Neutral citation [2023] EWHC 159 (Ch)
Case No. PT-2020-LDS-000128

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
PROPERTY, TRUSTS & PROBATE LIST (ChD)

Leeds Combined Court Centre
Oxford Row

LEEDS LS1 3BG

Date: 31st January 2023

Before District Judge Royle

- -

Between:

MR AQEEL KHAN

Claimant

– and –

WOODHEAD SHARPES LIMITED

Defendant

- -
- -

Mr Pennock of Parklane Plowden Chambers (instructed by **Stachiw Bashir Green Solicitors**) for the **Claimant**
Mr Bowmer of 4 New Square Chambers (instructed by **DWF Law LLP**) for the **Defendant**

Hearing date(s): 13th January 2023 (argument), 31st January 2023 (judgment)

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Approved Judgment

I direct that pursuant to CPR r.39.9(1) no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

District Judge Royle:

1. This is my judgment on the Defendant's application, dated 16th September 2022, for strike out of, alternatively summary judgment upon, the whole of the claim, following argument before me on 13th January 2023. The operative statements of case have been amended, following the hearing of a strike out application by DJ Geddes on 20th April 2021. By paragraph 4 of her order that day, she struck out a number of claims, and directed amended

particulars of claim ("**APoC**") in respect of claims relating to 5 remaining properties to which I shall refer.

2. The claim is for damages for a loss the Claimant ("**Mr Khan**") maintains he suffered when properties registered in his name were sold by two different lenders when payments due on the mortgages secured on those properties went unpaid by the Defendant ("**Woodhead**"). At all material times, Woodhead was appointed to collect the rents from the various properties and discharge the mortgage payments pursuant to a Crown Court restraint order to which I will refer. In a nutshell, Mr Khan's case is that Woodhead, in breach of contractual or tortious duty, failed to collect the rents and failed to pay the mortgages as required by their appointment pursuant to a variation to a Crown Court restraint order. His case is that the resulting distressed sale of all the properties meant that he suffered a loss of equity because the sale price of each property was below its open market value, which it would have realised had, in each case, they not been sold by the banks in that way.

3. The claim is valued at in excess of £3,000,000.

4. In argument, Mr Pennock clarified that the claim is for the difference between the true open market value of the properties, on the one hand, and the value they achieved in a 'distressed sale' by the lenders. That claim appears at paragraph 17 of the APoC. The proposition that the value in a distressed sale will be less than open market value is one which Woodhead required Mr Khan to prove by virtue of paragraph 17.4 of the amended defence ("**ADef**").

5. Mr Pennock further suggested that by reason of the wording of the prayer to the APoC, which referred to 'damages', the claim was framed sufficiently widely as to encompass a claim for the loss of the rent which, his client maintains, was not collected by Woodhead.

Background

6. The background to the claim is largely uncontentious, and those elements which *are* contentious are not of great significance to my decision. The application was supported or opposed by the following evidence which I have taken into account:

    a) Third witness statement of Grant Robertson Walker, a solicitor at DWF Law LLP, for Woodhead, dated 16th September 2022.

    b) Second witness statement of Adrian Charles Green, a solicitor at Stachiw Bashir Green, for Mr Khan, dated 30th November 2022.

    c) Second witness statement of Mr Khan, dated 30th November 2022.

    d) Fourth witness statement of Grant Robertson Walker, dated 22nd December 2022, made in response to (b) and (c) above.

7. In addition, I have been provided with the following:

    a) Supplemental expert report of Bruce Collinson, dated 30th November 2022, a valuation expert surveyor instructed on behalf of Mr Khan.

    b) The updated expert valuation report of Nigel Tapp, dated 2nd December 2022, a valuation expert surveyor instructed on behalf of Woodhead.

c) A joint statement of the two surveyors dated 21st December 2022, following meetings between the experts on 1st November 2022 and 15th December 2022.

d) The trial witness statement of Mr Khan, dated 28th November 2022.

8. The proceedings are at an advanced stage and the matter is due for trial in March 2023, in around two months' time. Procedurally, all of the material steps are complete, notably including disclosure and evidence. (I should say that Mr Bowmer maintains there have been some disclosure failures which are outstanding, but nothing in the application before me touches on that subject and I shall say no more about it.)

9. On 20th April 2021 District Judge Geddes made an order which struck out a number of heads of claim in Mr Khan's original statement of case which pertained to properties other than those which are the subject of the application before me. She directed that an amended particulars of claim be filed which dealt with claims touching on 5 remaining properties in respect of which she had declined to strike out Mr Khan's claim. So far as is material, her order required that, in relation to those properties, the amended particulars of claim were to *"[include] discretely in relation to each property (a) the facts alleged to constitute the alleged breach of contract / breach of duty; (b) the facts alleged as to causation and how the alleged breaches have allegedly caused loss and damage; and (c) the loss and damage claimed and the amount thereof."*. It appears to have been that order which caused the production of the APoC before me.

10. During the hearing, I was provided with the unamended Particulars of Claim. They appear, insofar as the five properties which feature in the APoC are concerned, to be in substantially the same form.

11. By 2011, or thereabouts, Mr Khan was the registered proprietor of 5 properties which are set out below and which, in the same year, were mortgaged to one of two lenders (also identified below). For ease, in the balance of this judgment I will simply refer to the properties by their street number.

Property Address	**Title no.**	**Registration date**	**Lender**
6/6A Rawson Place, Bradford BS1 3QQ	WYK150932	29.12.09	HSBC
37 Lidget Place, Bradford BD7 2LP	WYK44930	07.03.11	HSBC
178 Easterly Road, Leeds LS8 3AD	WYK255262	18.04.11	Lloyds
1392 Leeds Road, Bradford BD3 7AE	WYK280013	05.10.11	HSBC
1394 Leeds Road, Bradford BD3 7AE	WYK732623	05.10.11	HSBC

12. The four properties mortgaged to HSBC were charged to secure a single loan of £1.625m over a period of 5 years from 24th August 2011, albeit it may have been that some of the properties were already charged for similar purposes before that time. Clause 17.8 of the facility letter contained an agreement not to grant any lease over the secured properties. The letter also provided for the usual events of default, including non-payment. The charge document refers only to 1392 and 1394, but Mr Khan does not dispute that all of the four properties identified above are charged to HSBC, and Mr Bowmer indicated that it may

well be that only 1392 and 1394 were added as additional collateral in 2011, so that the other two properties were already charged.

