



Neutral Citation Number: [2020] EWHC 1159 (TCC)

Case No: HT-2018-000197

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

Rolls Building,  
Fetter Lane  
London, EC4A 1NL

Date: 11/05/2020

**Before :**

**JONATHAN ACTON DAVIS QC**  
**(sitting as a Deputy High Court Judge)**

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**Between :**

**CITY EAST RECRUITMENT LIMITED**

**Claimant/**  
**Respondent**

**- and -**

**BRITISH GAS SOCIAL HOUSING LIMITED**

**Defendant/**  
**Applicant**

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**Ms Anna Boase Q.C.** (instructed by **Pinsent Mason**) for the **Applicant/Defendant**  
**Mr Nigel Jones Q.C.** and **Ms. Katie Lee** (instructed by **Capstick-Dale & Partners**) for the  
**Respondent/Claimant**

Hearing dates: 10 March 2020  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 11 May 2020 at 2:00 pm.**

**Jonathan Acton Davis QC :**

1. The hearing of this application took place on 10<sup>th</sup> March 2020 and I reserved judgment. In the course of its preparation the consequences of the Corona Virus Pandemic intervened. On 31<sup>st</sup> March 2020 my way of an email from my clerk I informed Counsel of the outcome of the application, namely that it would be dismissed, and the relief sought refused, with my reasons to follow. Consequential issues were ordered to await provision of my reasons. This judgment sets out my reasons.

2. The Defendant applies by an application dated 21<sup>st</sup> November 2019 for a summary judgment and/or strike out in relation to specific paragraphs of the Claimant's Re-Amended Particulars of Claim dated 18<sup>th</sup> October 2019. The draft Order sought is at [2/702] of the agreed Bundle and is in the following language:

“1. Pursuant to CPR 24, judgment be entered for the Defendant on the claims advanced in the following paragraphs of the Re-Amended Particulars of Claim dated 18<sup>th</sup> October 2019:

1.1 The claim relating to “Estimated Flipped Workers” paragraphs 87, 88, 90, 91, 92 and 93(b), paragraphs 96, 100, 101, 102, 103(b) and the words the “Estimated Flipped Workers” in paragraph 97; and Appendix 4;

1.2 The claim for lost management time: paragraphs 86(d), 86(e) and 105.

2. Pursuant to CPR 24, judgment be entered for the Defendant on the issue of Commission as an additional claim (as opposed to an alternative to a claim for a Transfer or Introduction Fee as advanced in paragraph 95 and Appendices 2 and 3 of the Re-Amended Particulars of Claim dated 18<sup>th</sup> October 2019.

[In the alternative to paragraphs 1 and 2 :

1. Pursuant to CPR 3.4, the following paragraphs and words of the Re-Amended Particulars of Claim dated 18<sup>th</sup> October 2019 be struck out:

1.1 Paragraphs 87, 88, 90, 91, 92 and 93(b); paragraphs 96, 100, 101, 102, 103(b) and the words “and the Estimated Flipped Workers” in paragraph 97; and Appendix 4;

1.2 Paragraphs 86(d), 86(e) and 105;

1.3 Within paragraph 95, the words “in addition or” and equivalent wording in Appendices 2 and 3]

together with consequential relief.

3. Ms Boase accepted that the same test was applicable under CPR 24 as under CPR 3.4 and thus that she failed or succeeded on both alternative applications.

4. The background to the dispute is that the Claimant is a recruitment agency. The Defendant is a subsidiary of Centrica Plc which undertakes electrical, plumbing and heating installation. Between 2011 and 2016, the Defendant used the services of the Claimant (among other agencies) to recruit gas installers and other workers. There is a dispute about whether the Claimant's services were supplied pursuant to their standard terms as the Claimant contends or pursuant to the Defendant's agreement as the Defendant contends. It is common ground that the Court is not required to resolve that dispute nor the various consequential interpretation disputes. The application proceeds on the assumption that the Claimant's standard terms apply.
5. In broad terms, the Claimant's standard terms provide for the following structure in outline (using the language of the Claimant's standard terms):

- “(a) The Claimant would make an “Introduction” of an “Applicant” to the Defendant;
- (b) The “Assignment” took place where an Introduction led to an Applicant rendering services to the Defendant pursuant to a contract for services between the Worker and the Claimant (Clause 1.1);
- (c) During an Assignment, the Defendant was obliged to pay hourly charges for the Worker's services, comprising remuneration payable to the Worker and commission payable to the Claimant (Clause 9.1);
- (d) An “Engagement” occurred where an Applicant was engaged, employed or used by the Defendant on a permanent or temporary basis, other than for an Assignment (so, not pursuant to a contract for services between the Worker and the Claimant) (Clause 1.1);
- (e) If the Defendant intended to enter into an Engagement (either directly or via another agency) and to do so either (a) after an Introduction but before commencement of an Assignment; (b) during an Assignment; or (c) within the Relevant period (14 weeks from commencement, or 8 weeks from termination of an Assignment) (referred to as a “qualifying engagement”) the Defendant was obliged (by Clause 13.2) either:
  - (1) To pay a “transfer fee” of 30% of the remuneration payable to the worker in the first year of the engagement; or
  - (2) To enter into an extended or new Assignment in relation to that work, in which hourly charges, including commission would be payable.”

