Neutral Citation Number: [2019] EWHC 227 (QB)
Appeal No: QB/2017/0291

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

On appeal from the order of Master Kay QC
dated 2 November 2017 in Case No: HQ14X03579

Rolls Building
7 Rolls Buildings, Fetter Lane, London, EC4A 1NL
Date: 08/02/2019

Before :

MR JUSTICE WALKER

- -

Between :

Mr Selvaratnam BALARATNAM	Claimant and Respondent
- and -	
SANTANDER UK PLC	Defendant and Appellant

- -

- -

Ms Lisa Lacob (instructed by TLT LLP) for the defendant appellant

The claimant respondent appeared in person

Hearing date: 3 July 2018

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Approved JUDGMENT: Decision on the appeal

Mr Justice Walker:

A. Introduction

1. This is an appeal from a refusal by Master Kay QC to grant an application ("the bank's application") seeking to strike out, or to obtain reverse summary judgment on, a claim concerning events during the period 2007 to 2009 in relation to a proposed development in Sandown Road, Great Yarmouth. The case concerns a commercial relationship between Mr and Mrs Balaratnam ("the borrowers)" and Abbey Commercial Mortgages, which was at that time a trading name for Abbey National Plc. That company is now known as Santander UK Plc. I shall refer to it as "the bank". The present proceedings are bought by Mr Balaratnam alone. The bank does not suggest that he can sue only if Mrs Balaratnam is joined. In this judgment I shall simply refer to Mr Balaratnam as "the claimant". At the hearing before the master, the bank focussed on assertions in the particulars of claim as then extant ("the original claim particulars"). The bank's submission was that none of the heads of claim in the original claim particulars had any prospect of success.

2. On 1 November 2017 the master handed down a judgment which ruled against the bank's application. An order ("the November 2017 order") by the master gave effect to that ruling, and gave directions for case management. Those directions included a requirement for the claimant to serve amended particulars of claim by 8 December 2017. The requirement was supported by a sanction: the claim was to be struck out if amended particulars of claim were not served within the time allowed.

3. Permission to appeal, along with a short extension of time for that purpose, was granted by me at an oral hearing on 1 May 2018. On that occasion, as at the hearing of the appeal, the claimant appeared in person, while the bank was represented by Ms Lisa Lacob of counsel, instructed by TLT LLP ("TLT").

4. When granting permission to appeal I gave directions designed to ensure that the court was presented first with submissions on the heads of claim in the original claim particulars. The directions then required submissions as regards each new head of claim sought to be relied on by the claimant in a document filed on 7 December 2017 ("the purported amended claim particulars"). In the present judgment I deal with the principles governing the appeal, and the background, before turning to the bank's criticisms of the original claim particulars and of the master's decision which gave rise to the purported amended claim particulars.

B. Principles governing the appeal

5. In a skeleton argument for the permission hearing the bank identified two decisions of the Court of Appeal concerning the test which must be satisfied before an appeal of the present kind can be allowed. The first was *Price v Price* [2003] EWCA Civ 888, [2004] PTQR P6. The judgment of the court at paragraph 26 cited what had been said by Lord Woolf MR in *AEI Ltd v PPL* [1999] 1 WLR 1507, 1523:

> … It must be shown that the judge has either erred in principle in his approach or has left out of account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale.

6. The second case identified by the bank was *Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 131. At paragraph 32 of his judgment Brooke LJ cited what was said by Lord Fraser of Tullybelton in *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, 652:

> … the appellate court should only interfere when they consider that the judge of first instance not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible.

7. The claimant did not dispute these propositions.

C. The background, including "amended" claim particulars

C1 Background: events which are common ground

8. The relevant history begins in late 2007. At that time the borrowers owned, among other properties, two care homes: Carisbrooke House at 10/11 Sandown Road, Great Yarmouth ("the first property") and Highfield Nursing Home in North Anston ("the second property"). The bank had provided loan facilities to the borrowers to enable purchase and development of these properties. Chandler & Co, a finance broker, had represented the borrowers in relation to the arrangement of these loan facilities.

9. Discussions took place between the borrowers and the owner of a property ("the third property") at 12 Sandown Road, next door to the first property. Those discussions envisaged purchase of the third property at a price of £270,000. The borrowers intended to convert the third property from a hotel into a care home and to complete a ten-bed extension to the rear of the first property ("the development project"). The borrowers instructed Chandler & Co to arrange a new facility with the bank to fund the purchase of the third property and the development project.

10. The total amount owing by the borrowers to the bank under loan facilities was recorded in statements for an account number 50003007468 ("the loan account"). On 17 March 2008 the loan account stood at £2,271,580. In a letter of that date the bank set out an offer of a further advance of £885,000 for purchase of the third property and for the development project. The letter stated that the terms and conditions of the current loan would continue to apply subject to 22 additional clauses. The letter also stated that the further advance, together with existing borrowings, would be secured by, among other things, charges on specified properties ("the security properties"). These included the first, second and third properties. The offer was accepted by the borrowers on 1 April 2008. I shall refer to the agreement created by this acceptance as "the facility agreement".

11. Additional clauses 13 and 15 of the facility agreement provided:

> 13. A retention of £615,000.00 will be made in respect of the development [project, which is to be] completed… to a satisfactory standard. Such work to be completed within 12 months of completion of the facility. The [monthly repayment instalments] will be recalculated following the draw down of all or part of the retention.

> The release of any retention monies would also be dependent upon the satisfactory conduct of your account and full compliance with conditions of the advance and any security for it.
>
> …
>
> 15. Prior to release of any retention funds we will require confirmation from our appointed Quantity Surveyor that they consider the proposed building costs to be acceptable and have approved a staged payment schedule. The building contract should not be signed prior to confirmation from our Quantity Surveyor that it is acceptable. In addition, if the building works have already commenced without our knowledge, we reserve the right to withdraw this [facility letter].

12. In May 2008 Stevens Scanlan were engaged by the bank as the appointed quantity surveyors for the development project.