13. 178 was charged to Lloyds to secure a business loan agreed on 24th March 2011 in the sum of £593,775, also over a 5-year term. The documentation demonstrates that if receivers are appointed then their powers are extended to include a power to sell.

14. Neither counsel could tell me whether the properties (which were sold at the behest of the lenders) were sold by the receivers or the banks themselves. However, it appears from Mr Khan's trial witness statement, at paragraph 14, that it is his position that the properties were sold by the receivers in possession.

15. The monthly repayments on the two agreements were on any view substantial. There is a minor dispute over the precise figure, but it does not matter. As a minimum, it was circa £13,000 per month.

16. As Mr Khan puts it in his trial witness statement, in September 2013 his life changed. He had been arrested on 8th November 2012 and interviewed under caution in relation to offences of fraud and money laundering.

17. On 25th September 2013, a restraint order ("**the Restraint Order**") was made by the Crown Court (p.48 of the bundle). I accept from Mr Bowmer that for such an order to have been made, various conditions found at s.40 of the Proceeds of Crime Act 2002 ("**the 2002 Act**") must have been met. Those conditions were that (a) a criminal investigation or proceedings for an offence had been started, and (b) there was reasonable cause to believe that the defendant (i.e. Mr Khan) had benefitted from his criminal conduct. The Restraint Order appears at p.48 of the bundle and there was no suggestion before me that it has been set aside. (It was varied after initially being made, to facilitate a sale of one of the properties. I shall return to that matter later.) The terms of the Restraint Order, insofar as are material for this judgment, are these:

> *4. The Defendant [i.e. Mr Khan] must not:-*
>
> *…*
>
> *(2) in any way dispose of, deal with or diminish the value of any of his assets whether they are in or outside England and Wales.*
>
> *…*
>
> *6. The prohibition includes the following assets in particular:-*
>
> *…*
>
> *(g) the property known as 6 and 6a, Rawson Place, Bradford, BD11 3QQ …*
>
> *(h) the property known as 37 Lidget Place, Bradford BD7 2LP …*
>
> *(i) the property known as 178 Easterley Road, Bradford, LS8 3AD …*
>
> *(j) the property known as 1392, Leeds Road, Bradford, BD3 7AE …*

(k) the property known as 1394, Leeds Road, Bradford, BD3 7AE …

18. Paragraph 17 of the Restraint Order limited any renting out of the properties to circumstances where they were managed by a qualified management agent. Even then, there were conditions to be fulfilled, including limitations on what the agent could do, and a prescriptive, ordered list of what the rental income could be used for. Insofar as is material, the agent was permitted to set the rents, enter into tenancy agreements on behalf of Mr Khan, pay the mortgages, collect the rents, pay any service charges and ground rent, and deal with repairs (up to 10% of the rental income unless the agreement of the Proceeds of Crime Unit was obtained): see paragraph 17(3) of the Restraint Order. The disbursement of the rent received was to be made for the following purposes *in order* (see paragraph 17(4) of the Restraint Order):

a) Payment of the mortgage for that property;

b) Payment of service charges in respect of that property;

c) Payment of ground rent in respect of that property;

d) Payment for repairs in accordance with 15(3)(h) (which I take to be a typographical error for *17*(3)(h));

e) Payment of the agent's fees set at 10% (plus VAT) of the rental income;

f) Payment of any surplus to a bank account in the name of A A Khan Property.

19. By a variation order made on 1st November 2013, by consent, Mark Brearley of Woodhead was appointed as the agent to manage the properties which were the subject of the Restraint Order (see p.74 of the bundle).

20. Whilst I accept that 1392 was purchased with criminally obtained funds (by virtue of Mr Khan having pleaded guilty to count 10 on the indictment, to which I will refer below), I do not accept that the fact that the Restraint Order covers the five properties which are the subject of this claim necessarily means that *all of them* (except 37) were purchased, in part, with criminally obtained funds. It may well be that the Restraint Order catches all of Mr Khan's known assets even though some of them were not acquired, in part, with criminally-obtained funds. For example, the Restraint Order restrains dealings with 37, but there was no suggestion before me that that property was so acquired. I am therefore not prepared to proceed on the basis that four of the five properties were acquired, in part, with criminally-obtained funds, though the contrary is true for 1392.

21. It is not contentious that Mr Khan was then tried for a range of offences and pleaded guilty to some of them during the course of that trial. At the sentencing hearing, the Crown Court appears to have accepted the submission of the prosecutor that Mr Khan was '[the] mastermind at the centre of a web of conspiracy'. The indictment before the Crown Court is found at p.306 of the bundle. In that respect Count 8 pertained to 6 / 6A, Count 9 pertained to 178, and Count 10 pertained to 1392 and 1394. However, it is clear from the words of HHJ Kearl QC, the sentencing judge, that Mr Khan was not being sentenced for his involvement in the property transactions in question: see p.371 of the bundle at line 10, and also the exchanges between the Judge and the prosecutor at p.340 (line 13 onwards) in which it becomes clear that Mr Khan was being sentenced only for the conspiracy to

defraud, Count 10 (1392 and 1394) and creating letters purporting to be from HSBC (as to which, see below). In other words, he was not being sentenced in relation to counts 8 or 9, which pertained to 6 / 6A and 178.

22. Count 11 on the indictment was in relation to forging documents pertaining to 1392 and 1394 which purported to give him permission to grant leases over those properties. I have seen leases dated 8th June 2012 in relation to both properties. Each is for a 999-year term.

