Case No: H90CF017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
PROPERTY TRUSTS AND PROBATE LIST (Chd)

Neutral Citation Number [2021] EWHC 1005 (Ch)

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 15/04/2021

Before :

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court
Between :

(1) THE RIGHT HONOURABLE IVOR EDWARD OTHER WINDSOR-CLIVE, EARL OF PLYMOUTH **(2) LADY EMMA WINDSOR-CLIVE** **(3) THE HONOURABLE DAVID JUSTIN WINDSOR-CLIVE** **(as trustees of the St. Fagans No 1 and No 2 Trusts)**	**Claimants**
- and -	
JENKIN THOMAS REES	**Defendant**

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Ms Katherine Holland QC and Dr Christopher McNall (instructed by **Burges Salmon LLP**) for the **claimants**
Mr Peter Williams (of **Ebery Williams Solicitors**) for the **defendant**

Hearing date: 7 April 2021
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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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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC :

1. By a claim form served on 23 November 2020 the claimants as freeholders seek possession of Maesllech Farm, Raydr, Cardiff (the farm) from their former tenant, the defendant Mr Rees. The farm comprises about 240 acres, mainly of arable land, a farmhouse, outbuildings, and two cottages, which Mr Rees held under two tenancy agreements, one dated January 1965 and the other dated March 1968. Each tenancy was governed by the Agricultural Holdings Act 1986 (the 1986 Act). Each was terminated by notices to quit served in January 2018 under Case B of Schedule 3 Part 1 thereof (Case B) on the basis that the land was required for development under planning permissions in 2016 and 2017 in respect of land of which the farm forms part. The permissions are for significant development which includes residential houses, a school, shops and associated development.

2. The notices to quit were challenged by Mr Rees and an arbitrator was appointed under the 1986 Act to determine their validity. In an award dated January 2020 the arbitrator determined that three of the notices were valid. Mr Rees appealed that award which appeal was heard and dismissed by me in October 2020. A request was made by Mr Rees's then solicitors to the arbitrator to extend time until the notices to quit took effect, which was granted until 20 August 2020.

3. Thereafter a defence and Part 20 claim dated 25 January 2021 was served on behalf of Mr Rees in the present possession claim. The gist of the defence and Part 20 claim was that he had been promised by the claimants' agent Richard Knight that no part of the farm would be taken back by the claimants until it was actually required to be built on, that Mr and Mrs Rees would not have to give up possession of the farmhouse, that the claimants accepted that Mr Rees's son Phillip would succeed to the tenancy of the farm and enjoy security under the 1986 Act, and that they would be offered further land to continue their farming business or compensated for the costs of relocating their farming business.

4. It was further pleaded in the Part 20 claim that in reliance on those promises Mr Rees and his son acted to their detriment, including by taking on extra responsibilities, by not objecting to the claimants' applications which led to the planning permissions, and by Phillip Rees committing to remain at the farm in his 40s and 50s rather than seeking to secure his livelihood elsewhere.

5. The Part 20 claim therefore sought a declaration that the claimants' ability to recover possession of the farm is "subject to an equity" in favour of Mr Rees and his son or "such satisfaction of the equity" as the court thinks fit.

6. The claimants responded with a reply and defence to counterclaim dated 9 March 2021 which was expressed to be without prejudice to the claimants' contention that the defence and Part 20 claim should be struck out pursuant to CPR 3.4 and/or dismissed pursuant to CPR 24 and/or stayed pursuant to CPR 3.1. The reply set out particulars denying that the alleged promises had been made or that there had been any detrimental reliance sufficient to give rise to a defence to the claim for possession of the farm.

7. An application by the claimants along the lines referred to above was made by the claimants and filed at court on 18 March 2021. It is that application which this judgment now deals with.

8. The first ground of the application is that the defence and Part 20 claim is an abuse of process and should be struck out as the promises and detrimental reliance upon which Mr Rees relies in seeking to defend the current possession proceedings could and should have been raised and dealt with in the arbitration proceedings and in earlier arbitration proceedings in 2017 between the parties relating a notice to quit some 21 acres of land included in the farm. That notice was also found to be valid by the arbitrator and possession of the 21 acres has been given by Mr Rees, although he says that no development has yet taken place thereon.

9. Under CPR 3.4(2)(b) the court may strike out a statement of case "if it appears to the court… that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings". There was no dispute before me as to the principles to be applied. The question is whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before.