6. The Defendant says as paragraph 9 of its Skeleton Argument that:

“In and after 2015 (it) became increasingly concerned about the quality of work performed by and the reliability of agency workers... In 2016 (it) made a strategic decision, for good business reasons, to rely less heavily upon labour supplied by

recruitment agencies (including the Claimant) and to rely more heavily on labour supplied by small and medium enterprises.”

7. As set out at paragraph 30 of the Re-Amended Particulars of Claim [1/1/20], within the recruitment industry, the term “flipping” a worker is used colloquially to describe a situation where a worker, introduced or supplied by an employment agency or business, is either:
  - (a) taken on or engaged directly by a client of the employment agency (so that there is a direct contract of employment between the client and the worker);
  - (b) taken on or engaged by a client through an alternative employment agency (so that there is a contractor employment or service between the worker and the alternative employment agency, and the alternative employment agency has a contract to supply labour with the client);
  - (c) taken on, used or engaged by a client through a third party business or corporate entity to whom the client has introduced the worker (so that there is a direct contract of employment services between the third party business and the worker, and the third party business has a contract to supply labour/services with the client).
8. Subsequently and consequentially payment is not made to the agency for the use of the worker.
9. The dispute between the parties concerns whether and to what extent the Defendant has “flipped” workers introduced by the Claimant and failed to pay for the privilege. The Defendant was required by the contract to inform the Claimant when it used workers. However, it is the Claimant’s case that the Defendant has purposely utilised those workers, not paid the Claimant and actively and fraudulently concealed the fact in order to profit from those workers at the Claimant’s expense.
10. In short expansion of the draft Order set out above, the application proceeds under three heads:
  - (a) The “Estimated Flipped Worker Issue, i.e. that paragraphs 87, 88, 90-92, 93(b), 96, 100-102 and 103(b), the words “and the Estimated Flipped Workers” in paragraph 97 and Appendix 4 of the Re-Amended Particulars of Claim are all objectionable because “(the Claimant) has not pleaded a proper factual basis on which the Court could reach any reliable conclusion as a matter of liability that a particular proportion of workers were flipped” [2/8/714] (paragraph 52 of Mr Kirwin’s Witness Statement) and that “the claims in debt (for Transfer or Introduction Fees and for Commission) relating to Estimated Flipped Works have no proper legal basis where (the Claimant) cannot identify a specific sum alleged to be due in relation to a specific worker, (the Claimant) cannot bring a claim in debt)” [2/8/714] (paragraph 53 of Mr Kirwin’s Witness Statement);

- (b) The “commission as an additional claim issue” i.e. that the words in paragraph 95 of the Re-Amended Particulars of Claim area objectionable because, essentially, “it is inherently unlikely that both a Transfer Fee and Commission would have been payable in relation to all, or any of the workers that are alleged to have been “flipped” [2/8/715] (paragraph 60 of Mr Kirwin’s Witness Statement) and that “absent any proper explanation of how a Commission claim could be “in addition” to a Transfer Fee Claim in relation to any worker, it appears there are no reasonable grounds for Commission as an additional claim [2/8/716] (paragraph 61 of Mr Kirwin’s Witness Statement; and
- (c) The “Lost Management Time Issue” i.e. that paragraph 86(d), 86(e) and 105 of the Re-Amended Particulars of Claim are objectionable because, essentially “the Claimant” has made no attempt to amend its pleading to answer the reasonable factual question raised by (the Defendant). The (Claimant’s) suggestion that it can maintain the barest of claims without any effort to give factual particulars, pending disclosure and expert evidence is absurd [2/8/68] (paragraph 68 of Mr Kirwin’s Witness Statement) and, therefore, such claims “have no prospect of success” [2/8/69] (paragraph 69 of Mr Kirwin’s Witness Statement).
11. There is no dispute about the applicable legal principles. Under CPR 24.2, to have a “real prospect of success” a case must be better than merely arguable. A realistic claim is one that carries some degree of conviction (**Global Asset Capital v. Aabar** [2017] Civ 37 at [27(1)]) and the proper disposal of an issue under CPR 24 does not involve a mini-trial (**Global Asset Capital** at [27(2)]). Under CPR 3.4(2) the Court is empowered to strike out a statement of case in whole or in part. The Court may conclude that the Particulars of Claim fall within the rule where they are incoherent and make no sense, or contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the Defendant and within ground (b) where the claim is vexatious, scurrilous or obviously ill-founded.
12. As set out at paragraph 3 above, Ms Boase Q.C. accepts that her application falls or succeeds on both limbs of the application and that for all practical purposes in this case there is no distinction.
13. Mr Jones Q.C. relied upon **Wragg v Partco Group Limited** [2002] EWCA civ 594 [45] to [48] and [51]. At paragraphs 27-28 of the judgment, the Court summarised the well-known principles to be applied in strike-out cases of this nature. However it also referred to the following in the course of its judgment. In particular at paragraph 51 of the Court said:
- “It is important to preserve a degree of latitude in approaching the terms of the pleading, whenever issues of fact are not undisputed or in dispute and when it is reasonable to suppose facts may emerge at trial or in the pre-trial processes yet to come...”
14. Further in **Ardila Investments VENRC** [2015] EWHC 1667 [Com]. The Court said at [81-82] that:

