Neutral Citation Number: [2020] EWHC 2687 (QB)

Case No: QB-2019-002602

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 October 2020

Before :

MR JUSTICE FREEDMAN

- -

Between :

CHAN MOK PARK

Claimant

- and –

(1) HASSAN HADI
(2) HAIDER JALEEL ABED

Defendant

- -

Mr Gideon Roseman (instructed by **Sterling Winshaw Solicitors**) for the Defendants

The Claimant appeared in person with the assistance of his **McKenzie Friend Zulfiqar Ali Syed** who was given limited rights of audience

Hearing dates: 28 July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Monday 12th October 2020 at 2.00pm.

MR JUSTICE FREEDMAN :

I Introduction

1. These proceedings concern a public house known as The Hand and Flower Pub, whose address is 24 Upper Ham Road, Richmond ("the Pub"). Prior to June 2019, the Claimant ("Mr Park") was the sole shareholder and director of two companies, being Montscot Pubs Limited ("MPL"), which held a commercial lease for the Pub from the brewery and The Hand Flower Kitchen Pub Limited ("HFKL"), which carried on the business. This case concerns a transaction as a result of which Mr Hadi/Mr Abed (collectively "the Defendants") directly or indirectly acquired ownership or control of the business. The Defendants say that they acquired the same by agreeing to discharge the liabilities of the business which they did. Mr Park says that they acquired control without fulfilling their contractual obligations and/or they acquired the same by duress and undue influence. Through these proceedings, he seeks redress for the balance of the price payable and/or restitution. Mr Park seeks to amend his claim substantially. The question is whether he is still entitled to proceed on the basis of his amended claim or whether the claim should be struck out or otherwise brought to an end. There is also an issue as to whether Mr Park has been in breach of an unless order made by the Court on 4 June 2020, and to the extent that he has, what are the consequences.

2. There was a hearing listed before Lavender J on 4 June 2020, which was adjourned with various directions including the unless order. The adjourned hearing was before me on 28 July 2020 and judgment was reserved. The following applications were before the Court:

   (i) The Defendants' adjourned application for default judgment, alternatively, for an order that Mr Park must pay approximately £27,000 to the Defendants owed pursuant to previous court orders if Mr Park is to continue with these proceedings and an order for security for costs; and

   (ii) Mr Park's application to amend the Claim Form and the Particulars of Claim.

3. The Defendants appeared before the Court by Mr Roseman of Counsel. Mr Park had the assistance of Mr Syed. I allowed Mr Syed limited rights of audience in a brief judgment which I gave in the course of the hearing. The Defendants objected about the involvement of Mr Syed acting beyond the role of a McKenzie Friend, and observed that he appeared to have acted outside court as if the lawyer to Mr Park. Evidently, he drafted an application, a witness statement in support and the skeleton argument of Mr Park and the draft amended Particulars of Claim. He qualified as a lawyer in Pakistan and is or was registered to practise law in Pakistan, but he is not registered to practise law in the UK.

4. The Defendants expressed a concern that there has been a breach the Legal Services Act 2007 ("the LSA") by the assistance of Mr Syed. The Defendants have been vigorous in this regard. Their solicitors sent a letter by email dated 17 July 2020 with a heading "possible criminal offence" in 27 paragraphs of the letter: see paras. 4 - 30. There was a response of Mr Park of 20 July 2020 (and there is an inference that it was drafted by Mr Syed) saying that Mr Syed was helping as a friend and there is no lawyer/client relationship. Mr Park said that he had not paid Mr Syed, nor had Mr Syed demanded anything. Later that day, the solicitors for the Defendants said that this was not a response to all the concerns in their letter of 17 July 2020, and accordingly "we will be reporting this matter and Mr Syed to the relevant authorities for investigation." There is a section of their skeleton argument dated 27 July 2020 (paras. 20-26) prepared for the hearing headed "The Conspiracy between C and Mr Syed to breach of the Legal Services Act 2007". Further, the skeleton argument prepared for the Defendants expressed concern about illegal/unlawful conduct in the representation of Mr Park by Mr Syed. According to the skeleton argument, the matter had been reported to the SRA.

5. As I observed in that brief judgment, it became apparent that Mr Syed was not receiving any remuneration actual or contingent for assisting Mr Park. I was satisfied that in view of Mr Park lacking the linguistic skills and the know-how to put forward his own case that it was desirable to permit Mr Syed to represent Mr Park in court. I gave limited permission to Mr Syed to act. Mr Roseman on behalf of the Defendants did not in the end actively object.

II The history of the dispute

6. The following is gleaned from the respective pleadings and some of the contemporaneous documents. Many of the contemporaneous documents are attached to a long witness statement of Mr Hadi, his second statement, comprising 55 paragraphs and dated 27 July 2020 with an exhibit of 60 pages. The order of Lavender J of 4 June 2020 had required any evidence of the Defendants (if so advised) to be filed and served by 2 July 2020. In fact, it was not served until the day before the hearing. The Defendants served the statement without any application for an extension of time. No explanation has been provided for the lateness other than that there was a problem about getting Mr Hadi's signature due to Covid: no unsigned statement was served. No point was taken on behalf of Mr Park during the hearing, and its lateness was only noticed by the Court in the course of writing this reserved judgment. The consequence was that there was no statement in response, the timetable of Lavender J having given an opportunity for a responsive statement. A part of Mr Hadi's second statement was to draw attention to the respects in which it was contended that Mr Park was in breach of the same order.

7. The Pub and the business were being marketed for sale through estate agents Century 21 with an asking price of £179,000. On 29 April 2019, there was a meeting between Mr Park and Mr Hadi at the Pub and attended by a representative of Century 21: see

Hadi (2) para. 12. There was a further meeting on 5 May or 6 May 2019 between Mr Park and Mr Hadi. There are different versions of this meeting. The Particulars of Claim ("PC1") stated that Mr Park met with Mr Hadi on 5 May 2019 at the Pub: it is said that there was an agreement to sell and buy the business for the sum of £170,000, there would be a deposit of £30,000, required to pay arrears of rent, and that the balance would be paid on completion of an assignment of the lease to Mr Hadi's company: see PC1 para. 4. In draft Amended Particulars of Claim ("PC2"), it was said that there was an agreed sale price of £170,000 in the initial negotiation with a deposit of £30,000 to be made to confirm the agreement and an exchange of details of the lawyers for each party: see PC2 paras. 5-7.