10. A summary of the principles was approved recently by the Court of Appeal in *Koza Ltd v Koza Altin Iseltmeleri AS* [2020] EWCA Civ 1018, citing Simon LJ in *Michael Wilson and Partners v Sinclair* [2017] EWCA Civ 3. The principles relevant to the present case are as follows:

> "(1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated: see Lord Diplock in Hunter's case [1982] AC 529, Lord Hoffman in the Arthur JS Hall case [2002] 1 AC 615 and Lord Bingham in Johnson v Gore Wood & Co [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in Hunter's case. Both or either interest may be engaged.
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> (2) An abuse may occur where it is sought to bring new proceedings in relation to issues have been decided in prior proceedings. However, there is no prima facie assumption that such proceeding amount to an abuse: see Bragg v Oceanus [1982] 2 Lloyd's Rep 132; and the court's power is only used where justice and public policy demand it, see Lord Hoffman in the Arthur JS Hall case.
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> (3) To determine whether proceedings are abusive the court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's

> process: see Lord Bingham, in Johnson v Gore Wood & Co and Buxton LJ in Laing v Taylor Walton [2008] PNLR 11."

11. In witness statements filed by Mr Rees in both sets of arbitration proceedings, he referred to his dealings with Mr Knight and what he was told and how he acted in response. However, this was not formulated as an equitable claim giving rise to a defence in respect of the notices to quit in question.

12. Ms Holland QC and Dr McNall for the claimants submit that it should have been so formulated and dealt with as part of the arbitration proceedings, or at least the latter should have been stayed and the claim determined by the court. That would have, or may have, avoided the time and costs of two sets of proceedings. That was the course which was adopted in *John v George and Walton (*1996) 71 P&CR 375. In that case an arbitrator appointed to determine a notice to quit, also under Case B, stated a case for the opinion of the county court as to whether the landlords were estopped from relying on planning permission for the conversion of farm building without first providing replacement buildings. The county court proceedings were settled on the basis that the tenant would take proceedings for a declaration in that regard. HH Judge Moseley QC dismissed those proceedings but the Court of Appeal allowed an appeal on the basis that the landlord was estopped from relying on the planning permissions in question.

13. Mr Williams, for Mr Rees, submits that all that the arbitrator in the present case could determine was the validity of the notices to quit. Although some issues of estoppel may properly form part of those proceedings, if the estoppel relied upon goes to the issue of possession, as it does in the present case, then as the claimants must institute possession proceedings in court once the arbitrator has determined the validity of the notices to quit, that is the time and place to raise such an estoppel.

14. It emerged in the hearing before me that there was a dispute between the parties as to the jurisdiction of the arbitrators in the present case, and in that regard I was referred to authorities and provisions of the 1986 Act by both sides which were not included in the authorities bundle or referred to in the respective skeleton arguments. Consequently I reserved my judgment to consider these matters.

15. By the Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006 SI 2006/2805 arbitrations in respect of agricultural tenancies were from 19 October 2006 to be conducted in accordance with the Arbitration Act 1996 (the 1996 Act). This means that the whole machinery of the 1996 Act applies to such arbitrations and to the arbitrations between the present parties referred to above (see *Peel v Coln Park LLP* [2010] EWCA Civ 1602).

16. The powers of arbitrators under the 1996 Act are set out in section 48 as follows:

> "(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.
>
> (2) Unless otherwise agreed by the parties, the tribunal has the following powers.

(3) The tribunal may make a declaration as to any matter to be determined in the proceedings.

(4) The tribunal may order the payment of a sum of money, in any currency.

(5) The tribunal has the same powers as the court—

(a) to order a party to do or refrain from doing anything;

(b) to order specific performance of a contract (other than a contract relating to land);

(c) to order the rectification, setting aside or cancellation of a deed or other document."

17. Also relevant are the following subsections of section 83 in Part VII of the 1986 Act which part sets out miscellaneous and supplementary provisions:

"(1)Without prejudice to any other provision of this Act, any claim of whatever nature by the tenant or landlord of an agricultural holding against the other, being a claim which arises—

(a) under this Act or any custom or agreement, and

(b) on or out of the termination of the tenancy of the holding or part of it,

shall, subject to the provisions of this section, be determined by arbitration under this Act.