13. As to the making of the further advance and the utilisation of the retention monies:

    (1) the retention of £615,000 had been calculated by taking the amount of the further advance (£885,000) and deducting from it the purchase price that was to be paid by the borrowers to the vendor of the third property (£270,000);

    (2) on 16 June 2008 the bank advanced a sum of £282,000 to the borrowers; this comprised £270,000, being the purchase price of the third property, and a sum of £12,000 out of the retention monies;

    (3) the bank at the same time debited the loan account with its fee of £8,850 in respect of the further advance; but

    (4) no further advance was made by the bank for the development project: the remaining retention monies (£603,000) were not released to the borrowers at any time.

14. On 14 August 2009 the bank wrote to the claimant in relation to the borrowers' monthly repayment instalments. The bank's letter stated that a repayment of £10,587.50 had been due on 4 August 2009, but had not been received. The result was that the arrears on the account had now reached £15,638.02. The letter asked that the claimant should "give this matter your immediate attention".

15. In emails sent on 17 and 25 August 2009 the claimant asked for the bank's help. He proposed that there should a payment "holiday" for 6 months or a year, after which "I could be able to continue to make the payments".

16. On 28 August 2009, however, the bank wrote to the claimant. The bank's letter noted that, at the time of writing, the debit balance on the loan account was £2,562,969.89, and that interest continued to accrue at the agreed rate. The opening paragraphs of the letter, after identifying the account number and the addresses of the security properties, stated:

> In view of the unsatisfactory manner in which the above account has been conducted, we find it necessary to call upon you to make

> repayment of your indebtedness to us. Unless, therefore, repayment of all your indebtedness, together with interest thereon to the time of payment, is made by close of business at 12.00pm on the 1st September 2009, we shall proceed to exercise the powers available to us under our security without further notice to you.

17. The amount claimed by the bank was not paid. On 1 September 2009 the bank appointed Mr David F Wilson and Mr JNR Pitts, both of Begbies Traynor (Central) LLP (which I shall refer to as "Begbies"), as joint fixed charge receivers over the secured properties.

C2 Background: the original claim and the bank's answers

18. The claim form was issued on 2 September 2014. It was accompanied by the original claim particulars.

19. The original claim particulars were verified by the claimant in a statement of truth dated 28 August 2014. They began with 54 numbered paragraphs setting out the claimant's account of events. Paragraph 55 introduced what it called "MOCB Guidelines", to which no reference had been made previously. It comprised a single sentence:

> 55. Furthermore, the defendant failed to follow and/or adhere to the MCOB (Mortgage Code of Business) Guidelines as regards all issues concerning loan(s) granted to the claimant for the said project(s)/purpose(s).

20. The remainder of the substance of the original claim particulars was set out under 2 headings. The first was "Breach of Contract". Under this heading the claimant set out 4 numbered paragraphs, 1 to 4. For ease of reference, I shall call them paragraphs 55A1 to 55A4:

> 55A1. The defendant breached the said contract by failing to release the said retention funds as per the agreement. The defendant did not have a valid basis for withholding the said retention funds.
>
> 55A2. The defendant unfairly and unreasonably withheld the said retention funds. The claimant had paid the Loan Agreement Fees at all material times as part of the agreement but the defendant failed to fulfil their obligations.
>
> 55A3. The defendant acted in bad faith by appointing the claimant's agents/negotiators, namely, Begbies Traynor as the Receivers in relation to the claimant's properties
>
> 55A4. The defendant breached and/or failed to follow the MCOB (Mortgage Code of Business) guidelines as regards to all issues concerning loan(s) granted to the claimant for the said project/purposes(s).

21. The second heading was "Particular of Loss and Damages". Under this heading the claimant set out 3 numbered paragraphs, 1 to 3. For ease of reference I shall call them paragraphs 55B1 to 55B3:

> 55B1. The defendant breached the contract as a result of which the claimant suffered losses/damages, namely, the sum of £11,035,918.18 (the sum of eleven million, thirty five thousand, nine hundred & eighteen pounds and eighteen pence only).
>
> 55B2. The claimant relies upon Schedule 1 annexed hereto as regards losses/damages suffered by him.
>
> 55B3. Furthermore, the claimant claims interest under Section 35A of the Senior Courts Act 1981 on such sums as are found due to it at such rate and for such period as the court thinks fit.

22. Turning to the bank's answers, it suffices for present purposes to refer to what was said in certain respects in the bank's defence, which was the subject of a statement of truth dated 13 November 2014, and a witness statement made by Mr Andrew Thorncroft, a solicitor of TLT, on 22 April 2016 in support of the bank's application ("Thorncroft 1").

23. Paragraph 19 of the defence denied that the bank had been under any obligation to release the retention sum. Among other things, there had been failures to comply with requirements in the facility agreement, among them:

(1) the claimant had been unable to comply with planning conditions, nor had he been able to explain to the bank, or to its quantity surveyor, how he intended to comply;

(2) the claimant never provided a staged draw down schedule;

(3) the claimant did not know which contractors he was using, nor did the bank, or its quantity surveyor, have sight of any tender process;

(4) the claimant failed to comply with the requirements of the quantity surveyor; and

(5) as identified by the quantity surveyor, it was not possible to complete the renovations in the time frame proposed or within the budget provided for.

24. Thorncroft 1 explained that:

(1) unbeknown to the bank, the second property was closed as a care home in the light of safeguarding concerns, but the claimant made no mention of this;

(2) the claimant, meanwhile, was seeking an overdraft increase, but could not provide further information required of him, nor could he explain the need for a proposed £75,000 overdraft for the properties within the business;

(3) in fact in order to obtain permission for residents to be returned to the second property, work costing more than £35,000 was required;

(4) at this time, however, over £30,000 of fees charged to social services had not been paid, and would not be paid until the claimant demonstrated the care offered to be satisfactory;

(5) in such circumstances losses suffered by the claimant, and the appointment of receivers, could not plausibly be attributed to the bank's refusal to release the retention sum;

(6) contemporaneous documentation directly contradicted the claimant's allegations of breach by the bank;

(7) on his own case, the claimant did not commence work on the development project, let alone complete that work, within a year of the facility being entered into, as required by additional clause 13.

25. The defence and Thorncroft 1 added, among other things:

(1) the losses alleged by the claimant in respect of each of the properties were incomprehensible;

(2) they were also plainly overstated, as the properties had been exposed to the market and there was no evidence to show that they were worth more than the price achieved by the receivers, there was no legal basis for claiming losses of business value or future income, and no contemporaneous evidence had been supplied;

(3) the claimant was required to prove causation, but had failed even to plead it, there was no explanation of how losses of over £6m could be attributable to failure to release retention monies, the other properties should have been independently sustainable without the completion of the development project, and there was evidence that losses on other properties arose from extraneous factors.