8. Mr Hadi says that the meeting was on 6 May 2019 and that Mr Park said that he would sell the business for a sum of £40,000. There was a text message later that day which is difficult to make out, but it contains the following words on, which Mr Hadi relies "Also u gonna tall u solicitor I going to tell my solicitor £40000pound because Mr chan want quickly sale." The sum of £30,000 appears earlier in this text message.

9. At that stage, Palmers solicitors acted for Mr Park and Judge Law solicitors acted for Mr Hadi. There were emails from Palmers to Judge Law seeking to progress the matter on 16 May 2019 and 29 May 2019. The latter email referred to the matter being very urgent given that Mr Park owed rent and had breached a consent order regarding payments evidently of rent arrears.

10. The delays caused stress and pressure to Mr Park: see PC2 para. 9 and Hadi (2) para. 22. On 3 June 2019, there was a meeting between Mr Park and Mr Hadi at the offices of Palmers solicitors where a sale price of £170,000 was confirmed. Mr Park says that his solicitor stated that there were liabilities other than rent which needed to be paid before the sale of the business and assignment of the lease to Mr Hadi could take place. Mr Hadi confirmed that the sum of £170,000 would be paid after deducting the moneys paid to clear arrears and other debts: see PC2 para. 10. Mr Hadi confirmed that he was at that meeting: see Hadi (2) paras. 23-24. He does not say that he entered into an agreement at that stage. He says that Mr Abed was considering entering into the transaction on the basis of purchasing Mr Park's shares in HFKL and taking an assignment of the lease.

11. There was an exchange of emails which require careful attention. On 6 June 2019, Palmers for Mr Park wrote to Judge Law stating that the matter was extremely urgent since the lease was to be forfeited on 12 June 2019 if the outstanding rent arrears were not cleared. It was understood that Judge Law's client had agreed to take over Mr Park's company and then pay the outstanding arrears and deal with the assignment: see page 26 of the exhibit to Hadi (2).

12. Judge Law replied after midnight, by then on 7 June 2019 at 00.46, also subject to contract. The email started with "…I…confirm that I now have my client's instructions." It said that the author understood that "our clients have met with (sic) your presence" [apparently referring to the meeting of 3 June 2019 in the presence of Mr Syed Shah of Palmers, the solicitor for Mr Park]. It was said that they agreed the following, subject to contract to allow matters to progress:

> "1. My client will take over your client's company holding the lease ("the Company") by way of SPA. Upon the completion of the SPA, my client will furnish us with £30,000 which I understand is all amounts due to the freeholder (please confirm). We will then forward these to the freeholder's solicitors to settle the outstanding sums on the completion of the SPA.
>
> 2. My client will then apply for the lease to be assigned to his current company directly to the freeholder.
>
> 3. Upon the completion of the assignment, my client will settle all debts owed by the Company to all third parties save for your client and any Connected persons.
>
> 4. A**ll debts owed by the Company, as well as all associated costs, will be deducted from the previously agreed premium of £170,000, and my client will furnish us with the net amount to be transferred to you**. I understand that this is to be done at the point of assignment of the lease only. (emphasis added)"

13. Confirmation was sought that this was agreed. Further, there were sought a draft share purchase agreement and stock transfer form, a completion statement from the freeholder's solicitors confirming all amounts owed and a draft agreement reflecting the terms for review and approval.

14. Later on 7 June 2019, Palmers responded subject to contract saying that they had similar instructions that Judge Law's client would be taking over the company holding the lease. "Upon completion of the transfer to the company, your client will pay of (sic) the outstanding debts/arrears owed to the landlord and no doubt this will be deducted from the agreed sale price (£170,000)…" Information would be provided about the other debts of the company (if any). "…the purchase/sale price will have to be transmitted to us upon completion (sic) it cannot wait until assignment".

15. PC2 refers to oral communications on 6 June 2019 (para. 11) and 7 June 2019 (para. 12). The first was that the business was to be purchased by Mr Abed, the cousin of Mr Hadi, on behalf of Mr Hadi. The second was that on 7 June 2019, Mr Hadi proposed that instead of a lease assignment, the sale could be the sale and purchase of shares in

Montscot Pub Limited ("MPL"). In PC2, it is then asserted that the agreement took place from communications, conduct and email exchange between the parties and in particular the exchange of emails dated 7 June 2019: see para. 13.

16. A different account is given by Mr Hadi in his second witness statement. He says that subsequent to the meeting of 3 June 2019, he stated that Mr Abed was no longer prepared to continue the transaction. Mr Park pleaded with him and said that he would sell his shareholding in HFKL and resign as a director if Mr Abed simply agreed to pay the arrears to the landlord to enable Mr Park to remove all his personal belongings from the residential flat above the Pub. Mr Hadi said that Abed would be likely to agree but would want to pay a nominal sum of say £10 for the transfer of Mr Park's shares in HFKL: see Hadi (2) paras.25-26 and Defence para. 7(viii). He subsequently confirmed this with Mr Abed and had a conversation on 6 June 2019 and he says that Mr Park agreed: see Hadi (2) para. 27 and Defence para.7(ix).

17. Mr Park says that he agreed to the sale of his business by nominating Mr Abed as a director of MPL. However, his accountants inadvertently appointed Mr Abed as the sole director of HFKL and he instructed them to rectify this by removing Mr Abed as directors of HFKL and appointing him as director of MPL. The Defendants deny that Mr Abed was inadvertently appointed as a director of HFKL: the reason why he became a director of MPL was because of the discovery of the Defendants that the lease was owned by MPL.

18. On 11 June 2019, Mr Hadi cleared the arrears of rent in a sum of £36,664.59. On 13 June 2019, Mr Park sent a message stating that the parties had agreed to take over the lease for £170,000 and that having paid the lease, there was a remaining balance of £133,335.41. When this was paid, the key would be handed over.