1A) Notwithstanding subsection (1) above, but subject to the provisions of subsections (2) and (3) below, the tenant and landlord may instead refer for third party determination under this Act any such claim as is mentioned in subsection (1).

(2) No such claim as is mentioned in subsection (1) above shall be enforceable unless before the expiry of two months from the termination of the tenancy the claimant has served notice in writing on his landlord or tenant, as the case may be, of his intention to make the claim.

(3) A notice under subsection (2) above shall specify the nature of the claim; but it shall be sufficient if the notice refers to the statutory provision, custom or term of an agreement under which the claim is made."

18. As indicated above the grounds set out in the notices to quit which were subsequently the subject of the two arbitrations was that the land which was the subject of the notices respectively was required for a use other than agriculture namely the development summarised above. In respect of that which was the subject of the first

arbitration, agents for Mr Rees responded that he wished "to contest all matters relating" to the notice to be referred to arbitration under the 1986 Act. In respect of that which was the subject of the second arbitration, the response was in similar terms but expressed the wish "to contest all matters arising out of the reasons stated" in the notice.

19. The arbitrator in each case was appointed by the President of the Royal Institution of Chartered Surveyors (RICS). The appointments were not put into evidence before me, but were referred to in the awards. For example, the arbitrator in the second arbitration award says that he was appointed "to consider" the notices to quit. Under the heading " The matters to be considered by the arbitrator" the award continues:

> "Whether five Case B notices to Quit dated 29 January served by the Landlord on the Tenant on 31 January are upheld."

20. The award then went on to consider each of the notices and various issues arising in respect of one or more of them. These included whether the land was required for development rather than building development, whether Mr Rees was estopped from asserting that three acres of land fell outside the 1965 tenancy, and whether the claimants had a present and genuine requirement for the land referred to in the notices in accordance with the planning permissions.

21. The arbitrator took the advice of Queen's Counsel on various issues, which advice was cited at length within the award. The award was that three of the notices were "valid and upheld" and that two were "invalid and not upheld."

22. Ms Holland QC and Dr McNall do not accept that the arbitrators did not have jurisdiction to consider the issue of possession or an estoppel claim in relation to possession. They say that the arbitrators could have declared that the claimants were estopped from claiming possession under section 48(3) of the 1986 Act. In my judgment that is not so clear cut, as the declaration is limited to any matter to be determined in the proceedings, which begs the question what is to be determined. They also submit that the arbitrators could have ordered the claimants not to take possession pursuant to the notices under section 48(5)(a) or alternatively to order the payment of the compensation particularised in the Part 20 claim under section 48(4). In my judgment there is more force in these submissions.

23. They also refer to the wide wording of section 83 of the 1986 Act that any claim of whatever nature by the tenant against the landlord shall be referred to arbitration under that Act. Again however, in my judgment this is not clear cut. The reference in subsection (1) is to a claim which arises under the Act or any custom or agreement. The estoppel claim set out in the Part 20 claim does not arise under the Act or custom. It does not fit easily into the category of "agreement" and the reference to "term of an agreement under which the claim is made" in subsection (3) suggest that such an estoppel claim is not contemplated by the section.

24. However, I am prepared for present purposes to proceed on the basis that such an estoppel claim could have been raised and dealt with in the arbitration proceedings. In my judgment it could have been included by agreement of the parties under section 48(1) on the powers exercisable by the arbitrator as regards remedies. Although the issues and remedies involved in such an estoppel claim are factually and legally

complex and the Business and Property Courts in England and Wales have expertise which an arbitrator appointed by the President of the RICS may well not have, the arbitrator could have taken legal advice, as occurred in the second award.

25. However the estoppel issues in that award went to the validity of the notices. The estoppel claim in the defence and Part 20 claim in the present proceedings does not affect the validity of the notices or whether the claimants may rely on the planning permission. The promises alleged in the Part 20 claim are not that the planning permission or any notices to quit on the grounds of such permission would not be relied upon (save possibly in respect of the farmhouse) but that land would not be taken until it was required to be built on and that further land would be given for Mr Rees and his son to continue farming or compensation given to reflect the cost of relocating a farming business.

26. The principles upon which relief will be granted in such estoppel claims are not entirely clear, and in promise based cases involves some discretion (see Snell's Equity, 34th edition, paragraph 12-047). That in my judgment does not sit easily with the submission that such a claim should have been dealt with by the arbitrator under the statutory scheme of the 1986 Act.