C3 Background: the judgment below

26. Paragraphs 1 to 5 of the judgment below gave introductory background. The particulars of claim were then summarised at paragraphs 6 to 10. The bank's case on liability was summarised at paragraphs 11 to 14, and its case on causation and quantum at paragraph 15. Paragraph 16 gave an overall summary of the bank's case on the bank's application.

27. Paragraphs 17 to 19 summarised what had been said by the claimant in an original skeleton argument and in written submissions dated 19 September 2016. There was then a heading, "Consideration". Under this heading, paragraph 20 dealt with principles applicable to the court's power to strike out claims and give summary judgment. Paragraph 21 was in these terms:

> 21. The issue in this application is whether the defendant has satisfied the relevant test to the extent of demonstrating that the claimant has no real prospect of success or, to put it another way, that his claim is fanciful. The defendant's counsel has recognised that if there are aspects of the case which should be considered at trial then the case should not be made the subject of a summary judgment order.

28. It was in paragraph 22 that the master set out his analysis. The first two sentences of that paragraph set out a general conclusion:

> 22. In my view this is a case where the defendant has failed to meet the burden placed upon it. Although its argument held an initial attraction in its simple approach to the issues further scrutiny has driven me to the conclusion that the matter is not as simple as the defendant has sought to paint it but that there are issues involved which give cause for concern as to how this matter was handled and indicate that the claimant has a real prospect of success.

29. Three specific reasons for that conclusion set out in 3 subparagraphs. I shall call them subparagraphs (22a), (22b), and (22c). Starting with (22a):

> (22a) That the claimant is a businessman who approached the defendant for assistance with respect to expanding his business interests. Whether this gives rise to a direct duty of care is open for consideration. Certainly the Financial Conduct Authority ("FCA") & Financial Services Authority (FSA) Regulations referred to by the claimant would suggest that the banks do owe duties of care to their customers in a general sense and this was, to some extent, apparently given some general support by the cases referred to by the claimant. Even though it appears that they may have been foreign decisions they nonetheless appear to have emanated from common law jurisdictions and are therefore persuasive if not directly authoritative. However the more important point is that the existence of such a duty of care and its nature and extent would depend upon all the surrounding circumstances as referred to in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL). In my view this would give rise to a circumstance in which the claim should proceed to trial.

30. What I have called subparagraph (22b) stated:

> (22b) In the present case the actions of the Quantity Surveyor with respect to the conduct of the matter give rise to concerns. It appears that there was a refusal to release the funds on the basis that the work had not been completed. The question which arises is whether, upon a true construction of the facility letter, that was a proper reason for refusing to accept that the sums should be released. It seems to me that this gives rise to a triable issue in itself with a more than fanciful prospect of success but if it is held that was not the proper construction of the agreement then the next issue is whether the quantity surveyor was acting outside the scope of his remit. If he was then the question which needs to be considered is why he was doing so, whether that

> action was capricious or arbitrary and the extent to which it would have been proper for the defendant to exercise some degree of control over those actions.

31. What I have called subparagraph (22c) stated:

> (22c) For the reasons set out it seems to me that there are a number of questions which need to be considered to ensure that neither the defendant nor the quantity surveyor acted arbitrarily.

32. The final paragraph in the judgment was paragraph 23:

> For the reasons set out above I consider that the defendant's application must be dismissed and that further directions should be considered for the furtherance of this claim.

C4 Background: the November 2017 order

33. In addition to dismissing the bank's application, the November 2017 order made ancillary provision, which included in paragraphs 3 and 4:

> 3. The claimant is to file and serve amended particulars of claim by no later than 4pm on 8 December 2017 containing:
>
> > (a) Full particulars of any alleged breach of tortious or statutory duty.
> >
> > (b) Detailed particulars of loss including the alleged quantification and causation.
>
> 4. In the event that the claimant fails to file and serve amended particulars of claim as provided in paragraph 3 above the claim will stand as struck out without further order.

C5 Background: the purported amended claim particulars

34. The purported amended claim particulars were filed by the claimant on 7 December 2017. I have called them the "purported" amended claim particulars because:

    (1) they can stand as amended particulars only by virtue of paragraph 3 of the November 2017 order, but that order is under challenge in this appeal; moreover

    (2) for reasons given in section E4 below I do not consider that they comply with paragraph 3 of that order in any event.

35. Paragraph 1 of the purported amended claim particulars said that the facts in this matter overlapped with "various causes of action". It went on to say that the purported amended claim particulars pleaded causes of action which were then set out in 9 subparagraphs, listed as (a) to (i). I shall refer to them as "the PACP Heads of Claim". They were:

(a) Breach of contract by the defendant and/or his employee and/or agent.

(b) Breach of professional negligence/tort (negligent advice) committed by the defendant and/or his employee and/or agent as regards mis-selling the bank product to the claimant by inducing him.

(c) Breach of professional negligence/tort committed by the defendant's agent, namely, the quantity surveyor, [in] that he acted in bad faith, and/or committed misrepresentation, and/or made mis-statement(s) and/or breached the terms of agreement in relation to the release of the retention funds.

(d) Breach of trust and/or breach of fiduciary duty by the defendant and/or his employee and/or agent by appointing Begbies Traynor (a company from whom the claimant sought advice) as the receiver.

(e) Appointment of an inappropriate receiver (namely, Begbies Traynor) who acted in bad faith and who also had knowledge if the issues between the claimant and the defendant since Begbies Traynor had been the claimants agents prior to Begbies Traynor being appointed as a receiver and therefore, a breach of the Law of Property Act [1925].

(f) Misrepresentation and/or a mis-statement made by the defendant and/or his employee and/or agent as regards the mis-selling of the bank product to the claimant by inducing him.

(g) Breach of section 150 (section 138D as amended) of the Financial Services and Markets Act [2000], namely, that the defendant breached its statutory duties/regulatory obligations (mentioned below) and has caused loss to the claimant.

(h) Breach of statutory duty by the defendant and/or his employee and/or agent, namely, Financial Conduct Authority (FCA) and Financial Services Authority (FSA) regulations. Principles 1, 6, 7 and 9 of these said regulations.