“The real question is whether the pleaded facts... and the inferences which are to be drawn from them are so deficient that they should be struck out”.

15. With that introduction I turn to the relevant claims.

Claims in relation to the 181 “estimated flipped workers”.

16. At paragraph 1.1 of the draft order [2/7/702] the Defendant seeks summary judgment on the claim relating to “the estimated flipped workers” advanced in or (by paragraph 1.1 of the alternative drafting) strike out of the paragraphs of the re-amended particulars of claim listed in paragraph 1.1 of the draft order. There are two sub-headings to this application. The first is that the claim relies on a factual basis so flimsy that, even if it were admitted or proved, the claim would have no real prospect of success. The second is that the claim is technically defective in that it claims Transfer fee and commission as a debt, alternatively as damages. It is said that a debt means a sum of money that is owed or due: it is a specific sum. A debt cannot be claimed on the basis of estimated liability.

17. The Claimant’s case is summarised at paragraph 40 of the Defendant’s Skeleton Argument:

“CER alleges that a Transfer Fee and Commission is due in relation to 30% of the 1,083 workers it introduced over a nine year period, on the basis of a single alleged remark in October 2016 by an employee of PH Jones called Colin Finlayson...”

18. Thereafter at paragraphs 41 to 43 of the Skeleton, a sustained attack is mounted on what is described “limited and unreliable evidence”. The gist is that a conversation in a public house made by an employee in his personal capacity, which employee has no recollection of making the statement alleged and the vagueness and unparticularised nature of the informal remark which was no more than an estimate or casual opinion is essentially as was described in paragraph 44 of the skeleton as “pub-chat” is insufficient material on which to base a claim for £8.3 million.

19. The pleading at paragraph 37 of the Re-Amended Particulars of Claim [1/1/24] reads:

“On 26 October 2016 at the Queens Head pub in Stratford at approximately 7.00 pm, the Claimant’s Paul Mersh, Darren Winter and Russell McNally were informed by Colin Findlayson (head of labour and procurement at the Defendant), in response to being asked by Mr Mersh how many of the Workers introduced by the Claimant had been “*been flipped or taken on*”, Mr Findlayson stated: “if you take into account the ones we took on direct, through a new limited company, through another agency or through an existing SME I would guess it about 30%.”

At paragraph 38 it is pleaded that Mr Findlayson also stated:

“This situation is mainly Stuart Margerrison’s doing. He authorised the taking of agency contractors and encouraged them to be siphoned off through other avenues to save costs.”

At paragraph 39 it is said Stuart Margerrison is director of residential services of the Defendant.

20. Additionally to the arguments based upon the inadequacy of the factual basis behind of the plea Ms Boase Q.C. draws my attention at paragraph 48 of her Skeleton to Mr Mersh's invitation in his witness statement to allow the Court to allow the Estimated Flipped Workers Claim to survive "at least until after the disclosure is completed." The gist of her argument is that is insufficient reason not to strike out a claim which has no real prospect of success.
21. Mr Jones QC says that the conversation with Mr Findlayson is very strong evidence to suggest that the Defendant "flipped" the Claimant's workers on a significant scale. Additionally that conversation should be read in the context of paragraphs 40 to 52 in section E6 of the Re-Amended Particulars of Claim under the heading "Further facts leading to Inference" and paragraphs 53 – 75 in section E7 of the Re-Amended Particulars of Claim under the heading "Circumstantial evidence leading to Inference". It is unnecessary to add to the length of this judgment by repeating those paragraphs in full. It is sufficient to say that the headings are accurate summaries of the material pleaded in the paragraphs within those sections of the re-amended pleading.
22. Ms Boase QC is asking the Court to decide on a summary basis that the claim as pleaded has no real prospect of success. I am unable to come to that conclusion. The content of paragraph 37 – 39 of the Re-Amended Particulars of Claim, if true, found a claim for damages. The various criticisms made by Ms Boase of what is reported as having been said and the circumstances in which it was said are matter for cross examination and submission after cross examination. Additionally the Court's findings will depend upon the impression made by the witnesses through their demeanour and the manner in which they give their evidence at trial. There may be cases in which a Court can conclude on a summary basis that a plea is so inherently unlikely to be accepted that it should be struck out. However this is not one of those cases.
23. Furthermore section E5 of the pleading must be read in the context of sections E6 and E7. It would be unfair to do otherwise.
24. Therefore I do not need to consider the additional argument that the case be allowed to proceed at least until after disclosure.