27. The submission that such a claim should have been raised in the arbitrations which should then have been stayed for court proceedings to determine the claim has more force. However, whilst that course may have avoided two sets of proceedings and costs if the claim succeeded, that would depend on what relief if any the court decided to grant. Moreover, if the claim failed then the arbitrator would still be seized of issues regarding the validly of the notices, such as whether the claimants had a genuine and present requirement for the land.

28. I have come to the conclusion taking all these points into account that I cannot be satisfied that the estoppel claim in the defence and Part 20 claim should have been raised in the arbitrations.

29. I turn now to deal with the second ground of the application, that the alleged promises and detrimental reliance set out in the defence and Part 20 claim are so vague that they do not disclose a reasonable defence to the possession claim and should be struck out pursuant to CPR Pt 3.4(2)(a), which gives the court power so to do where such statements of case disclose "no reasonable grounds" for defending the claim.

30. Mr Williams, whilst not accepting any lack of particularity in this regard, submits that any such lack could be cured by a request for further information under CPR Part 18. Ms Holland QC submits that it is not for the claimants to assist Mr Rees in curing defects in his pleaded case, and I accept that point.

31. I also accept that in some respects the defence and Part 20 Claim are not entirely clear, particularly in relation to the promises alleged concerning farm land not being taken until actually required to be built on and offers of other land or compensation to carry on farming, and it is arguable that these particular promises are not clear enough to found an estoppel. However, I am not persuaded that this lack of clarity is such that no reasonable defence to the possession claim is disclosed, and according I decline to strike out on this basis.

32. A separate point that even on their own terms these allegations are incapable in law of given rise to a proprietary interest in the farm sufficient to constitute a defence to the possession proceedings was not pursued, and in my judgment this point also fails.

33. The final ground of the application is that Mr Rees has failed to comply with a court order in respect of the payment of costs to the claimants and accordingly the defence and Part 20 claim should be struck out under CPR Part 3.4(2)(c) which gives the court the power to do so where "there has been a failure to comply with a…court order."

34. The order which is specified in the application as the order which Mr Rees has failed to comply with is an order which I made in Mr Rees's appeal in claim PT-2020-CDF-000006 against the second arbitration award which appeal I dismissed on 29 October 2020. On 11 December 2020 I ordered Mr Rees to pay £100,000 on account of the claimants' costs of that appeal within 14 days. No part of the amount has been paid.

35. This part of the present application is against the background of a similar application by the claimants dated 22 September 2020 for an order that unless Mr Rees pay to them the sum of £50,000 within 14 days of the date of the order, his damages claim, as set out in the points of claim in case number C30CF095, dated 10 August 2019, should without further order be struck out and stand dismissed.

36. The order for the payment of the £50,000, by the 15 July 2020, was an order for payment on account of costs by the Court of Appeal, in dismissing an appeal by Mr Rees and his son. The decision appealed related to the rights of the claimants to enter part of the farm land to carry out exploratory and survey work in furtherance of conditions attached to the planning permissions referred to above.

37. I also heard that application on 16 March 2021, by which time none of the £50,000 had been paid, and this still remains outstanding. By the claim number C30CF095, Mr Rees sought unliquidated damages arising out of aspects of the entry on behalf of the claimants onto the farm in pursuance of the planning permissions. Three acts of trespass were relied upon which of were fairly minor allegations, such as the digging of boreholes or trial pits, or the positioning of ecological surveying equipment. However the claim included compensation for the anticipated benefit from the planning permissions running into millions of pounds.

38. In giving my extempore judgment, I indicated that there was no dispute between the parties about the principles to be applied on such an application and cited Sir Richard Field's summary in *Michael Wilson & Partners Ltd v Sinclair & Others* [2017] EWHC 2424 (Comm) as follows:

    i) Firstly, whether or not to grant the application is a matter of discretion, either under CPR Part 3 or under the inherent jurisdiction of the court.

    ii) Secondly, the policy of making a costs order payable within a specified time before the end of litigation must be borne in mind, and that is to discourage irresponsible interim applications or the irresponsible resistance to proper applications.

    iii) Thirdly, all relevant circumstances must be taken into account, including the right to a fair trial under Article 6 of the European Convention of Human

Rights, alternative ways of enforcing the costs order, whether the court made the order despite submissions that it was inappropriate to do so before the conclusion of the litigation, and if there were no such submissions whether there ought to have been.

iv) Fourthly, a submission that a paying party lacks the means to pay and, therefore, the debarring order might potentially mean a denial of justice or a breach of Article 6 rights should be supported by detailed, cogent and proper evidence, giving full and frank disclosure of financial position, including the prospect of raising funds.

v) Fifthly, if there is no such evidence, the court should normally require the order for the payment of costs being allowed to continue, unless there are strong reasons for not so ordering.

vi) Finally, normally the order should be an unless order, unless there are strong reasons for imposing an immediate order.