(i) Breach of statutory duty by the defendant and/or his employee and/or agent, namely, the Banking Conduct of Business Sourecebook's (BCOBS) (reference is made to page 180 of the claimants supplementary bundle) paragraph 2.2.1. and paragraph 2.2.2. and paragraph 5.1.4 (principle 6) of the said regulations.

36. Paragraphs 2 to 81 of the purported amended claim particulars repeated paragraphs 1 to 54 of the original claim particulars with various additions and other changes. The heading which had followed paragraph 55 of the original claim particulars then appeared, altered to read:

Breach of Contract <u>and Breaches /Violations of other causes of action</u>

37. Paragraph 82 of the purported amended claim particulars repeated the head of claim at paragraph 55A1 of the original claim particulars (breach of the facility agreement by failing to release retention funds). The purported amended claim particulars do not expressly categorise this as falling within any of the PACP Heads of Claim. I shall nonetheless assume it is intended to form part of PACP head of claim (a).

38. Paragraph 83 of the purported amended claim particulars repeated the head of claim at paragraph 55A2 of the original claim particulars (unfairly and unreasonably withholding retention funds). The purported amended claim particulars do not expressly categorise this as falling within any of the PACP heads of claim. I shall nevertheless assume that it is intended to form part of PACP head of claim (a).

39. Paragraph 84 of the purported amended claim particulars repeated the head of claim at paragraph 55A3 of the original claim particulars (bad faith appointment of Begbies as receivers). The purported amended claim particulars do not expressly categorise this as falling within any of the PACP heads of claim. I shall nevertheless assume that it is intended to form part of one or both of PACP heads of claim (d) and (e).

40. However the head of claim at paragraph 55A4 of the original claim particulars (failure to adhere to MCOB Guidelines) was not repeated in the purported amended claim particulars. Both paragraph 55A4 and paragraph 55 itself (which was the sole pleaded foundation for paragraph 55A4) were omitted in the purported amended claim particulars.

41. There was then new material comprising paragraphs 85 to 88 of the purported amended claim particulars. Paragraph 85 of the purported amended claim particulars began as follows:

> 85. Therefore, in such circumstances due to the breach of contract/ and/or negligence and/or violations/breaches of the other causes of action committed by the defendant, the claimant suffered damages/financial losses which were caused by the defendant. The defendant breached/violated the following causes of action:

42. The remainder of paragraph 85 set out, using substantially the same wording as appeared in the purported amended claim particulars at paragraph 1, the PACP heads of claim.

43. Paragraphs 86 and 87 of the purported amended claim particulars were the subject of two further headings:

> Mitigation
>
> 86. The claimant did all that he could as regards mitigation in respect of his losses. The claimant wrote to the defendant (complaining of this matter). The claimant raised this matter with the Financial Ombudsman Service but they stated that the matter is suitable to be dealt with by a court of law. Therefore, in these circumstances the claimant's losses were clearly reasonably foreseeable by the defendant. What can one expect a claimant to do once his hands and feet are cut off by the defendant.

> Reasonable Foreseeability
>
> 87. The defendant owed a duty of care to the claimant. The defendant clearly breached the said of care. Furthermore, damages arose due to the abovementioned breaches and other causes of action. The said damages were reasonably foreseeable. The defendant being a large, financially stable, powerful, wealthy institute and a modern day version of Goliath could clearly foresee the damage/losses that could be caused to the claimant (a hard working small business with a small sling like David) and/or of any domino effects due to the said above stated actions of the Defendant. The defendant would have reasonable foreseeability in their arsenal of wisdom.

44. Paragraph 88 of the purported amended claim particulars was headed, "Quantification of Losses". It set out specific items of loss said to have been suffered by the claimant. Each such item of loss was quantified. The resulting "grand total" of losses was £9,396,350.

45. The specific items were set out in 9 subparagraphs, listed as (a) to (i), of paragraph 88. Subparagraphs (a) to (e) concerned the first and second properties, in respect of which losses of "present value… (including the business value)" and "income... (net income)", were identified. These losses totalled £7.325m. Subparagraph (f) concerned the third property, described as "a 10-bedroom hotel". The loss allegedly suffered in relation to the third property was "Present value £290,000". Subparagraphs (g) and (h) concerned two further properties ("the Carpens properties"). The loss suffered in respect of these properties was said to be their present value, in an amount of £250,000 each, thus totalling £0.5m. Subparagraph (i) identified fifteen other items of loss, comprising the balance of the total of £9,396,350.

46. The final heading in the original claim particulars appeared immediately before paragraph 89 of the purported amended claim particulars. It was altered to read:

> Particulars of Loss and Causation

47. Paragraph 89 of the purported amended claim particulars said that, "[the] claimant suffered the following losses which were caused by the defendant:". This was followed by eight subparagraphs of paragraph 89, listed as (a) to (h). Subparagraphs (a) to (e) said that the claimant lost the first, second and third properties, and the Carpens properties "due to the breach of contract and/or negligence and/or violations/breaches of other causes of action committed by the defendant". Subparagraphs (f) to (h) of paragraph 89 stated:

> (f) The claimant lost his credit ratings due to the breach of contract and/or negligence and/or violation/ breaches of the other causes of action committed by the defendant.
>
> (g) The claimant suffered from financial problems, bad health, stress, depression, future loss of income and miscellaneous losses due to the breach of contract and/or negligence and/or violations/breaches of other causes of action committed by the defendant.

> (h) **The abovementioned losses arose due to failure of the defendant to release the said retention funds as per the agreement and also due to the breach of contract and/or negligence and/or violation/breaches of the other causes of action committed by the defendant. In such circumstances, the "but for" test is satisfied. The defendant clearly caused the above losses due to breaches/violations of the causes of action stated in paragraph 1 of this particulars of claim. If the defendant had released the said retention funds then the defendant would not be in this position and therefore the defendant has caused damages with reasonable foreseeability.**

48. The purported amended particulars of claim in paragraphs 90 to 92 revised what had been said in the original claim particulars at paragraph 55B1, deleted what had been said in the original claim particulars at paragraph 55B2 and added new material in paragraph 92. I will return to paragraph 92 in section E4 below. For present purposes I need only set out paragraph 90:

> 90. The defendant breached the contract and/or committed negligence and/or violation/breaches of the other causes of action as a result of which the claimant suffered losses/damages, namely, the sum of £9,396,350.00 (the sum of nine million, three hundred & ninety-six thousand and three hundred & fifty pounds only) ~~£11,035,918.18 (the sum of eleven million, thirty-five thousand, nine hundred & eighteen pounds and eighteen pence only).~~

49. At paragraph 93 the purported amended claim particulars repeated what had been said at paragraph 55B3 of the original claim particulars. The purported amended claim particulars also made changes to the prayer. It is not necessary to set out these changes for present purposes.