23. Mr Khan was sentenced to six years' imprisonment. In his sentencing remarks, the Judge pointed out 1392 had been purchased using criminally-obtained money, in part. Whilst I was referred to the prosecutor's case summary for the Crown Court trial (p. 311), that appears to have been produced before the guilty pleas, and thus represents only the Crown's case, rather than any synopsis of facts that Mr Khan was taken to have admitted. Accordingly, that summary does not establish that any particular property *was in fact* purchased, in whole or part, with criminally-obtained money.

24. On 22nd December 2014, Mr Khan pleaded guilty to a number of counts of criminal contempt which arose from breaches of the Restraint Order made in consequence of his earlier guilty pleas. In particular he pleaded guilty to:

a) Causing or permitting to be transferred £15,791.99 from Woodhead's rent account on or about 8th October 2013.

b) Causing or permitting to be transferred £38,307.23 from Woodhead's rent account between 6th January 2014 and 29th January 2014.

c) Causing or permitting to be transferred £20,115.69 in rental income from Woodhead's rent account to a Mr A. Ishaq on or after 16th October 2013.

d) Causing or permitting to be transferred a total of £239,859.26 to Roadside Property Management Limited between 13th December 2013 and 21st November 2014.

e) Failing to make arrangements for the rental income (totalling £2,934) received by MAK Homes in relation to 37 to be transferred to Mr Brearley (the operator of Woodhead).

25. It is uncontroversial that the banks appointed receivers over the properties as follows, and that the properties were sold (though, as I have observed, it is unclear whether the sales were by the banks or the receivers under their extended powers):

a) 1392 – appointed 10th February 2016 (p.181); sale 5th April 2016 for £1.2m.

b) 1394 – appointed 7th March 2016 (p.287); sale by Mr Khan (see below) for £370,000 in 2019.

c) 178 – appointed 12th January 2015 (p.182); sale 7th March 2016 for £640,000.

d) 6/6A – appointed 10th June 2014 (p.186); sale 10th October 2015 for £147,000.

e) 37 – appointed 10th June 2014 (p.186); sale 6th May 2015 for £31,000.

26. HSBC brought possession proceedings in relation to 1394 in May 2017 in which it relied on non-payment, and also the granting of an unauthorized lease to a Mr Shahid Khan (which was not the lease over 1394 to which I referred above). A possession order was made by DJ Hickinbottom in relation to 1394 on 4th December 2017, but then execution of the warrant of possession was suspended (again by DJ Hickinbottom) on 3rd July 2018. It is not in dispute that that suspension was to facilitate a private sale of 1394 by Mr Khan to a Mr *Mohammed* Khan. To this day, legal title has not been registered in Mr Mohammed Khan's name, though it appears there was a contract of sale and money paid. Quite why there has been no registration is unclear.

27. What is crystal clear, however, from the witness statement of Mr Khan which supported the application for the suspension of the warrant, is that (as at 23rd February 2018) Mr Khan regarded £350,000 as a fair price for 1394. He went further, and said that the only person who would lose out (i.e. at that price) would be Mr Khan himself. The transaction in fact proceeded at £370,000 (see p.290). The substance of that position is common ground: see the witness statement in this application on behalf of Mr Khan by his solicitor at p.26 paragraph 6.

28. Two conclusions, inevitably it seems to me, emerge from the possession proceedings and what came after them:

    a) First, 1394 was not sold by HSBC or its receivers but by Mr Khan himself.

    b) Second, 1394 was sold at a price which Mr Khan maintained at the time was more than a fair price.

29. In consequence of the suspension of the warrant, and the reason for it, HSBC (who had, by then, appointed receivers over 1394) removed those receivers (in respect of 1394 only) by deed on 15th April 2019. That was plainly to facilitate the sale between Messrs Khan.

30. It was suggested that the Restraint Order was varied to facilitate the sale of 1394 to Mr Mohammed Khan, but I do not recall being shown any documentation to that effect. I expressly reach no conclusion about whether the sale by Mr Khan was thus in breach of the Restraint Order as a consequence. However, upon receipt of funds in payment for 1394, those were funds which clearly were caught by the Restraint Order and were not available to be dissipated or dealt with.

31. On 27th July 2017, the Crown Court made a confiscation order ("**the Confiscation Order**") under the 2002 Act (see p.187 of the bundle). The 'benefit figure' recorded in that order is £4m. The available amount was £166,104.77. That available amount included some surplus on the sale of 178. The National Crime Agency had confirmed there was no equity in 1392, 6, or 37, and unlikely to be any in 1394. By the time that order was made, in fact all but 1394 had been sold. It is not clear to me that the mention of a property in the context of a confiscation order necessarily means that that property was acquired in part or whole with criminal funds. Indeed, I suspect strongly that that is not so.

32. What seems clear, however, is that had Mr Khan had realisable assets of a further £3.8m plus when the confiscation order was made, those, too, would have been subject to that order, in light of the £4m benefit which had been identified. That is not, however, the same as saying that the POCU would have applied to vary the Confiscation Order if further assets became available: such a decision is not one I am prepared to speculate about.

The ambit of the claim

33. Beyond those matters, the APoC, in broad terms, rely on the following:

a) The rental income which fell due from the tenanted properties exceeded the monthly mortgage payments by £3,400.08 per calendar month.

b) The Restraint Order.

c) That there was a retainer between Mr Khan and Woodhead giving rise to duties in both contract and tort in relation to the management of the properties, upon their appointment following the variation to the Restraint Order.

d) That there were, implied into the retainer, terms requiring Woodhead to exercise reasonable care and skill in (i) letting and management, (ii) collection of rents, and (iii) securing new tenants, (iv) payment of the mortgages in a timely fashion, and comply with the Restraint Order.

e) That Woodhead negligently failed to collect the rents or pay the mortgages.

f) That at the Crown Court hearing before HHJ Kearl QC on 5th November 2014, it was demonstrated that Woodhead had collected sufficient rents to pay the mortgages, but had failed to do so.

g) That Woodhead failed to visit or speak to the tenants at 37 and/or 1394;

h) That Woodhead 'held on to' £200,000 of rental income collected from the properties which, if not used to pay the mortgages, should have been paid out to the A A Khan Property account referred to above.

i) That Mr Khan does not know what rents Woodhead did or did not collect because, he says, the information has not been provided by them.

j) That Woodhead failed to market 6/6A (which he has said elsewhere was used as his business base), Unit 2 & Unit 3 at 178, leading to lost rental income of £6,583 per calendar month.

k) That the negligent failures of Woodhead caused the banks to take possession of the properties and sold them in a 'forced distressed sale' below open market value. That allegation is made in respect of *all five* properties. The aggregate loss claimed is £2,552,000.

l) Particulars of negligence and/or breach of contract which appear to me simply to rehearse the alleged duties, rather than to plead specific acts or omissions.

