the action.

56. Once this point had been raised by Mr Shepherd, Mrs Gelley objected that this claim had been abandoned by Mr Shepherd in front of the District Judge. She has said, and has put in a witness statement dated 22 October 2019 which testifies, that at the hearing before the District Judge on 19 March 2018, just after she had started her submissions, there was a short adjournment because Mr Shepherd did not have a copy

of her skeleton argument with him. When the hearing resumed, she says, the District Judge had taken Mr Shepherd to the order of DJ Kramer made in these proceedings on 24 October 2017, to which I have referred above. The recitals in that order were, in part, to the following effect:

> "The Defendants have indicated that they intend to apply to strike out the claim or seek summary judgment for the Defence.
>
> The Claimant has said that in essence his case is that he had an agreement with Mr Blair for a half share of the increase in value of the land at 630 Whessoe Road, Darlington due to the realignment of planning permission and that he obtained such realignment and since 20th July 2010 has been entitled to payment under the agreement. *He said that the allegations of fraud and forgery in his particulars of claim are part of the background but have not in themselves caused him loss at the moment.*" (emphasis added)

57. Mrs Gelley further says in her witness statement that, when this order was shown to Mr Shepherd, the District Judge asked him whether the fraud had caused him any loss, and he had said no; and that on that basis, she had said to the court that she would not address the matter further. Mrs Gelley produced her own notes of the hearing, which give support to this account, and which contain the following:

> "JL [Judge Loomba] October order. 24 October order. … Reads order. Fraud and forgery issue academic claim only based on agreement. Fraud and forgery not cause of loss?
>
> C. [Claimant] No, no, no.
>
> D. [Defendant] Then won't pursue."

58. Mrs Gelley has sought to obtain a full transcript of the proceedings before the District Judge. The transcript which has been provided by the transcribers for Mr Shepherd misses out part of the hearing (including the relevant part) and the relevant tape has not been located. Mrs Gelley accordingly sought the District Judge's note, and this has been made available at this hearing. This includes the following: "Philip's order. Claim not based on fraud or forgery." ("Philip" is clearly a reference to DJ Kramer.) When read together with the Skeleton Argument which Mrs Gelley had put in on that occasion, which allows the reader to identify at what point in the hearing this episode occurred, I consider that this note clearly supported Mrs Gelley's account of what had happened.

59. While Mr Shepherd has given instructions to his counsel that he made no concession about his fraud claim, he has not given any witness statement or other evidence to that

effect. He has produced no note of the hearing. In my judgment it is plain that he did make a concession that the fraud and forgery had caused him no loss and that he was not relying on it as a basis for his claim for damages. Given the terms of the recital to the order of 24 October 2017 it was natural that he should have been asked about his position on that issue. It also appears plain that he must have responded in the way I have described, for otherwise Mrs Gelley would have dealt with it further, and the District Judge would have considered it in his judgment and disposal of the case.

60. In circumstances where Mr Shepherd has twice stated to the court that he has suffered no loss by reason of the frauds / forgeries, and where in the hearing below he said that his claim was not based on those matters, and on the basis of that concession the matter was not dealt with further, I do not consider that he is able to raise that issue now as a basis for contending that the District Judge's decision was wrong.

61. For the reasons which I have given I dismiss the appeal against the striking out of this action under CPR 3.4(2)(b).

62. I will hear the parties on consequential and ancillary orders which may be sought.