C6 Background: the grounds of appeal & respondent's notice

50. The bank's grounds of appeal were filed on 23 November 2017. They thus were filed prior to, and were unable to deal with, the purported amended claim particulars.

51. In section D below I discuss, so far as is appropriate, what was said in the grounds of appeal about heads of claim in the original claim particulars. Similarly in section E below I discuss, so far as is appropriate, what was said in the grounds of appeal about the master's willingness to contemplate the introduction of matters which had not thus far been pleaded.

52. On 12 March 2018 the claimant filed a skeleton argument ("the claimant's March 2018 response") responding to the bank's appeal. This was followed on 14 March 2018 by a respondent's notice on form N162.

53. The respondent's notice did not seek to appeal any part of the November order. Section 4 of form N162 requires a respondent to set out any part of an order which a respondent wishes to appeal. The claimant stated in section 4 that this was not applicable.

54. In section 6 of form N162 the claimant said that he wished the November 2017 order to be upheld on grounds which were different from or additional to those given in the master's judgment. In that regard form N162 simply referred to the claimant's March 2018 response. That response, however, made no attempt to distinguish between reasons identified in the master's judgment and points which were different from, or additional to, those reasons.

D. Issues as to the original claim particulars

D1 Head of claim at paragraph 55A1

55. Paragraph 55A1 of the original claim particulars asserted (see section C2 above) that the bank had no valid basis for withholding retention monies. In paragraph 10 of the grounds of appeal the bank said that the master had erred in failing to have regard to the admission in paragraph 14 of the original claim of particulars that the claimant had not fulfilled each requirement for the release of the retention funds. As to this:

> (1) At paragraph 12(j) the master's judgment noted the bank's reliance on the express admission in paragraph 14 of the original claim particulars;
>
> (2) At paragraph 18(c) and paragraph 19(c) (vi) the master's judgment noted assertions by the claimant that the bank had misunderstood paragraphs 14 and 15 of the original claim particulars;
>
> (3) The master's analysis at paragraph 22 of his judgment, however, contains no reference to this point.

56. The only answer given to this point by the claimant is his assertion that the bank had misunderstood paragraphs 14 and 15 of the original claim particulars. Those paragraphs stated as follows:

> 14. On 30 June 2008, the claimant hired the building contractors and asked for their quotations before commencing the construction works at the third property. The claimant further fulfilled almost each and every requirement for the release of retention funds; they kept on trying to meet the requirements of the bank's quantity surveyors, although, some of those were not reasonable but it could not be made possible to get the said funds released.
>
> 15. The defendant did not release the retention funds for the development of the third property despite several written and oral requests made by the claimant. The main reason for withholding the funds it seems was that the bank's quantity surveyor was not satisfied with the arrangements.

57. The master's judgment did not identify any respect in which the bank was said to have misunderstood or misconstrued paragraphs 14 and 15 of the original claim particulars. In fact the claimant sought to give details of this at paragraph 10 of his written submissions dated 19 December 2016:

> 10. The defendants have misunderstood and/or have misconstrued paragraphs 14 and 15 of the particulars of claim. The said paragraphs do not accept any liability and/or failure on the part of the claimant. Furthermore, the said paragraphs state that the claimant satisfied the reasonable conditions of the defendant. However, the defendant acted unfairly and unreasonably.

58. It can be seen, however, that paragraph 10 of the 19 December 2016 submissions provides no answer to the bank's point. The claim that there is no acceptance of failure on part of the claimant simply does not stand up to scrutiny: paragraph 14 of the original claim particulars expressly recognises that the claimant did not fulfil each and every requirement for the release of retention funds. It implicitly acknowledges that attempts to meet requirements of the quantity surveyor were unsuccessful. It asserts that some of those requirements were not reasonable, which implicitly accepts that others were reasonable.

59. Nor is it right to assert, as is asserted by the claimant in paragraph 10 of the submissions, that paragraphs 14 and 15 of the original claim particulars stated that the claimant satisfied "the reasonable conditions of the defendant". There is no such assertion in paragraphs 14 and 15 of the original claim particulars.

60. In these circumstances, in the absence of an application to amend accompanied by a satisfactory proposed amendment, the master ought to have struck out what I have called paragraph 55A1 of the original claim particulars.

61. The purported amended claim particulars, in a passage going outside the permissions given in the November 2017 order, would amend the original claim particulars in relation to these admissions. For the reasons given in section E4 below, however, the proposed amendments would not assist the claimant.

62. I add that, quite apart from relying on the admission in paragraph 14 of the original claim particulars, the grounds of appeal said that the master erred in holding that there was an issue as to construction, in failing to consider clauses of the facility agreement, and in finding that there were questions over the conduct of the quantity surveyor and whether the bank should have exercised control over the quantity surveyor: see paragraphs 6, 8 and 9. As to these matters:

    (1) the claimant maintained that the quantity surveyor had insisted that all work be done before the retention monies could be released;

    (2) the bank's case was different: it said that it had refused to release funds because additional clause 15 entitled it to require confirmation from the quantity surveyor that proposed building costs were acceptable and that a stage payment schedule had been approved, whereas neither of those things had happened;

    (3) I asked the claimant to identify where he had said to the bank that the quantity surveyor was asserting that no money could be released until all the work had been done;

(4) in response the claimant sought to rely upon an email he had sent on 26 September 2008 (page 126 of a supplementary bundle produced by the claimant on 28 March 2018), but nothing in this email made any reference to a refusal to release retention monies prior to completion of the work;

(5) in support of the bank's case, the evidence was clear that:

(a) the quantity surveyor on 22 September 2008 had stated that the claimant's costs figures overall appeared to be 10 to 15 percent higher than would have been expected and that some individual items seemed particularly high;

(b) far from insisting that all work must be done before retention monies could be released, on 14 October 2008 the bank asked the quantity surveyor, in the light of further cost estimates, to confirm that the quantity surveyor was happy for the bank to release "the first tranche of £50,000, to enable this project to commence"; and

(c) no such confirmation was provided by the quantity surveyor.