34. The ADef admits Mr Khan's legal ownership of the five properties, the various registration dates and the nature of that holding in each case (*viz.* freehold or leasehold), together with the existence of the legal charges to HSBC and Lloyds. Mr Khan is put to proof of the monthly mortgage payments. Only certain details about the prevailing rents are admitted. The appointment of Woodhead (and the fact that that gave rise to contractual obligations

between the parties), the making of the Restraint Order, and certain aspects of its effect, are admitted and thus common ground.

35. Further, by admission it is common ground that the obligations between Mr Khan and Woodhead included a requirement that Woodhead provide the services with reasonable care and skill – but it is expressly denied that the standard of care was any higher than that of a reasonably competent property manager. It is also expressly denied that the agreement gave rise to any warranty on the part of Woodhead that it would achieve any particular outcome, or any duty that the provisions of the Restraint Order would be complied with. Woodhead contends that its ability to fulfil its functions was 'self-evidently' constrained by the degree of co-operation, and level of information, provided by Mr Khan.

36. As to the allegations of negligence, the ADef complains that they are vague and embarrassing and are denied. One important part of the ADef in respect of paying funds to the lenders is that Woodhead's case is that it was not properly instructed and had no proper co-operation from Mr Khan.

37. The ADef admits the sales, and sale prices, of all of the properties except 1394. No admissions were made as to the condition of the properties sold by the receivers, or the selection of bidders, but the point is made that the banks and the receivers (whichever effected the sale) would have an equitable duty to obtain the best market price reasonably obtainable. No admissions are made as to the allegation that the properties were sold at under market value, and any loss arising therefrom is denied.

38. The ADef expressly takes the point that if the properties had not been sold by the banks, then those assets would have fallen into the ambit of the Confiscation Order.

39. Further, the ADef pleads that the claim is barred by illegality, on the basis that it is an "overwhelming inference" that any equity Mr Khan had represented the benefit of criminal conduct. Having reflected on that proposition, I do not accept it. The guilty pleas entered by Mr Khan were to specific counts, and I am not prepared to draw the inference from those pleas, the Restraint Order or the Confiscation Order that the equity in the properties was *all* tainted in that way. The exception is 1392, given the sentencing remarks of HHJ Kearl QC, to which I have referred.

40. I can say immediately that I do not read the APoC as setting out a claim with regards to loss of rental income. That is because:

    a) It is expressly pleaded at paragraph 15 of the APoC that the Claimant has no specific details of what rent was or was not collected by Woodhead.

    b) The plea of causation of loss at paragraph 17 of the APoC expressly refers to the loss of value, not loss of rent. A similar theme is seen in the second sub-paragraph of paragraph 22 of the APoC.

    c) The loss claimed in relation to each property is said, in the aggregate, to be £2,552,000 (see paragraph 20 of the APoC), which is the same figure as for the loss of value claimed on sale, and does not include lost rent.

d) The 'Details of Loss and Damage' at paragraph 22 of the APoC refer to a 'combined equity' in the properties at open market value, and goes on to refer to loss of equity, not rent.

41. Mr Pennock also asserted that a claim (as described in the third sub-paragraph of paragraph 22 of the APoC) for 'reimbursement' of fees and charges arose as a loss flowing from the negligence described. I disagree. It is clear, because (for reasons I shall explain) some rent was collected, that there has been at least partial performance provided by Woodhead. In those circumstances, there can be no contractual claim for reimbursement, and the payment of what I take to be contractual fees cannot, as I understand matters, be recovered in negligence. If this is anything, it is a type of claim in unjust enrichment – but one for which none of the essential elements of such a claim are set out in the statement of case.

42. I do not consider that the APoC sets out a case that failing to *rent out* empty properties contributed to the loss claimed. Even if I am wrong about that, the plea that Woodhead 'held on to' £200,000 (apparently sufficient to discharge the mortgage obligations) means that there can be no real prospect of arguing that such a breach caused any loss.

The application in summary

43. I now turn to Woodhead's application, which is for strike out and alternatively summary judgment on the entire claim. The application was issued on 16th September 2022, listed by DJ Bond on 21st October 2022, and came before me on 13th January 2023. The trial is listed on 6th March 2023 for several days.

44. In broad terms, five propositions are advanced:

a) That the APoC does not comply with DJ Geddes's order, is wholly inadequate and unsupported by evidence.

b) Mr Khan's claims (in respect of 37 and 1394) are transparently false.

c) The scope of duty relied upon by Mr Khan is misconceived.

d) Mr Khan's case on causation is ill-conceived and fanciful.

e) In any event, the whole claim is barred by illegality.

The legal principles as regards strike out and summary judgment

45. I remind myself of the applicable principles.

46. First, as to striking out. Under CPR r. 3.4(2)(a) the court may strike out a claim if it appears to the court that the statement of case discloses no reasonable grounds for bringing the claim. An application to strike out a statement of case is generally tested without the need for any evidence. The court assumes the truth of the matters stated in the statement of case and considers whether, as a matter of law, the allegations within the four corners of that document amount to a cause of action known to the law. It is for this reason that, where a statement of case is found to be defective, the court is likely to consider whether the defect might be cured by amendment and whether it is appropriate to give the party concerned the opportunity to amend.