19. On 21 June 2019, new solicitors acting for Mr Park, Sabeers Stone Green, wrote to Judge Law complaining about the circumstances in which Mr Abed was appointed as a director of MPL and sought reinstatement of Mr Park as a director: see PC2 para. 17. That letter was headed "subject to share purchase agreement/contract." On 23 June 2019, it was pleaded that in repudiatory breach of the agreement, Mr Hadi caused Mr Abed to take possession of the Pub, and Mr Abed did so: see PC2 para. 18. By a letter of 25 June 2019, the same solicitors wrote saying that the above-mentioned balance was still outstanding and was to be paid on completion of the purchase of the lease and business subject to obtaining landlord's consent. An alternative was provided involving 50% of the consideration to be paid immediately with 50% of the shareholding in MPL to be transferred and the remaining 50% to be transferred on payment of the balance of £85,000.

20. The claim was then that:

(1) there was an outstanding amount in contract of £133,335.41;
(2) if there was no contract, control had been acquired without consideration;
(3) the shares and directorship of MPL had been acquired by economic duress so that the business worth £170,000 had been acquired for £36,664.59.

21. The Defence includes the following:

(1) at the meeting in May 2019, the sum payable was to be £40,000 of which £30,000 would be required as a deposit: see Defence para. 4(vi);

(2) without prejudice to this, Mr Park was not able to assign the lease which was held by MPL, and in any event, any oral agreement would be void for failing to comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 ("LPMPA 1989").

(3) on 6 June 2019, by which time the lease was about to be forfeited, Mr Park and Mr Abed agreed that Mr Abed would discharge all arrears owed to the landlord and would pay the sum of £10 as a nominal consideration towards the purchase of the shares of Mr Abed in HFKL, and Mr Park would remove his possessions from the residential part of the Pub: see Defence para. 7.

(4) it was only the next day that Mr Park disclosed that in fact it was MPL who was the leaseholder and not HFKL and that company owed the arrears of rental, whereupon it was agreed that Mr Park would resign from MPL and transfer the shares in MPL to Mr Abed.

(5) On 11 June 2019, Mr Abed paid £10 to Mr Park and on 12 June 2019, Mr Abed transferred the sum of £37,910.59 to the landlord. He became the sole director and shareholder of MPL, the leaseholder of the Pub.

III Procedural history

22. On 5 July 2019, a without notice injunction was obtained by Mr Park against Mr Abed restraining him until a return date on 12 July 2019 from interfering with the residence of Mr Park. The order was discharged on application on 12 July 2019 by a consent order under which there were reciprocal undertakings that Mr Park would not enter the commercial part of the Pub and Mr Abed would not enter the residential flat above in the upper floor of the Pub. Mr Park was ordered by Ms Margaret Obi sitting as a deputy Judge of the High Court to pay the sum of £7,000 in costs to Mr Abed and to serve the Particulars of Claim by 19 July 2019, but he has failed to do so.

23. PC1 was duly served and there was a Defence and Counterclaim served on 29 August 2019. This sought by way of counterclaim declarations as to the validity of the varied share purchase agreement as alleged by the Defendants and that Mr Abed had duly complied with the terms of the said agreement. No defence to counterclaim was served. The sum of £7,000 ordered to be paid in the consent order was not paid.

24. The Defendants issued an application to strike out the claim and/or for summary judgment. In particular, they contended that (i) the claim sought repudiation which was not a remedy or a cause of action, (ii) the basis of the entire claim was that there was an oral contract for the disposition of an interest in land which was void for the purpose of section 2 of the LPMPA 1989, (iii) the said oral contract was alleged to have been amended, but once void the contract remains void and cannot be amended and certainly not amended orally, (iv) in any event, Mr Park could not have assigned the lease as MPL was the lessee and MPL was not a party to the Alleged Oral Contract, whether as amended or otherwise; (v) as MPL was the lessee and HFKL operated the business, all other aspects of Mr Park's claim, whether in relation to possession of the Pub or in respect of any loss to the 'business' was not something he personally could claim for.

25. The matter came before Lavender J on 4 June 2020. Mr Park appeared in person with the above-named Mr Syed acting as his McKenzie friend. Mr Roseman on behalf of the Defendants took issue with Mr Syed acting as Mr Park's advocate as this would amount to a criminal offence contrary to the Legal Services Act 2007. Mr Justice Lavender stated that he would exercise his powers to grant Mr Syed limited permission to speak on Mr Park's behalf.

26. Mr Justice Lavender adjourned the strike out/summary judgment application of the Defendants and ordered as follows:

(i) Unless by 18 June 2020, Mr Park:
   a. issued an application to amend his Claim Form and Particulars of Claim;
   b. filed and served a witness statement why he did not (i) serve a Reply and Defence to Counterclaim, (ii) issue an application earlier to amend his Particulars of Claim, (iii) file and serve any evidence in response to the Defendants' application before 4 June 2020;
   c. filed and served a further witness statement giving evidence of his financial means and exhibited a fully completed form ex. 140 form (record of examination), copies of all bank and building society accounts of Mr Park as at the date of the order and for the period 17 April 2020 to 17 June 2020

the Particulars of Claim be dismissed and he shall pay the Defendant's costs of the claim (to be assessed if not agreed).

(ii) In the event that Mr Park does issue the application pursuant to amend, the application will be heard at the hearing of the strike out/summary judgment application.

(iii) There were further directions about evidence. The Defendants were to file a witness statement by 2 July 2020, and responsive evidence was to be filed by 16 July 2020. Skeleton arguments were to be filed and exchanged on 27 July 2020. Mr Park was ordered to pay the costs of the Defendants summarily assessed in the sum of £20,805. This must have fallen due by 18 June 2020, but Mr Park has failed to pay it.