63. It follows that there was no relevant question as to the true meaning of the facility agreement, and there was no basis for saying that upon the evidence the requirements for release of retention monies, as set out in the facility agreement, had been satisfied. For this reason, too, the master ought to have struck out what I have called paragraph 55A1.

D2 Head of claim at paragraph 55A2

64. Paragraph 55A2 asserted (see section C2 above) that the bank unfairly and unreasonably withheld retention monies. Material parts of the grounds of appeal in this regard are found in paragraph 9, asserting that the decision of the quantity surveyor was final and binding whether or not he had acted reasonably, and paragraph 14, asserting that the master had erred in failing to give reasons for rejecting the bank's submissions. At paragraph 12(g) the master's judgment noted the bank's contention that, taking it at its highest, as regards the bank's own conduct it is simply required not to have acted capriciously, arbitrially, or for a collateral purpose: see *Socimer International Bank Limited v Standard Bank London Limited* [2008] 1 Lloyd's Reports 558 at paragraphs 66 and 106, and *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm) at paragraph 188 onwards. At paragraph 12(h) the master's judgment noted the bank's reliance on *Lewison, The Interpretation of Contracts*, paragraphs 14-05 and 14-07, for the proposition that where the parties have entrusted the decision as to whether a condition precedent has been fulfilled to a third party, that decision can only be challenged if it can quickly be seen to be absurd or ridiculous.

65. As to the claimant's case, the master's judgment described things that the claimant had said in written submissions. In this regard the judgment noted, among other things:

(1) at paragraph 19(b)(iv), a contention that the quantity surveyor had a duty to act professionally;

(2) at paragraph 19(b)(vi), a contention that the quantity surveyor owed a duty of care to the claimant;

(3) at paragraph 19(b)(vii), a contention that the quantity surveyor was acting to compel the claimant to give the building works to a different contractor so as to enable the quantity surveyor to "get a cut or commission";

(4) at paragraph 19(b)(ix), a contention that the quantity surveyor had been untruthful, and had behaved unreasonably, in stating that the claimant's construction figures appeared to be 10 to 15 percent than would have been expected;

(5) at paragraph 19(b)(xiv), a contention that the quantity surveyor had been unreasonable, misleading and/or negligent and therefore the bank should be liable as it should have fulfilled the terms of the facility agreement;

(6) at paragraph 19(c)(i), a contention that the bank negligently failed to appoint an independent quantity surveyor;

(7) at paragraph 19(c)(ii), a contention that the bank negligently failed to look into "why it was taking the quantity surveyor so long";

(8) at paragraph 19(c)(iii), a contention that the bank negligently failed to contact the claimant to ascertain matters;

(9) at paragraph 19(c)(iv), a contention that the bank negligently failed to take "many reasonable steps", and had failed to respond when the claimant contacted the bank direct and through a third party.

66. The master's judgment, however, makes no express reference to the passage in the original claim particulars which I have called paragraph 55A2. Moreover, the "Consideration" section of the judgment gives no consideration to whether an assertion that the bank acted "unfairly and unreasonably" could of itself amount to a failure by the bank to fulfil its contractual obligations.

67. In argument before the master no reported decision, and no legal textbook, was relied upon by the claimant in support of any contention that unfair or unreasonable conduct on the part of the bank, of itself, could constitute a failure to fulfil the bank's contractual obligations. Nor was there any such reliance at the hearing before me. In these circumstances the master ought to have accepted the bank's propositions recorded at paragraph 12(g) and (h) of his judgment and to have struck out paragraph 55A2 of the original claim particulars.

D3 Head of claim at paragraph 55A3

68. Paragraph 55A3 of the original claim particulars asserted (see section C2 above) that the bank acted in bad faith by appointing the claimant's "agents/negotiators, namely,

Begbies" as receivers in relation to the secured properties. Paragraph 11 of the grounds of appeal said that the master erred in failing to strike out allegations in respect of the appointment of Begbies in circumstances where the bank was contractually entitled to appoint Begbies. Paragraph 12 said that the master erred in failing to strike out the claimant's allegations of wrongdoing on the part of Begbies in circumstances where, as a matter of law, Begbies were the claimant's agent. Paragraph 11 and paragraph 12 also said that, as the claimant had not pleaded any loss consequent upon the appointment or the involvement of Begbies, the master ought to have held that there was no real prospect of any claim arising out of the alleged facts succeeding.

69. At paragraph 14(b) of his judgment the master noted the bank's contention that it was contractually entitled to appoint Begbies as receivers. However the section of the master's judgment dealing with the case for the claimant made no mention of any answer by the claimant. Nor did the section of the master's judgment headed "Consideration" make any reference to the point.

70. At the hearing before me the bank contended that when granting the security, the borrowers had agreed to permit the bank to appoint as receiver any person it chose. The bank added that if there were a conflict of interest then this was a matter between Begbies and the borrowers, and not a matter that affected the bank. The claimant replied that the bank must have known Begbies had acted as his agent in the past, that there were many others who could have been appointed as receiver, and that this needed investigating.

71. I agree with the bank that the master ought to have dealt with this point. Moreover, I am not persuaded by the claimant that there is anything in this regard that, even arguably, needed investigating. I shall assume that Mr Wilson and Mr Pitts (see section C1 above) can be treated as if they were Begbies for this purpose. As noted in the grounds of appeal the claimant has not identified any loss attributable to Begbies. There is no reason to think that they failed in any aspect of their duty to realise the best value for the secured properties. What is said in the grounds of appeal in that regard of itself disposes of this head of claim. I add that I do not accept that the mere fact that Begbies had previously acted for the borrowers automatically gives rise to a conflict of interest. On the contrary, if Begbies had already gained knowledge of the secured properties then appointing them as receivers could well be the most economical and effective choice.

72. In these circumstances I conclude that the master ought to have struck out the passage in the original claim particulars which I have called paragraph 55A3.