47. In a professional negligence claim (which this is), there is a requirement to plead what the defendant did do which it should not have done, or did not do which it ought to have done: see *Pantelli Associates limited v Corporate City Developments Ltd* [2011] PNLR 12 at [11] per Coulson J as he then was. That is because CPR r.16.4(1)(a) requires C to plead a 'concise statement of the facts upon which [he] relies.'.

48. The import of r.16.4 is also that where the particulars of claim contain an allegation of breach of contract and/or negligence, it must be pleaded in such a way as to allow the defendant to know the case that it has to meet. The pleading needs to set out clearly what would have happened but for those acts or omissions, and the loss that eventuated. Those are "the facts" relied on in support of the allegation, and are required in order that proper witness statements (and if necessary an expert's report) can be obtained by both sides which address the specific allegations made.

49. As to summary judgment, the test for summary judgment under CPR r. 24.2 is different. The court may enter summary judgment if it considers that the claimant has no real prospect of succeeding on the claim or issue and there is no other compelling reason why the case or issue should be disposed of at a trial.

50. The principles which apply, taken from *Easy Air Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch), approved by Court of Appeal in *Global Asset Capital Inc v Aabar Block SaRL* [2017] EWCA Civ 37, can be summarised in this way:

    a) I must be satisfied that the claim has a "realistic" as opposed to "fanciful" prospect of success. In other words, it must carry some degree of conviction and must be more than merely arguable.

    b) It is not the function of the court at this stage to conduct a mini-trial.

    c) On the other hand, I am not required to take everything the parties say at face value. If it is clear that there is no substance in any particular assertion, for example if it is contradicted by contemporaneous documents, then I am entitled to reject it.

    d) I must take into account the evidence placed before me and also have regard to the evidence that can reasonably be expected to be available at trial. In particular, if there are reasonable grounds for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge, so as to affect the outcome of the case, the court should be hesitant about granting summary judgment.

    e) Conversely, in appropriate cases the court can and should determine short points of law or construction if it has before it all the evidence necessary for a proper determination and the parties have had adequate time to address it in argument. If a case is bad in law it does not have real prospect of success.

51. That is all consistent with the dicta of Court of Appeal in *Elite Property Holdings Limited v Barclays Bank plc* [2019] EWCA Civ 204 per Asplin LJ at [41]:

> *"A claim does not have [a real prospect of success] where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely*

> *without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim[ant] has pleaded insufficient facts in support of their claim to entitle the Court to draw the necessary inferences."*

52. It is also consistent with the words of HHJ Keyser QC in *Maranello Rosso Ltd v Lohomij BV & others* [2021] EWHC 2452 (Ch) (the appeal from which was dismissed: [2022] EWCA Civ 1667):

> *"However, and importantly, the court ought to carry out a critical examination of the available material and is not bound to accept the mere say-so of anybody; where it is clear that a factual case is self-contradictory or inherently incredible or where it is contradicted by the contemporaneous documents, the court, after careful consideration of the evidence that is currently before it and having regard to the nature of such further evidence as might reasonably be expected to be available at trial, is entitled to reject that case even on a summary basis. The court will not be dissuaded from giving judgment by mere Micawberism. Where the claim turns on a point of law that can properly be determined on the available evidence, the court is entitled to go ahead and determine it …"*

53. I remind myself that:

a) The complexity of litigation is not a reason to refuse summary judgment.

b) A claim must be properly particularised – see *Maranello* at [20] quoting *Kawasaki Kisen Kaisha v James Kemball Ltd*.

c) If a defendant is entitled to summary judgment, then the claim discloses no reasonable grounds for being brought and should be struck out: see *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 at [21], approving *Global Asset* at [27].

54. I heed the observation of Lord Woolf in *Swain v Hillman* [2001] 1 All E.R. 91 at 94 that the court should not shrink from making use of the powers to enter summary judgment or strike out in appropriate cases. This gives effect to the overriding objective, not only in saving expense, achieving expedition and preserving the court's resources, but it is also in the interests of justice for a party who is bound to fail to know that as soon as possible.

55. In this case, the trial evidence is all in. There is nothing more to come.

The detailed arguments

56. I now turn to the rival contentions. Whilst I will deal with them all, I have found it convenient to deal with them in a different order than they appeared in argument. I remind myself that Mr Khan has already had one opportunity to amend and there was no suggestion that an application for a further amendment might be forthcoming if I were against him on this application. Furthermore, trial is imminent. In those circumstances, if I were to accede to any part of Mr Bowmer's application, I would decline to volunteer a further opportunity to amend to Mr Khan.

57. It appears to be Mr Khan's case (see his evidence at p.39 paragraph 10) that the money accumulated by Woodhead (around £200,000) was from rent and was sufficient to discharge the mortgage obligations. I therefore consider that any claim in respect of failing to collect rent has no real prospect of succeeding in light of my conclusion that there is no separate claim within the APoC for the rent money as distinct from a failure to pay that money to the banks. As no reason for that matter to be tried has been advanced, there will be summary judgment in favour of the Defendant in respect of all matters said to be caused by any failure to collect rents.

58. Woodhead put Mr Khan to proof of the notion that the price in a 'distressed sale' would be lower than open market value. I was initially troubled by this proposition, given the duties on mortgagees and receivers as regards sale prices. However, I am (just) satisfied on the basis of the expert evidence (notably Mr Collinson's first report at paragraph 6.9 of the report starting at p.405, but the supplemental report at p.579 makes a similar point), that the point has real prospects of succeeding. I express no view on its ultimate merit, which will be a question for the trial judge. That is not to be understood as meaning that the *claim for loss of equity* has real prospects; I am referring only to the concept that there can be a difference in sale price between a distressed sale and a non-distressed sale. It was Mr Pennock's position that he does not suggest that the mortgagees or receivers breached their duty as to obtaining the appropriate price. Rather, his case is that the appropriate price is conditioned by whether the sale is distressed or not, so that Mr Khan may suffer a loss by reason of there being a distressed sale if that was caused by Woodhead's failure to pay the mortgages.