27. Subsequent to the order of Lavender J of 4 June 2020, Mr Park attempted to issue an application on 18 June 2020 to amend the claim form and the Particulars of Claim. He sent an email to the Court at 3.55pm with various documents including the N44 to amend the claim form, the amended particulars of claim, two witness statements, the EX 140 about his means and the Metro bank account statement. The Court contacted Mr Park/Mr Syed because the form did not open at the court end. After that was sorted, on 22 June 2020 at 4.33pm, the documents were then served by email on the Defendants' solicitors. The Defendants say that this was not good service because they were not served on Thursday 18 June 2020, but after 4.30pm (at 4.33pm) on Monday 22 June 2020. They point out that this was deemed to have been served on 23 June 2020, that is 5 days' late. Further, service by email was not an effective form of service. It was therefore submitted that accordingly the sanction contained in the order applied that the Particulars of Claim is dismissed and Mr Park is to pay the costs of the claim. This was said by solicitors' letter on 17 July 2020 at para. 1-3. It did not refer to the failure, subsequently referred to, to serve bank statements of HFKL.

28. There was no application for relief from sanctions. There has been no witness statement explaining what occurred. In the course of the oral submissions, it was explained by Mr Syed that he was working from his home and without the benefit of an office at his home. He was under-equipped as regards machinery. He struggled to get the bank statements and had to visit the bank. He was acting without remuneration. Mr Park was unable to pay for legal representation. Although the documents should have been served on 18 June 2020, it was submitted that there was no disadvantage to the Defendants caused by the lateness in that they had enough time to respond.

29. The issues which arise are as follows:

(1) have the Particulars of Claim been dismissed due to the failure to obey the unless order in paragraph 1 of the order of Lavender J of 4 June 2020;
(2) if Mr Park is able to proceed, should the Court give permission to amend the Claim form and the Particulars of Claim;
(3) should the Defendants be given judgment on the Counterclaim;

(4) should permission to amend be made subject to a condition that Mr Park satisfies the outstanding costs orders and pays £50,000 into court by way of security for costs?

IV Failure to observe the unless order

30. The Defendants' case is that the effect of the breach of the order of Lavender J (service not by 4.30pm on Thursday 18 June 2020 but at 4.33pm on Monday 22 June 2020) is that the claim was dismissed with costs. The Defendants say that in any event, service by email was not allowed as their solicitors have never stated that they would accept service by email. There is a recital in the order that Mr Park was informed that there would be no further toleration of any failure on the part of Mr Park to comply with the Court's order and/or the Civil Procedure Rules, which must be fully complied with.

31. It is further said that whereas the order of Lavender J required copies of statements of bank accounts to which Mr Park is a signatory at the date of the order (4 June 2020) and for the period of 17 April 2020 to 17 June 2020, these have not been provided as regards the accounts of the company HFKL. According to Mr Syed, this was overlooked in the attempt to comply with the order of Lavender J. According to Hadi (2) at para. 55, this omission prevents Mr Park from being able to say that he has provided his full financial position and from then contending that he is unable to pay outstanding orders as to costs.

32. In oral submissions of Mr Roseman for the Defendants, it was submitted that there is the possibility that there was received £25,000 by way of a Covid grant. There was no evidence to support this assertion which seems unlikely, given that such grants depend on the business trading in March 2020 and occupying premises with high fixed property-related costs. There is no evidence that HFKL is still trading or that it is occupying a property. On the contrary, the evidence is that Mr Park is in receipt of job seekers' allowance, which ought to mean that he is unemployed and seeking work. This seems inconsistent with his being involved in a trading business of HFKL.

33. In most circumstances, an application for relief from sanctions would be required. In the particular circumstances of this case, I shall dispense with the need for a formal application because many matters for Mr Park and Mr Syed have been attend to, and there has been procured almost substantial compliance: see White Book Vol 1 para. 3.9.24. The Court must consider the three stage test in Denton, namely the seriousness or significance of the breach, the reason why the default occurred and all the circumstances of the case "including *the need – (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders.": see CPR 3.9(2).*

34. Applying the threefold test in *Denton v TH White Ltd* [2014] 1 WLR 3926, in my judgment, the delay of that which was provided from 18 June to 22 June after 4.30pm was neither serious nor significant. The relevant documents were prepared by 18 June 2020: the fault was about service. The time period was not long, and it did not affect the ability of the Defendants to prepare for the next hearing. Thus, there was no prejudice suffered from the default. If in fact the breach was serious or significant, whilst bearing in mind the difficult circumstances in which Mr Park and Mr Syed were operating, they do not provide a good reason for the default, but they provide significant mitigation. The Court has borne in mind that the absence of legal representation does not usually excuse failure to comply with rules and orders: see *Wright v Hassall* [2018] AC 12. In that case, Lord Sumption JSC at para. 18 said the following:

> "In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); *Nata Lee Ltd v Abid* [2015] 2 P & CR 3. At best, it may affect the issue "at the margin", as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor."

35. Considering all the circumstances of the case, looking at the matter as a whole, there was much to do to comply with the Order prior to 18 June 2020, and despite the handicap of not having a solicitor or barrister to act on his behalf, and with only the assistance of Mr Syed assisting without the benefit of an office, a lot was done. That included the preparation of an amended pleading, re-pleading much of the case. There was prepared a form about the financial circumstances of Mr Park and personal bank statements were obtained. Witness statements were prepared. In addition to this, there are peculiarities about the case that require examination to which I shall turn whilst looking at the application to amend. In all the circumstances, if the breach was serious or significant, it was not intentional or reckless or defiant, and it did not cause prejudice to the Defendants. Further, there was substantial mitigation for the default. Taking into account all the circumstances, the overall justice of the case that is that it should not fail because of the late service and the method of service of the documents.

36. It is said that there was a failure to comply with the unless order by not providing bank statements of HFKL. This aspect was not mentioned in the letter of 17 July 2020 of the solicitors for the Defendants. Mr Syed said that it was very difficult to obtain Mr Park's own Metro Bank statements, which depended on attendance at the bank, and he had overlooked obtaining the statements of HFKL. The account of HFKL at Lloyds Bank was in overdraft as at 25 April 2019 in a statement exhibited by Mr Hadi at exhibit page 60. Its address was that of the Pub and this has not changed despite the events of June 2019. Mr Syed recognised that this aspect had been overlooked. If it is the case that there was no money in HFKL enabling Mr Park to discharge the outstanding costs

orders and/or invalidating the other information provided to the Court, then this breach does not appear serious or significant and/or, if serious or significant, it is understandable that this got lost among the detail such that there is an explanation. In any event, taking into account the nature of the breach and the missing of the point and all the circumstances as outlined above, justice would be done by making a further order designed to procure the statements.