39. One of the points taken on behalf of Mr Rees by counsel then appearing on his behalf was that he does not have sufficient means to pay £50,000 which the Court of Appeal ordered him to pay, and that in order for him to do so that would impose difficulties upon him to carry on his claim for damages. There were no reasons to suspect that large sums are stashed away and Mr Rees is now in his late 80s.

40. I dealt with the evidence on that application of the financial means of Mr Rees in this way:

> "In my judgment, that evidence does not amount to the detailed, cogent and proper evidence, giving full and frank disclosure of financial position, including the prospect of raising funds, which is required by reason of the authorities. Accordingly, in my judgment, the fifth principle applies, that in the absence of such evidence, the court should normally require payment of costs for being allowed to continue, unless there are strong reasons for not so ordering. In my judgment, there are no such reasons"

41. Accordingly I made an order that unless Mr Rees paid the £50,000 by monthly instalments of £10,000 then his claim number C30CF095 should be struck out on default of any instalment. No payment has been made so that claim stands struck out. I also ordered Mr Rees to pay costs of that application in the sum of £18,000 in instalments but none of that has been paid.

42. Mr Rees filed a witness statement in response to the present application, but that does not deal with his financial circumstances and does not seek to offer any explanation as to why nothing has been paid in respect of these three costs orders against him.

43. Mr Williams takes a jurisdictional point that because the order for the payment of £100,000 on account of the costs of the claimants in the arbitration appeal was made in separate proceedings, CPR 3.4(2)(c) does not apply to the present proceedings. Whilst acknowledging that that rule does not expressly state that in order to strike out

proceedings under it because of a failure to abide by a court order, the order in question must have been made in the same proceedings, he submits that that is the proper reading of the rule.

44. In the absence of authority, and neither side was able to find any on the point, I would accept that having regard to the policy of making costs orders referred to above, what is contemplated in the normal course of events by the provision is the non-compliance with an order in the proceedings which it is sought to have struck out.

45. However, I do not consider that as a matter of jurisdiction the court, in the exercise of its discretion, cannot have regard to the failure to abide by court orders in other proceedings. For example, it may be that those other proceedings are so closely connected with the present proceedings that it may be proper to take such failure into account.

46. In my judgment that is the position with regard to the present application. The order for the payment of £100,000 on account, although made in separate proceedings, was made between the same parties as the parties in the present proceedings, was made in respect of the same subject matter, namely the farm, and was made on consideration of similar, albeit not identical issues. In those proceedings the issue was whether notices to quit the farm were valid. In the present proceedings the issue is whether the claimants are entitled to possession of the farm.

47. I have to have regard to the right to a fair trial and to other means of enforcing the costs order. There is no clearly effective means suggested. I also take into account that despite my observations on 16 March 2021 as to the inadequacy of the evidence then before the court of Mr Rees's financial position, no further such evidence was adduced in the present application or any explanation why no part of any of the three costs orders currently outstanding against Mr Rees has been paid.

48. I have regard to the proportionality of striking out the defence and Part 20 claim in default of payment of any part of the £100,000.

49. I have come to the conclusion that it would be unjust to allow Mr Rees to continue to dispute the claimants' right to possession of the farm whilst making no effort to pay any part of the £100,000 or giving any or any adequate explanation as to why none of this sum has been made.

50. However, in my judgment it would be disproportionate to strike out the defence and Part 20 claim unless such a large sum is paid within a short time. Accordingly the order I shall make is that unless Mr Rees pays such sum in monthly instalments of £10,000 then upon default of any such instalment the defence and Part 20 claim shall stand struck out without further order of the court.

51. I invite the parties to submit a draft order within 14 days of handing down of this judgment together, if necessary, with written submissions on any consequential matters which cannot be agreed. The parties helpfully indicated at the end of the hearing that such would be an appropriate way to proceed. I will then give further judgment on such matters on the basis of written submissions.