Material change of circumstances and delay

59. It is convenient first to deal with Mr Pennock's contention that there have been no material change in circumstances since the strike out application which confronted DJ Geddes some considerable time ago, so that the instant application should not be entertained.

60. Woodhead contends that at the time of that application certain disclosure had not occurred – namely the transcript of the sentencing decision, the statement of information relevant to the Confiscation Order (and the schedule thereto), and the material pertaining to the possession proceedings brought by HSBC – including Mr Khan's witness statement in that context, to which I have already referred.

61. In that regard:

a) First, there has been a complete replacement statement of case on behalf of Mr Khan in response to the Judge's order on that occasion.

b) Second, however, it seems to me that that statement of case is not materially different as respects the five properties which remain in issue when compared to the original.

c) There is clearly an impact of the evidence given by Mr Khan in the possession proceedings as to the realism of his case on the value of 1394.

d) There was an order of DJ Geddes which had not been made when the earlier strike out application was issued, and which plainly imposes requirements on the APoC which are the subject of part of the application with which I am dealing.

62. I am satisfied that there has been a sufficient change in circumstances. The fact that amended particulars have been provided, which Woodhead contends do not comply with DJ Geddes's order, coupled with the availability of the material relating to the possession proceedings, are in my judgment enough to open the door to Woodhead to make a renewed application for strike out and/or summary judgment.

63. In relation to Mr Pennock's argument that Woodhead has delayed too long in making this application, I reject that proposition. Whilst it is true that CPR PD23 requires applications to be made (in effect) promptly, the fact that an application is not so made is not a reason to dismiss it without more. First, r. 3.10 cures any such defect unless the Court orders otherwise, and no good reason was suggested to me why I should do so.

Fanciful scope of duty and/or scope of causation

64. It is convenient to take these two arguments together.

65. In the context of scope of duty, Mr Bowmer reminded me of *Manchester Building Society v Grant Thornton (UK) LLP* [2022] AC 783 at [4] and [13]:

> *4 In summary, our view is that (i) the scope of duty question should be located within a general conceptual framework in the law of the tort of negligence; (ii) the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given (in the context of this judgment, we use the expression "purpose of the duty" in this sense);…*
>
> *13 In our respectful opinion, the scope of duty question can and should be approached in a more straightforward way than is suggested by Lord Leggatt JSC. In our view, the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the reason why the advice is being given (and, as is often the position, including in the present case, paid for).*

66. Those dicta are really dealing with advice cases.

67. From those propositions, however, Woodhead maintains that the scope of its duty does not extend to this loss. Mr Bowmer further points out that in the possession proceedings relating to 1394, Mr Khan counterclaimed against the bank for an alleged loss on sale of £1.4m, and thus Woodhead argues that the fault is that of the bank, if anyone.

68. Turning to causation, Mr Bowmer argues that the suggestion that the cause of the banks exercising their rights (ultimately) to sell the properties is a fallacy. The primary thrust of that argument is that the banks had other potential reasons to do so beyond mere non-payment. He argues that there is no evidence that non-payment was the reason why the banks acted as they did.

69. Mr Pennock points out that in the possession case in relation to 1394, the bank expressly pleaded lack of payments as the reason for seeking possession. However, as I have explained, Mr Khan sold 1394 and not the bank. Mr Pennock further points out that the

appointment of receivers was said by the bank to have arisen because of the failure of Mr Khan to discharge his indebtedness. In relation to HSBC, that (of course) applies to four out of five of the properties.

70. Secondarily, Mr Bowmer argues that Mr Khan was responsible for failing to service the mortgages, or alternatively putting Woodhead in funds to do so, by reference to Mr Khan's guilty pleas to contempt of court to which I have referred.

71. Finally, Mr Bowmer argues that in the counterfactual scenario where the banks (or Mr Khan himself) had not sold the properties in 2015/16, they would have remained in the hands of Mr Khan and thus inevitably would have been caught by the Confiscation Order in 2017. Further, had they been sold for the price Mr Khan asserts, the proceeds of sale would, similarly, have been caught. In either circumstance, argues Mr Bowmer, Mr Khan would not have had the benefit of the amounts he now claims and is not entitled to claim them.

72. These issues have caused some considerable thought. Ultimately, I consider the following to be the answers to them:

a) In light of Woodhead's appointment in the context of the variation to the Restraint Order, I consider that their duty extended to paying the mortgage sums with the amounts they had in hand. It is more than merely arguable that they had sufficient in hand and, for whatever reason, did not discharge the mortgage instalments.

b) It is more than merely arguable to suggest that a reasonably foreseeable consequence of a failure to do so would be that the lenders would seek to enforce their security in one way or another. That is *not*, however, the same as saying that Mr Khan's *pleaded case* that the non-payment *directly caused the sales* is more than merely arguable.

c) As regards that latter suggestion, I do not consider there to be real prospects of showing that Woodhead's arguable failure to pay the mortgage instalments *caused the sale*, which is Mr Khan's pleaded case. It is further pleaded that that sale was in a distressed fashion. However, what plainly happened on the material before me is that the banks appointed receivers and, apparently *later*, took a decision to sell. There is no evidence before me which suggests that the latter was an inevitable, or even foreseeable consequence of the former.

d) That said, in light of the expert evidence, I would have been persuaded that it was more than fanciful to argue that, if causation had been established, then there would be a potentially recoverable differential between a sale in distressed circumstances and a more voluntary sale. That would only apply, on the expert evidence, to domestic rather than industrial or commercial properties.

e) In light of the terms of the Restraint Order, the contractual obligations which arose between Mr Khan and Woodhead, and the amount of money Woodhead are argued to have held (argued, I should add, by Mr Khan or on his behalf), I consider it to be more than merely arguable that the potential cause of the lenders' actions *in appointing receivers* was Woodhead rather than Mr Khan. For the reasons I have given, that is insufficient: the change of position when the banks (or the receivers) took steps to *sell* plainly came later – and the basis for that change is (i) not how Mr Khan's case is framed and (ii) entirely unknown and without

evidence, save perhaps in relation to 1394 – which was in any event apparently sold by Mr Khan not the bank (see below).