37. I order that Mr Park makes all reasonable efforts to obtain from Lloyds Bank the bank statements of HFKL for the period of 17 April 2020 to 17 June 2020 and as far as reasonably possible from 18 June 2020 to the time of the provision of the information. Within 21 days after the date of making of the order (or sooner if reasonably practicable), Mr Park shall make and serve a verifying statement with the bank statements, or if they have not been obtained, a full explanation as to all steps taken to procure them and why they have not been procured. That is a fallback position in case the unexpected occurs: it is expected that Mr Park will take all reasonable steps to procure the bank statements and that they will be provided. In the event that it appears from these statements that the moneys received by HFKL were of such magnitude that they enabled Mr Park to discharge the outstanding costs orders and/or invalidating other information provided to the Court, the Defendants will have permission to apply for such relief as is considered appropriate, such application to be made within 14 days after the provision of the information. If in fact no such application is being made, the Defendants should inform the Court as soon as reasonably practicable.

38. Mr Roseman also pointed to the new statement of truth (as has been required since 6 April 2020) not appearing in the witness statements of Mr Park, and to the shorter statement not containing the signature of Mr Park. The error of the wrong statement is understandable because the witness statements were prepared only shortly after the change in the rules, and the absence of a signature of Mr Park seems to be an administrative error in getting all the documents ready in an attempt to comply with the order of Lavender J. The witness statements must be prepared again with appropriate statements of truth (Mr Hadi's second statement contains an appropriate statement of truth). They must be signed. The order should provide for that.

39. The Court has had regard to the recital to the order of Lavender J about no further toleration of any failure on the part of Mr Park, but it has provided relief in view of the all the circumstances of the case including the overall intention of Mr Park and substantial steps taken by Mr Park to procure compliance with the order of Lavender J, despite the errors referred to above.

V Permission to amend the claim

(a) The test

40. CPR 17.1(2) provides that, after serving a statement of case, a party may only amend the same with the court's permission. The White Book 2020, at paragraph 17.3.6, provides:

> "In SPR North Ltd v Swiss Post International (UK) Ltd [2019] EWHC 2004 (Ch) the court (at [5]) confirmed that the test to be applied in an opposed application to amend is the same as the test applied to an application for summary judgment. The question is whether the proposed new claim has a real prospect of success. … Thus, the court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation…"

(b) The Defendants' case

41. The Defendants submit that the amended claim is abusive because Mr Park has relied on the same facts and causes of action as have already been struck out and/or as have been the subject of summary judgment against Mr Park. It is therefore said that it is abusive to rely on these matters in PC2: see the Defendants' skeleton para. 31(i).

42. The Defendants say that a major matter which led to the Particulars of Claim requiring to be amended was an infringement of section 2 of the LPMPA 1989. It appeared to be relying on an oral contract to assign a lease. The agreement relied on contained a term for the disposition of an interest in land, which includes an assignment of the lease: see PC1 para. 4, but was not contained in writing contrary to that provided in section 2 incorporating all the terms which the parties had expressly agreed.

43. In the alternative, the Defendants say by reference to paragraph 12 of PC2 that Mr Park's new case amounts to a variation of an oral contract to assign a lease to an oral share purchase agreement. It says that a wholly void contract cannot be rendered valid by a subsequent oral variation: see Chitty 33rd Edition at para. 22.033.

44. The Defendants also say that the case does not raise a real prospect of success having regard to the following. The assertion that there was an agreement in the sum of £170,000 fails because in May 2020 there was a text message which on the Defendants' construction of it appears to support an agreement at £40,000. There was no agreement because it must have been an outline of an intended agreement. Whether an assignment of a lease or a share purchase agreement, documents in writing would have to be prepared in order to create this agreement.

45. The Defendants say that following the email of 7 June 2019 of Judge Law, they learned that there had been a notice of eviction which was forwarded on 7 June 2019 at 15.04 (page 27 of the exhibit to Mr Hadi's statement). In paragraph 9 of Mr Hadi's second statement, it was said that the parties' solicitors did not realise that the parties had already entered into a concluded agreement prior to 7 June 2019.

46. As regards the correspondence of 6 June 2019 and 7 June 2019, they were 'subject to contract only' expressly. They were not intended to comprise an agreement. The Defendants' solicitors' email, whilst referring to £170,000 (which was said in oral submissions to amount to an error of the solicitors) made the need for an assignment pivotal and required prior to the obligation to pay the balance of the purchase price. An agreement of that kind not being in writing was void in view of section 2 of the LPMPA 1989 in that a central part of it was an agreement to create an interest in land.

47. The Defendants point to contradictions between the case as pleaded and some of the correspondence. This is as regards why Mr Park was removed as a director of MPL: his instruction to the accountants and a mistake in his then solicitors' letter of 21 June 2019 and pressure by Mr Hadi according to Mr Park's first witness statement. As regards Mr Park's allegation that there was a concluded agreement, this is contradicted by correspondence of 21 June 2019 and 25 June 2019 from Mr Park's then solicitors which suggest that the Defendants should not have taken possession of the business without an agreement: see Defendants' skeleton para. 31(ii).

48. Further, the conduct of Mr Park in seeking an injunction in respect of the residential part of the Pub only was inconsistent with the claim which was subsequently made in the terms of PC1. PC1 was also defective because the alternative claims to breach of contract were also untenable. There was no economic duress: Mr Park was in straitened financial circumstances and facing forfeiture. An agreement in those circumstances was entered into to pay off the arrears and there was no duress imposed by the Defendants: see Defendants' skeleton argument para. 31(iii). In any event, it is said that economic duress is not discrete cause of action, but at highest an 'unjust factor' for the purpose of a claim for unjust enrichment: see Defendants' skeleton argument para.36. This was not a case of a failure of consideration in that the rent arrears were paid off: see Defendants' skeleton argument paras. 31(iv) and 37. It is said that remedies sought are not based on any pleaded cause of action, but are plucked out of the air: see skeleton for the Defendants at paras. 31(v) and 38. In fact, the Pub was no more valuable than the sums paid.