D4 Head of claim at paragraph 55A4

73. Paragraph 55A4 of the original claim particulars asserted (see section 2C above) that the bank breached and/or failed to follow the MCOB Guidelines "as regards all issues concerning loan(s) granted to the claimant for the said project(s)/purpose(s)". In paragraph 2(c) the grounds of appeal said that the master had been wrong as a matter of law to reject the bank's submission that the MCOB Guidelines applied only to dwellings, and that as the secured properties were not the claimant's dwelling in consequence there was no obligation on the bank to follow the MCOB Guidelines.

Paragraph 14 of the grounds of appeal added that the master had erred in failing to give reasons in relation to the issues concerning the MCOB guidelines.

74. At paragraph 13 of his judgment, the master recorded the bank's argument that MCOB paragraph 1.2.1 had the consequence that the guidelines applied only to dwellings. However, the section of the judgment dealing with the case for the claimant does not record any answer by the claimant to this point. Moreover the section of the judgment headed "Consideration" makes no mention of the point.

75. At the hearing before the master the claimant did not identify any answer to this point. Nor did he do so at the hearing before me. I accordingly conclude that the master ought to have held that the MCOB Guidelines had no application to the present case, and ought to have struck out the passage in the original claim particulars which I have paragraph 55A4.

76. I add that paragraph 55 of the original claim particulars (set out in section C2 above) was manifestly inadequate. It failed to identify any basis for asserting that the bank was required to follow or adhere to the MCOB guidelines. It failed to identify which of those guidelines were said to have been applicable but not followed. It failed to identify anything which the bank ought to have done under those guidelines but had not done.

77. Moreover, as noted in section C5 above, the purported amended claim particulars no longer make any mention of the MCOB Guidelines. It seems from this that the claimant himself acknowledges that there is no merit in the head of claim at what I have called paragraph 55A4 of the original claim particulars.

D5 The original claim particulars: conclusion

78. For the reasons given above, each head of claim relied on in the original claim particulars was bound to fail. It follows that, unless there was some good reason to the contrary, the master ought to have granted summary judgment to the bank on the entire claim. In section E below I consider whether there was any good reason to the contrary.

E. Willingness to permit new matters

E1 New matters: introduction

79. The grounds of appeal asserted in paragraph 1 that in the absence of any pleaded duty it was wrong to hold that a party had a real prospect of succeeding in a claim for a breach of that duty. The claimant has asserted in response that the bank "consented and/or agree that the particulars of claim and defence need to be amended".

80. As to that assertion, the transcript of the hearing before the master records an exchange between the master and Ms Alexia Knight, who appeared on behalf of the bank at that hearing:

> MASTER KAY: … If … there is some argument lurking about somewhere that needs a trial by a judge, then we need to ascertain what

> it is and make sure the pleadings are appropriate to deal with it, don't we?
>
> MS KNIGHT: Yes.

81. Nothing in this exchange is inconsistent with paragraph 1 of the grounds of appeal. The bank, through Ms Knight, was willing to contemplate that the court might identify an argument that needed trial by a judge and make sure that the pleadings were appropriate to deal with it.

82. The master's judgment put it this way in paragraph 21:

> 21. …the defendant's counsel has recognised that if there are aspects of the case which should be considered at trial then the case should not be made subject of a summary judgment order.

83. I do not read the master as saying here anything inconsistent with paragraph 1 of the grounds of appeal. He was certainly not recording a concession that a claim for breach of duty could go to trial without first ensuring that the alleged duty had been properly pleaded.

84. The course taken by the master in paragraph 3 of the November 2017 order ran counter to the approach which the master himself had contemplated in the exchange cited earlier. The approach the master had contemplated would "make sure the pleadings are appropriate". The November 2017 order, however, contained no mechanism to ensure that only "appropriate" pleadings were relied upon.

85. There are of course cases where a court concludes that a claimant may have an unpleaded argument needing to be tried. In general the best way of examining whether this is so, and if it is then ensuring that the pleadings are appropriate to deal with it, is to require the claimant to apply to amend the particulars of claim. That was certainly so in the present case, where the particulars of claim drafted thus far were incoherent and difficult to follow.

86. The November 2017 order, however, did not take this course in circumstances where plainly, if permission to amend were to be contemplated, it ought to have done. Instead it permitted amendments without the precaution of insisting that the court must see them in draft. I regret to say that the amendments purportedly made in the present case are even more inadequate and difficult to follow than the original claim particulars. Also, as explained in section E4 below, they do not in fact comply with the November 2017 order.

E2 New matters: alleged breaches of tortious duty

87. In this section I deal with alleged breaches of tortious duty other than alleged breaches of statutory duty: alleged breaches of statutory duty are dealt within section E3 below. Paragraph 3(a) of the November 2017 order permitted amendment of the original claim particulars to allege breaches of tortious duty. The purported amended claim particulars assert such breaches in PACP heads of claim (b), (c) and (f) (see section C5 above).

88. To my mind the pleading of each of these heads of claim is fatally flawed. The reason is that all of them, even I assume that the alleged duty existed, fail to identify with adequate precision:

(1) what it is said that the bank ought to have done; and

(2) how it is that any failure by the bank resulted in the claimant being any worse off than otherwise would have been the case.

89. Thus PACP head of claim (b) says that were breaches of duty as regards mis-selling. While numerous additions and changes are made to what had previously been paragraphs 1 to 54 of the original claim particulars, no attempt is made in the purported amended claim particulars to identify which of them, or which parts of the original paragraphs 1 to 54, are relied on in relation to PACP head of claim (b).

90. A typical example of these failures is found in the purported amended claim particulars at paragraph 12. The third and fourth sentences stated:

> 12. … the defendant did not inform the claimant of any strict criteria and/or risks involved. Therefore, the said advice was a negligent one as regards the said arrangement.

91. As to this, these sentences:

(1) do not identify the alleged "strict criteria";

(2) do not identify the alleged "risks involved";

(3) do not identify the contents of the "said advice"; and

(4) do not assert that if advice had been given about the alleged "strict criteria" and/or "risks involved" the borrowers would have taken any different course, or that there is any other way in which the claimant acted to his detriment in reliance upon the "said advice".