f) In light of Mr Khan's guilty pleas to the various criminal contempt counts in relation to diversion of funds from Woodhead which were put to him, totalling around £300,000, I agree with Mr Bowmer that (in effect) it may well be said that Mr Khan had failed to mitigate his loss: I cannot see that there are real prospects of avoiding a conclusion that he could have either (a) discharged the mortgage instalments himself so as to stave off the banks, or (b) returned the money to Woodhead for onward payment.

g) However, I agree with Mr Bowmer's basic proposition that it is likely that any equity in the properties which remained in Mr Khan's hands when the Confiscation Order was made in 2017 would be likely to have been sought to be recovered by the POCU. Any suggestion to the effect of what the POCU would have been likely to do with proceeds received thereafter is, in my judgment, speculation.

73. Accordingly, as there was no other reason for trial advanced before me, and since:

a) I consider that Mr Khan's claim that the failure to pay the mortgage payments resulted in a distressed sale has no real prospect of success given the intervening appointment of receivers (about whose activity and decision making little or nothing seems to be in evidence), and likewise in relation to the banks' decision-making and reasoning, and

b) I have already reached the conclusion that the allegations of failure to collect rents and failure to market properties have no real prospect of succeeding either

I will grant summary judgment on the claim.

'Transparently false and scurrilous pleading'

74. I deal with the balance of the arguments *de bene esse*, and in case matters went further and it was said that I was wrong to reach the conclusion I have at paragraph 73 above.

75. 1394. Mr Bowmer argues that the APoC cannot succeed in relation to 1394 because the allegation is that possession was obtained by the relevant bank and the property was subject to a 'forced distressed sale … below open market value'. He points out that Mr Khan obtained a suspension of the warrant of possession in relation to 1394, and the release of the bank's receivers, and effected his own contract of sale of that property, setting the sale price himself, and in circumstances where he gave evidence in the possession proceedings that a price *lower* than that at which the transaction appears to have proceeded was a fair price.

76. Mr Pennock advanced nothing of substance in response to that argument.

77. I am satisfied that, as regards 1394, there is no real prospect of Mr Khan succeeding in showing that the negligence (if there was any) of Woodhead led to any loss of equity in a property in circumstances where *he* undertook the sale *at a price he considered fair and reasonable.* Whilst the bank required payment, there is no real prospect of resisting the

suggestion that the whole exercise of the sale was in Mr Khan's hands and that he cannot now be heard to complain about his own actions. No other reason for trial was suggested.

78. Accordingly, I would have given summary judgment in favour of Woodhead as respects all matters to do with 1394.

79. 37. There is no dispute between the parties that Mr Khan arranged for, or continued an arrangement with, 'Mak Homes' to collect the rent on this property rather than leaving it to Woodhead pursuant to the Restraint Order. Indeed, he pleaded guilty to a contempt of court for breach of the Restraint Order by failing to arrange for the rent to be transferred to Woodhead between 1st October 2013 and 30th June 2014.

80. Mr Pennock maintains that Mak Homes were appointed only because Woodhead did not collect the rent, and the amount (around £2,900) is relatively small. He further points out that none of that excuses Woodhead's failure to demand and collect the rent.

81. For the reasons I have already given, claims in relation to failure to collect rent will not proceed. For the period identified above, I agree with Mr Bowmer's submission that Mr Khan's case has no real prospect of succeeding (and there is no other reason for trial) because it appears Mr Khan arranged for someone else to collect the rent and failed to pass it to Woodhead. However, in light of my conclusions above in relation to duty and causation, it makes no difference.

Illegality

82. For completeness, I will express a short view on Mr Bowmer's submissions on illegality.

83. Mr Bowmer argues that the purpose of the claim is to allow Mr Khan to realise money derived from equity in properties which he acquired by his criminal acts. I was referred to *Patel v Mirza* [2017] AC 467, and *Grondona v Stoffel & Co* [2021] AC 540 for the principles in this regard.

84. The first consideration is whether the underlying purpose of a prohibition (i.e. making something unlawful) would be enhanced by the denial of the claim. The difficulty with that proposition in this case is that I do not feel able on the evidence I have seen and the submissions I have heard to say with the requisite degree of confidence that all the properties were purchased with, in part, criminally-obtained money. It may be that they were – but I have not been persuaded at this point for the reasons I gave in relation to the background to the case.

85. The position may be otherwise in respect of 1392, in light of the sentencing judge's remarks that that property was funded in part with criminally-obtained funds. Put shortly, I would have agreed with Mr Pennock's argument that there is a competing duty at stake in relation to holding Woodhead to their contractual duties (ultimately based on the terms of an order of the Crown Court).

Non-compliance with the order of DJ Geddes

86. Finally, I shall deal with Mr Bowmer's argument that the pleadings do not comply with the order of DJ Geddes. It is instructive to rehearse the terms of paragraph 4 of her order made on 20th April 2021. Her order required that the APoC set out:

> *".. all of the elements of his cause of action for breach of contract and/or negligence in respect of [the properties] including discretely in relation to each property (a) the facts alleged to constitute the alleged breach of contract/breach of duty; (b) the facts alleged as to causation and how the alleged breaches have allegedly caused loss and damage; and (c) the loss and damage claimed and the amount thereof."*

87. I was referred to *Pantelli Associates Ltd v Corporate City Developments Ltd* [2011] PNLR 12 at [11] per Coulson J, as he then was:

> *CPR r.16.4(1)(a) requires that a particulars of claim must include "a concise statement of the facts on which the claimant relies". Thus, where the particulars of claim contain an allegation of breach of contract and/or negligence, it must be pleaded in such a way as to allow the defendant to know the case that it has to meet. The pleading needs to set out clearly what it is that the defendant failed to do that it should have done, and/or what the defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated. Those are "the facts" relied on in support of the allegation, and are required in order that proper witness statements (and if necessary an expert's report)can be obtained by both sides which address the specific allegations made.*