49. The Defendants also say that some of the allegations can only be made by MPL. Specifically, Mr Park could not have assigned the lease as MPL was the lessee, and

MPL was not a party to the contractual arrangements. He says also that as MPL was lessee and HFKL operated the business, the claim cannot be made by Mr Park.

50. Accordingly, the Defendants submitted that (a) its claim for summary judgment/strike out should succeed, and (b) the case is not saved by PC2 which has no real prospect of success.

(c) Discussion

51. In looking at the order made on 4 June 2020, it is not stated that there has been summary judgment given against Mr Park. That is inconsistent with the terms of the order, which contains the unless order in paragraph 1. If the Particulars of Claim had been struck out, it would have said so, whereas in fact the Particulars of Claim were only dismissed in the event of non-compliance with the matters which have been ordered in the body of paragraph 1. There was a need for revision of the Particulars of Claim. That is to be inferred from the requirement to amend the Particulars of Claim and the Claim form, but that is not to say that either strike out or summary judgment had been ordered on 4 June 2020.

52. The draft amendment makes it clear that the agreement was for the sale of a business and that the sale and purchase of the business was to be "via the sale of shares in [MPL] instead of lease assignment": see PC2 para. 12 and also 6-7, 10 and 13. This involved taking over a company holding the lease. That may have been alluded at as a possibility in PC1, for example at paragraph 8, but it is stated expressly in PC2. There is therefore an argument with at least a real prospect of success that the agreement could be oral or by conduct without the application of with section 2 of the LPMPA 1989 since it was a contract for the sale/purchase of shares rather than a contract for the sale/purchase of an interest in land. This also provides an answer with a real prospect of success to the defence that only MPL could assign the lease and/or the claims could only be brought by MPL. PC2 focus on the purchase and sale of shares of Mr Park in MPL and the removal of the shares from Mr Park so that Mr Park was able personally to claim for his loss of the shares and/or the business. This provides a sufficient answer at this stage with a real prospect of success to the contention that the action could not be maintained by Mr Park.

53. The argument that an oral variation of a contract void under section 2 is ineffective, in my judgment, can be answered as follows. A change from a contract to assign a lease to a contract to buy the shares of the company of the tenant is not a variation, but a replacement of the original contract with a different kind of contract. Such a change is not a mere variation, but the replacement of a contract requiring writing to a different contract not requiring writing. That is not a mere variation for the reasons referred to

in Chitty 33rd Edition at para. 22-034 and see also *Morris v Baron & Co* [1918] 1 AC 1. This point has at least a real prospect of being a complete answer to the variation point raised at paragraph 34(ii) of the skeleton argument of the Defendants.

54. This is a case where the parties have made serious allegations against one another. The second statement of Mr Hadi is replete with very serious allegations. It contains a section headed "Mr Park's dishonest conduct" at paras. 31-44. The case is that there was an agreement at £40,000 or the amount of the arrears of rent, and then on 13 June 2019, Mr Park sought to obtain a further sum of £133,335.41 and threatened to retain the pub licence unless he received this money. This was an attempt to extract further monies to which he knew that he had no entitlement. He lied to new solicitors to extract further money from Mr Abed. He repeated the lie in his application for an injunction. He "has, in effect, admitted his deceit" in connection with the termination and appointment of directorships, being a reference to control of the HFKL being given instead of control of the lessee MPL. There is then reference to the apparently hopeless application for an injunction in respect of the residential part of the premises. If Mr Park had a case, then it would be expected to relate to the entirety of the Pub, whereas in fact the injunction was in respect of the residential part of the premises, and the consent order allowed the Defendants to use the commercial part of the premises.

55. There are serious allegations by Mr Park against the Defendants, namely that whether or not there was a concluded agreement and whether or not it was binding despite not being in writing, the sum that had been agreed in discussions was £170,000 and not £40,000 or the amount of the arrears of rent. Mr Park's case is that the Defendants have made up this story, and in this regard they rely on the email of Judge Law of 7 June 2019. Albeit subject to contract, it refers unequivocally to the sum of £170,000 which was the previously agreed premium. The email is very specific about having taken instructions. It is not simply a broad confirmation of the previous email of 6 June 2019, but it condescends to detail. The detail about an agreed premium of £170,000 is unequivocal. This might drive a coach and horses through the case of the Defendants that the sum of £40,000 was agreed in principle in May 2019 and that the arrears of rent and £10 was agreed on 3 June 2019 and confirmed on 6 June 2019, and then varied to take into account that the lessee was MPL and not HFKL: see Defence paras. 4, 7 and 9.

56. This then is capable of putting the subsequent communications in a different light, namely that the Defendants may have seen an opportunity to take the business without paying anything more than the arrears of rent (and possibly some other debts of the business and possibly a sum of £10). It could have been the case that the Defendants would say that whilst it all started from an asking price of £179,000 which at one stage they were willing to pay (or a sum of £170,000), there was a specific reason why matters changed. However, that is not the Defendants' story: it is that the matter started and finished in an agreed sum of £40,000. Viewed this way, there is a real issue that the Pub has been seized on 23 June 2019 either without agreement or despite an agreed sum of £170,000.

57. It is right to say that the suggestion that there was a concluded agreement has difficulties even on Mr Park's case. The correspondence of 6/7 June 2019 was all subject to contract. There was never a Share Sale Agreement that was drawn up and agreed. The language of the email of Judge Law of 7 June 2019 is that the sum of £170,000 was to be paid only upon completion of the lease being assigned to the current company of Judge Law's client: see points 2, 3 and 4 of the email. As noted above, there are significant contradictions in the various ways in which this case has been expressed on behalf of Mr Park, and also in the subsequent correspondence of 21 June 2019 and 25 June 2019. Nonetheless, the claim as amended still has at least a real prospect of success. These difficulties would be greater if it were the case that there was no executed agreement and that the Defendants did not proceed with the acquisition of the Pub. However, the Defendants' case is that there was an agreement. It was on different terms, according to them, involving a consideration by reference to the arrears of rent and £10. Further, possession of the Pub was taken on 23 June 2019 and the business then conducted by Mr Abed, according to the Defendants.