92. More generally as to duty of care, it does not seem to me that the claimant derives any assistance from the cases that he cited to the master: they turned on their own facts. Indeed the master rightly recognised, citing *Caparo Industries*, that the existence of a duty of care and its extent depend upon all the surrounding circumstances. To my mind, however, the master had no evidence before him which could enable him to conclude that such a duty of care might have arisen in the present case. Nor did the claimant demonstrate in his submissions to me that there was any arguable basis for such a duty.

93. These matters all, to my mind, bear out my conclusion that the master's decision to grant permission to amend was wrong in principle.

E3 New matters: alleged breaches of statutory duty

94. Paragraph 3(a) of the November 2017 order also permitted amendments which are alleged breaches of statutory duty. The purported amended claim particulars assert such breaches in PACP heads of claim (g), (h) and (i) (see section C5 above).

95. The pleading of each of these heads of claim suffers from similar problems to those identified at section E2 above concerning alleged breaches of tortious duty. More fundamentally, however, the bank pointed out that the regulatory provisions which the claimant seeks to rely upon do not apply in the circumstances of the present case:

    (1) the Financial Services and Markets Act 2000 (regulated activities) order 2001 did not have the effect of making entry into the facility agreement a regulated activity;

    (2) the Banking: Conduct of Business Sourcebook was not in force until 1 November 2009, whereas the matters relied upon by the claimant took place prior to this date, and in any event that sourcebook applies to a firm solely in relation to accepting deposits from banking customers.

96. The claimant was unable to supply any answer to either of these points.

97. Thus there is no possible basis upon which any claim for breach of statutory duty can succeed. This, too, supports my conclusion that the master was wrong in principle to allow amendment in the way that he did.

E4 Other comments on the purported amended claim particulars

98. There are other aspects of the purported amended claim particulars which call for mention. I deal with them in the comments below. The comments below should not be regarded in any sense as exhaustive.

99. The November 2017 order required that the amended pleading should set out detailed particulars of loss. One of the things which the November 2017 order included in this regard was causation. This is plainly something which rightly troubled the master. It has not been dealt with satisfactorily in the purported amended claim particulars. Assertions are made as to causation, but there is a lack of any specific explanation.

100. Paragraph 12 of the purported amended claim particulars appears to assert a collateral oral agreement, made at the time that the facility agreement was signed, that "the whole fund [including retention monies] shall be released upfront…". The claimant sought to add to this at paragraph 10(a) of his skeleton argument for the hearing before me. There was no recognition by the claimant that an assertion of an oral agreement fell outside the grant of permission to amend in the November 2017 order. Nor was there any attempt by the claimant to give details of the individuals who were said to have made the suggested agreement, and when and where the suggested agreement was made. It is difficult to understand how, if such an agreement had been made, the claimant failed to mention it in the original claim particulars.

101. At paragraph 18 of the purported amended claim particulars the claimant began by asserting that the bank had "a hidden policy of making profit (through any means) being a capital making institution." It is difficult to understand precisely what complaint is made in that regard. After making other assertions, paragraph 18 concluded:

> The [claimant] may have been treated differently due to his ethnicity, namely, being a black person with skin colour darker than the colour of the night.

102. There was no permission in the November 2017 order to make an allegation of racism. Any such allegation is of the utmost seriousness. If it were to be made, it could not simply be asserted as a matter of speculation. It was quite improper for the claimant to slip this in at the end of a paragraph dealing with other things, and to do so merely in order to speculate that it was something which "may have" happened.

103. Paragraphs 23 to 27 of the purported amended claim particulars contained changes and additions to the previous paragraphs 14 and 15 in the original claim particulars. Those paragraphs are discussed in section D1 above. There was no recognition by the claimant that the November 2017 order gave him no permission to amend in this regard. Even as purportedly amended, the new pleading continued to admit in paragraph 23 that the claimant had not fulfilled every requirement for the release of retention funds. The new paragraph 27 went only so far as to say that the claimant "does not accept that he did not comply with a condition precedent(s) in relation to the said retention funds". Despite the defendant's case having been fully pleaded, there is no attempt to assert, for example, that the claimant put forward a schedule for staged payments, or that the quantity surveyor had given confirmation that the proposed building costs were acceptable.

104. In paragraphs 57 and 58 of the purported amended claim particulars the claimant sought to add to what had been said about the appointment by the bank of Begbies as receiver. The new pleading sought to allege that in this regard the bank was guilty of breach of trust and breach of fiduciary duty. There was no recognition that such an amendment was not permitted by the November 2017 order. Nor was any satisfactory basis put forward for asserting that there had been any breach of trust or breach of fiduciary duty.

105. Paragraph 92 of the purported amended claim particulars was in these terms:

> 92. Furthermore, it is humbly requested that all discretion be kindly exercised in the claimant's favour and that the maxims of equity be applied. The claimant requests the Highly Honourable Court to look at the claimant's matter sympathetically.

106. I have sympathy for the claimant. He invested hard work, a great deal of time, and substantial sums of money into a business which went wrong. I recognise that in other cases there have been concerns about the ways in which certain divisions of certain banks, when dealing with secured loans advanced prior to the financial crash, acted when purportedly attempting to assist borrowers in relation to repayment problems. However, the material produced by the claimant does not in my view come close to providing any proper basis for complaint about the conduct of the bank in the present case. The claimant has repeatedly shown a willingness to make grave accusations on the basis of the flimsiest material, or indeed no material at all. In those circumstances it is in the interests of justice, and indeed the claimant's best interests, that his claim should be brought to an end.

F. Conclusion

107. In section D above I have explained why, subject to there being some good reason to the contrary, the master ought to have granted summary judgment to the bank on the entire claim advanced in the original claim particulars. In section E I have examined whether there was or is any good reason to the contrary. I there explain that, in giving permission to amend without requiring approval of the amendments by the court, the master adopted an approach which, in the circumstances of the present case, should not have been adopted. This approach was both wrong in principle and outside the generous ambit within which a reasonable disagreement is possible. That this was so is borne out by the inadequacies in the purported amended claim particulars. No proposed amendments have been identified which would have any reasonable prospect of rescuing the heads of claim in the original claim particulars. It follows that there was nothing to justify the master's failure, on the bank's application, to grant summary judgment in favour of the bank.

108. For the reasons given above, I conclude that this appeal must be allowed.