#### Debt/Damages

25. The claim is said to be technically defective in that it claims a Transfer Fee and Commission as a debt, alternatively as damages. A debt means a sum of money that is owed or due, it is a specific sum. A debt cannot be claimed on the basis of estimated liability. Ms Boase QC added in oral argument that the claim is only an estimate whereas for a debt to exist it must be an identified sum of money. I was initially attracted to that argument. However, the response from Mr Jones QC was in effect that the situation is akin to an investigation under a process like that of taking an account followed by an order for payment of what is found due. He persuaded me that at this stage it would be wrong for the court to say that his approach is unfounded in law. The issue should go off for trial. In my judgment that is the correct course. In any event

there is no practical advantage in striking out the claim for debt because the plea is in the alternative: debt or damages.

26. For the above reasons the Court dismisses the application in relation to the claims in relation to the 181 “estimated Flipped Workers”.

Commission in addition to Transfer Fees.

27. Ms Boase QC says that under clause 13.2 of the Terms & Conditions (assuming they apply), the Client has a choice to pay either the Transfer Fee or to enter a new or extended assignment and pay commission. There is no provision for a period of work to be treated simultaneously as an engagement giving rise to a Transfer Fee and an assignment giving rise to commission. Thus the Claimant may have a claim to damages equivalent to a Transfer Fee or damages equivalent to commission. However in relation to any one engagement, the Claimant cannot have a claim for both. In response, Mr Jones QC refers to Mr Mersh’s witness statement at paragraphs 91 – 100 [2/9/736] where it is explained that in Mr Mersh’s view it is entirely possible for there to be a situation in which the Defendant was liable to pay to the Claimant both the transfer fee and commission. The salient points are:

- (a) Clause 13.2 of the Claimant’s standard terms envisage a situation in which both a Transfer Fee and commission would be payable. The Defendant was given an option to elect which one was payable. However, the Defendant, by its concealment of its “flip” did not exercise its right to elect the payment of commission or Transfer Fee.
- (b) An example is given of a Mr Aston. It is said that his circumstances show a situation in which the Defendant would be liable to pay both a Transfer Fee and commission.

28. In her Skeleton Argument Ms Boase QC at paragraphs 55 – 61 explains why Mr Aston’s case is a false example.

29. In my judgment there may well be a clear evidential dispute as to whether and if so at what point in time commission would no longer have been payable henceforth and instead a transfer fee due. Additionally the claims are on estimated figures and it would be wrong in principle to remove from the claim the possibility in principle of claiming both commission and transfer fees. It may be that a court is persuaded that Mr Aston is a false example but I cannot see that that to be so plainly so that the claim should be struck out. It is necessary to investigate the background in relation to each worker including the detail of when any “flipping” occurred.

30. The application to strike out the claim for commission in addition to a transfer fee is refused.

Lost Management Time.

31. At paragraph 105 of the Re-Amended Particulars of Claim [1/1/46] at section G4 it is pleaded “Lost Management Time and Reduction in Revenue and Profit”



“105. Calculations for lost management time and business development losses will be provided by way of expert evidence in due course by way of disclosure”

32. At paragraph 86 [1/1/38] it is said:

“The Claimant has sustained losses under the following headings, namely: ...

(d) lost management time;

(e) significant reduction in revenue and profit, with the consequent inability to grow and develop a business.”

33. As Ms Boase QC says, the Claimant has not pleaded any legal or factual basis as to liability nor identified any quantum. That plea was the subject of a Request for Further Information [2/3//692] and after service of the Re-Amended Particulars of Claim the subject of a second Request served approximately 2 ½ weeks before the hearing.

34. The Defendant’s frustration at dealing with such an unparticularised claim can be understood. However in my judgment the correct approach is first to apply for an order that the Further Information be provided and if that order is obtained and there be non-compliance with the Order an application can then be made that the claim be struck out. Absent those steps, the application is premature.

35. Thus the application to strike out in relation to the claims for loss of management time and business development losses is also dismissed.

36. For the above reasons the application was dismissed. I make express that my decision is not based in any respect on the “no other compelling reason” provision in CPR 24.2.