58. This case of the Defendants is altogether different from that of Mr Park. In the sense that there was an executed agreement, it does lend some force to the case of Mr Park that there was an agreement which can be established from "the communications, conduct and email exchange between the parties" (albeit it begs the question as to whether an agreement, if there was one, was as contended for by Mr Park or by the Defendants): see PC2 at paragraph 13. The case of Mr Park starts from the advertisement for sale of the Pub at £179,000, and from the commonality of the letters of 6-7 June 2019 that the price for the business would be £170,000, to be paid for by a deposit of the arrears and a balance thereafter. The Defendants have not provided a clear explanation as to how the email of 7 June 2019 sent shortly after midnight by Judge Law refers to the sum of £170,000. It is possible that the account given that the parties' solicitors did not realise that the parties had entered into a concluded agreement as per the account of the Defendants (Hadi (2) para. 9) would prevail at trial, but at this stage this has barely been developed as an account, and it is not a straightforward case bearing in mind the detailed terms of the email of Judge Law of 7 June 2020.

59. The Defendants' case seeks to concentrate on aspects of Mr Park's case which are questionable. They raise significant points, but they do so as if looking at the matter in a vacuum. It is necessary to look at the arguments both ways. It is apparent from the foregoing that there are major parts for Defendants also to answer. In my judgment, where there are troubling aspects of both cases, this is a case which is not susceptible to the short cuts of strike out or summary judgment or conditional orders. The short cuts are not appropriate for this case.

60. If there was no binding agreement, but just an agreement in principle or an unenforceable agreement, then the alternative claim is one of unjust enrichment. As pleaded, there is a claim for restitution. The Defendants are critical about the reference

in the claim to a total failure of consideration. It is said in the Defence at paragraph 23 that this is misconceived because there was paid the sum of £36,664.59. The plea is in essence a plea for unjust enrichment of the Defendants or either of them at the expense of Mr Park. It is that if there was no contract, there was a failure of the basis for the transfer of the shares in that it was in anticipation of an intended agreement which did not materialise or of an enforceable agreement under which the balance of the sum of £170,000 would be paid: see Goff & Jones on the Law of Unjust Enrichment 9th Edition where the terminology is discussed between phrases such as failure of basis and failure of consideration at 12-10 – 12-17. In *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, Aikens LJ discussed the difference as being "a question of which is the more apt terminology; it does not have any legal significance": at [62]. It therefore follows that the precise formulation of the claim in restitution may not have any legal significance because the underlying facts have been pleaded, giving rise to an unjust enrichment: see also Chapter 16 of Goff & Jones referring to benefits conferred under anticipated contracts which do not materialise.

61. It is also pleaded that there was economic duress in that the Defendants overbore the will of Mr Park and brought him to the point where he was left with no choice but to make Mr Abed a director of MPL and then to acquire a business worth £170,000 for approximately £36,000. The way in which duress is pleaded in PC2 is as follows:

(i) para. 14: Mr Park was under threat of eviction and under immense duress of circumstances and agreed to the sale of the business nominating Mr Abed as a director of MPL;

(ii) para.17: on 10 June 2019, Mr Hadi pressurised Mr Park to provide the company house authentication code, telling him that he was standing at the bank to transfer funds to his account but needed the account before he could do so;

(iii) para.18: on 11 June 2019, Mr Hadi telephoned Mr Park and provided him with a blank transfer form for Mr Park to sign, and after that Mr Hadi agreed that the deposit would be payable, which Mr Park duly did sign;

(iv) para.27: as above described, Mr Hadi "asserted undue pressure and force" to Mr Park to transfer the shares in MPL;

(v) paras. 28 - 29: Mr Hadi put Mr Park under undue pressure and acquired the shares and directorship of MPL. Both defendants together overbore Mr Park, leaving him no choice other than to make Mr Park a director and shareholder of MPL, thereby acquiring a business worth £170,000 for about £36,000.

62. There is some window into the thinking of the case in the skeleton argument prepared by Mr Syed. The skeleton argument for Mr Park mentions undue influence which does not appear in the pleaded case, but it is very closely related to the duress. In a case of actual undue influence, a relationship of undue influence may be established by proof of threats, coercion or misrepresentation: see Snell's Equity 34th Ed. at para.8-021. The undue influence is set out in the skeleton argument and not at the moment in the pleading, but it is consistent with the way in which the matter has been pleaded around

duress and may provide a further route to giving effect to the factual allegations made about the pressure and coercion to give up the directorship of and shares in MPL. The revised Particulars of Claim do not at the moment incorporate the skeleton argument, but if and to the extent that it is felt that necessary to seek to incorporate the same, then further application will have to be made.

63. As regards the suggestion that the remedies sought go beyond the pleaded causes of action, the first claim is the balance of the price on the premise that there was a contract. The second alternative is a plea of restitution, and this might be imprecise, but it has not been 'plucked out of thin air'. The factual analysis is in part summarised in the paragraphs of PC2 containing the factual allegations of pressure and coercion. Restitution is then the consequence which may operate in a number of different ways. It might be simply be an application to disgorge the unjust enrichment referred to as restitution, that is to say the value of the Pub and the business less the moneys paid by way of rent arrears. It might be that it is rescission and the consequences of rescission arising out of the shares and business being obtained. So too as regards the damages, they might be damages in addition to or in lieu of rescission. Given that the facts have been set out in the pleaded case, and the Court being satisfied that this gives rise to a real prospect of success, the Court will not insist on the remedies being cleared up at this stage. These remedies for restitution, duress, undue influence and the like are complex even for lawyers. It is more just and practical that the matter is allowed to proceed, and the precise legal analysis of how law and equity will respond to the issues in the case be dealt with later in advance of the trial. Broadly, the nature and directions of the case which the Defendants have to meet are adequately set out at this stage for the case to go forward.