88. It is also instructive to see what the terms of the particulars of claim in that case were, of which complaint was being made:

> *"**Performance***
>
> *16. Paragraph 10 is denied. It is averred that the claimant failed to perform*
>
> *to the contractual standard and is in breach of the QS Contracts and the PM*
>
> *Contracts.*
>
> ***Particulars of Breach of the QS Contracts***
>
> *16.1 Failing adequately or at all to identify or determine the defendant's initial requirements and subsequently develop the full brief.*
>
> *16.2 Failing adequately or at all to advise on feasibility and procurement.*
>
> *16.3 Failing adequately or at all to establish the defendant's order of priorities for quality, time and cost.*
>
> *16.4 Failing to prepare adequate and/or accurate initial budget estimates.*
>
> *16.5 Failing to prepare or develop a proper and/or accurate preliminary cost plan.*
>
> *…*
>
> ***Particulars of Breach of the PM Contracts***

16.13 Failing to select or appoint appropriate consultants.

16.14 Failing adequately or at all to co-ordinate and review the progress of design work.

16.15 Failing adequately or at all to facilitate communications between the defendant and the Consultants.

89. The argument which led to Coulson J's remarks that I have cited above was this, at [10]:

> *Mr Coplin's principal criticism of the allegations of professional negligence at [16] is that they read as if the pleader had simply taken each relevant contract term and then added the words "failing to" or "failing adequately or at all to" as a prefix to each obligation, thus turning the obligation into a breach of professional negligence. In his submissions on behalf of CCD, Mr Winser candidly accepted that that is precisely what he had done. By way of mitigation, Mr Winser said that, in drafting the proposed amendments, he had been hampered by the absence of any expert advice as to whether—and if so how—Pantelli had been negligent or otherwise acted in breach of contract.*

90. Finally, it is worth noting the terms of allegations of breach in this particular case, from the APoC:

> *The Defendant is liable for the Claimant's loss and damage pursuant to the Defendant's negligence and or breach of contract in that the Defendant failed to adequately or at all [sic];*
>
> *Particulars of Breach of Contract and or Negligence*
>
> *a. Exercise the reasonable care and skill to be expected in an experienced Estate agent specialising in the letting and management of commercial and residential properties;*
>
> *b. Comply with the terms of the [Restraint Order];*
>
> *c. Collect rents from the Tenants of the properties or a reasonable amount of those rents;*
>
> *d. Pay the mortgages upon those properties;*
>
> *e. Secure new tenants, where applicable, for any of the properties should the properties be or become vacant;*
>
> *f. Ensure the mortgage payments relating to the properties were paid accurately, fully, and in a timely manner;*
>
> *g. Apply the rents collected from a property for the payment of the mortgage for that property with any surplus to be paid into … [the A A Khan Property account];*

> *h. Provide a summary of income rent and outgoing expenditure to the Proceeds of Crims Unit ("POCU") on a monthly basis within 14 days after the end of each month.*

91. At paragraphs 14—16 of the APoC, Mr Khan relies on the following:

> *14. So far as [Mr Khan] is aware and believes the Defendant failed to, at least, visit or speak to, or collect rental income from the Tenants of [37] and [1394] contrary to paragraph 17(4)(f) of the [Restraint Order] and held on to rental income collected from properties subject to the Court Order to a value of over £200,000 which, if not used to pay mortgage payments, should have been transferred to [the A A Khan Property account].*
>
> *15. The Claimant does not have specific details of what rent the Defendant did or did not collect or what payments they did or did not make to HSBC or Lloyds Banks [sic] PLC because the Defendant acted contrary to their duties and did not provide a monthly summary of incoming rent and expenditure contrary to paragraph 17(5) of the [Restraint Order].*
>
> *16. Further, the Defendant failed to market and or let and or sell the following empty properties [6/6A] at a monthly rent of around £2,000, and Unit 2 [178] at a potential income of around £10,000 per year and Unit 3 [178] at a potential income of around £45,000 per year generating extra monthly income of around £79,000 per annum.*

92. In light of my conclusions above, I deal with this point *de bene esse*, and even then only in relation to the question of payment of the mortgage instalments.

93. In my judgment, whilst there could have been very much to be said about the allegations of breach in the APoC in relation to collection of rents and so forth, there is very little which assists Woodhead in relation to non-payment to the lenders. Whilst it is true that the allegation of breach in this regard is essentially a repetition of the relevant statement of duty, it may be thought that there is not a great deal which *needs* to be added. That is not so of other breaches. However, Woodhead is entitled to know *which* mortgage payments they are said not to have made, and when – and almost certainly the amount in each case. That is, in part, what DJ Geddes's order required. Had I not granted summary judgment on the claim for the reasons above, those elements which remained would all have pertained to non-payment of mortgage payments and would have been struck out for failing to comply with the District Judge's order, by reason of CPR r.3.4(2)(c). In my judgment it is no answer to suggest that Woodhead has failed to provide an account: the information should have been readily available from the banks, of which he was a client.

Conclusion

94. For the reasons I have given, I do not consider that the Claimant has any real prospect of succeeding on this claim. As no alternative reason (compelling or otherwise) was suggested for the trial to proceed, I will grant summary judgment in favour of Woodhead.

95. The same overall outcome can additionally be reached by a different route:

a) There would be summary judgment on claims for failing to rent out unoccupied properties, as not being said to cause any loss.

b) Likewise in relation to failure to collect rents, on the basis of the evidence relied upon by Mr Khan himself.

c) In my judgment, there is no pleaded claim for lost rental income.

d) There would be summary judgment in relation to any claim resting on the sale of 1394 by HSBC.

e) All claims resting on the sale of properties by the banks are struck out for failing to comply with DJ Geddes's order.