64. As regards the points which are raised that the true claimant would be MPL and not Mr Park personally, in other words an objection of reflective loss, this ignores the thrust of the case. It is that if there was no contract as alleged by Mr Park, the complaint is about how the Defendants procured the transfer of the shares and directorship of MPL. That gives rise to complaints of Mr Park as shareholder and director. It follows that Mr Park's response to that argument raises at very lowest a real prospect of success.

65. In all the circumstances, the strike out application and the summary judgment application are dismissed. Whilst there are a number of unanswered questions in respect of Mr Park's case, the same applies to the case of the Defendants for the reasons set out above. There are serious allegations made by Mr Park against the Defendants and by the Defendants against Mr Park. This is not a case which is suitable for strike out or summary judgment. In my judgment, PC2 raises a case with a real prospect of success. Accordingly, permission is given to amend Mr Park is given permission to amend his claim as per PC2.

VI Reply and Defence to Counterclaim

66. There ought to have been pleaded a defence to counterclaim. A reply was not strictly required in that absent a reply, there was a general joinder of issue. There is a statement of apology of Mr Park about failing to respond in a meaningful manner. The unless order did not require the pleading of a defence to counterclaim. The Counterclaim is about declaratory relief only to the effect that the agreement is as per Mr Abed's account and that Mr Abed complied with it. It is obvious from the Amended Particulars of Claim that Mr Park takes issue with the existence of such an agreement. On the basis that permission is given to amend the Particulars of Claim, the Defendants would be able to amend their pleading in the light of it, and at that point, there should be a positive obligation expressed by court order for Mr Park to serve a Reply and Defence to Counterclaim.

VII Conditional leave and/or security for costs

67. I do not regard the claim as being so improbable that an order for conditional leave is required. Again, it comes back to the apparent consensus in the correspondence of 6 and 7 June 2019 that any agreement should proceed on the basis of payment of £170,000, and yet the business being thereafter taken for a sum of about £36,000. All of this can only be determined satisfactorily at a trial, and the trial should not be subject to a conditional leave order. I have also considered above the question of relief from sanctions.

68. There has been a failure on the part of Mr Park to comply with the order made by Ms Obi sitting as a deputy Judge of the High Court as regards payment of costs of £7,000 and by Lavender J of £20,805. It is said that the consequence should be that the Court should exercise its power to strike out. I am satisfied that sufficient information has been laid before the Court to the effect that Mr Park has not the ability to pay these sums, save for the information relating to HFKL. He has provided full information about his resources in his EX 140 form in which he says that he has no money to make an offer, his business is closed, and he has no income. He is in receipt of Job Seekers' allowance: see paragraph 5 of the EX 140 form. In a witness statement, he said that he had no money to pay his lawyer. He does not say in writing that he has no friends or business associates who might lend him money, but Mr Syed informed the Court on behalf of Mr Park that Mr Park had left an appeal for money, but did not receive any financial response. His family had left him, and he had no support. He is now separated from his partner. The effect of the information provided to the Court is that he does not have any ability to raise money in order to discharge these costs orders.

69. In these circumstances, subject to the information relating to HFKL, I am satisfied that it would not be right to make discharge of the outstanding costs orders a pre-requisite of being able to continue with the action. The order will provide that in the event that the information provided by HFKL appears to indicate moneys received by HFKL enabling Mr Park to discharge the outstanding costs orders and/or invalidating other information provided to the Court, the Defendants will have permission to apply.

70. Mr Park has real prospects of success of being awarded a sum of money from one or both of the Defendants in which event he will be able to discharge his liabilities for previous costs orders. It is plainly right that the Court does have power to make an order that the discharge of such liabilities should be a pre-condition of the ability of the defaulting party to amend. However, where the evidence was that such a condition would in effect prevent the amendment order from having practical effect, the Court may decide not to make such an order. This is such a case where no such condition should be imposed, subject to this point being reviewed in the light of the information which emerges from the bank statements of HFKL.

VIII Conclusion

71. In the light of the above, I direct in outline only that

(1) There will be permission to amend as set out in this judgment.

(2) The Defendants' application for strike out and/or summary judgment is dismissed.

(3) To the extent necessary, relief from sanctions is granted to Mr Park by extending time for the service of the documents which were served on 22 June 2020 at 4.33pm and such service is treated as effective.

(4) As regards the failure to serve HFKL's bank statements:

(i) Mr Park is to make all reasonable efforts to obtain the same for the period from 17 April 2020, and to confirm the same by a verifying statement within 21 days (or sooner if reasonably practicable) from the date of this order;

(ii) In the event that the statements invalidate the information provided about Mr Park's assets, the Defendants have permission to apply within 14 days thereafter.

(5) As regards the statements provided by the Defendants pursuant to the order of Lavender J, the same shall be provided again signed with proper statements of truth and redated at the time of being signed or signed again. The statements of truth should have added in addition to the belief that the facts stated in the statement are true, it should add as follows: **"**I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.**"**

(6) Subject to the foregoing, there is no requirement to meet the outstanding costs orders in order to continue with the claim, and there is no order for security for costs.

(7) There will be no default judgment in respect of the Counterclaim.

72. The parties are asked to seek to agree a draft order to give effect to the matters set out in this judgment. The outline above is only a summary, and the draft order will be more detailed to capture the various referred to in this judgment. I shall consider the draft order and the submissions as to consequential orders as to costs.

73. For the reasons set out above, Mr Park has raised a case with a real prospect of success. Without in any way affecting this conclusion, the following is added in conclusion. The case has complexities even for lawyers specialising in the field. At the moment, although Mr Park has had the assistance of Mr Syed, it would be of assistance if Mr Park was able to secure the services of lawyers qualified in this jurisdiction to assist him whether through a pro bono scheme or a conditional fee or a funded claim or otherwise. They might be either solicitors or a barrister, and in the latter case either instructed by solicitors or by way of direct access. There are various possibilities which may or may not bear fruit, but they ought to be explored. In the meantime, it is for Mr Park, with or without assistance (of Mr Syed or otherwise), to carry out the various urgent steps referred to in this judgment which will form part of the order to be drawn up.