



Neutral Citation Number: [2021] EWHC 136 (QB)

Appeal No: QA-2020-000071
Claim No: E03CL370

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
ORDER OF CIRCUIT JUDGE HH JUDGE BAUCHER DATED 28 JANUARY 2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2021

Before :

THE HONOURABLE MR JUSTICE SAINI

Between :

KHALID KASEM

Appellant

- and -

UNIVERSITY COLLEGE LONDON HOSPITALS
NHS FOUNDATION TRUST

Respondent

Iain Daniels (instructed by **Saunders Law LLP**) for the **Appellant**
Mark Roberts (instructed by **Hempsons LLP**) for the **Respondent**

Hearing date: 20 January 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down by release to Bailli. The date and time for hand-down was deemed to be 10:30am on Thursday 28 January 2021.

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THE HONOURABLE MR JUSTICE SAINI

MR JUSTICE SAINI :

This judgment is in 5 parts as follows:

- I. Overview: paras. [1]-[14]
- II. The Facts: paras. [15]-[20]
- III. The Particularisation Issue: paras. [21]-[54]
- IV. Additional Grounds of Appeal: paras. [55]-[67]
- V. Conclusion: para. [68]

I. Overview

1. This is an interlocutory appeal in a claim brought by the Respondent NHS Trust (“the Trust”) against the Appellant, Khalid Kasem (“Mr Kasem”). By that claim, the Trust alleges that it was induced by Mr Kasem’s fraudulent representations to offer him a CPR Part 36 settlement in the sum £75,000.00 in compromise of his clinical negligence claim against the Trust. That original claim was a damages claim against the Trust for what was alleged by Mr Kasem to have been negligently performed shoulder surgery, which caused him long term and debilitating problems. That offer was accepted by Mr Kasem by Notice of Acceptance in accordance with the CPR Part 36 procedural regime.
2. Basing itself on information it says it acquired post-compromise, the Trust claims that Mr Kasem fabricated and/or exaggerated the impact of the allegedly negligent surgical procedure on him. In short, the Trust argues that Mr Kasem made a dishonest claim and obtained financial settlement of his claim vastly in excess of any true or legitimate claim. It has not paid the £75,000.00 and seeks damages for fraud against Mr Kasem.
3. In support of its claim the Trust relies upon photographic evidence from social media which it says shows that Mr Kasem must have lied in his claim as regards quantum. That evidence is said to identify him undertaking a number of activities which are inconsistent with his claimed disability. This is said to be at odds with the claimed serious and continuing shoulder problems asserted by Mr Kasem to have been caused by the allegedly negligent surgical procedure.
4. The legal nature of the Trust’s claim, and the relief sought, are at the heart of this appeal. The claim is a common law deceit claim but an averment at the start of its Particulars of Claim has caused part of the controversy in issue on appeal.
5. At paragraph 4 of its original Particulars of Claim the Trust pleaded:

“For the avoidance of doubt the [Trust] does not seek, by way of remedy, to have the Notice of Acceptance set aside and/or to withdraw its Part 36 Offer. The [Trust] seeks damages in the tort of deceit, including on an exemplary basis, on account of the fraudulent misrepresentation.”

6. On behalf of Mr Kasem it was denied that he had lied in making the original claim but more specifically he responded that the Trust's fraud claim fell to be struck out because the above plea at paragraph 4 of the Particulars of Claim relied upon the Part 36 compromise remaining in place (and thereby the Trust sought to maintain its protection and avoid the need to litigate the underlying claim). It was said that this was an abuse of process. Mr Kasem also argued that the original pleading was not properly particularised, and the claim should be struck out for that distinct reason.
7. Both of these complaints led to Mr Kasem issuing an Application Notice dated 28 June 2019 seeking orders striking out the Trust's claim, alternatively for summary judgment under CPR Part 24.
8. That application came before Her Honour Judge Baucher ('the Judge') sitting in the Central London County Court on 17 October 2019. The Judge accepted the complaint made by Mr Kasem as regards the abuse in relying on the Part 36 compromise and struck out the claim. However, she also directed that the Trust have liberty to seek to amend its claim and apply for reinstatement of it. The Judge did not at this stage address the fraud particularisation complaints. There is no note or transcript before me of what seems to have been an ex tempore judgment.
9. An Application Notice dated 15 November 2019, accompanied by a draft amended Particulars of Claim, was in due course served by the Trust. The amendment removed paragraph 4 of the Particulars of Claim and replaced it with a plea which expressly sought a setting aside of the Part 36 compromise. The Trust did not however amend or further particularise the fraud claim which, as indicated above, was the subject of a separate complaint in Mr Kasem's Application Notice of 28 June 2019.
10. The Judge's detailed judgment of 28 January 2020 on the Trust's amendment application is the subject of this appeal. In summary, the Judge held that amendments were to be allowed on the basis that the Trust was not barred by the doctrine of affirmation from resiling from its original pleaded adoption of the compromise, and also that the pleas in fraud were sufficiently particularised to pursue a deceit claim. The Judge accordingly made an Order on 28 January 2020 granting the Trust permission to amend and she dismissed Mr Kasem's application to strike out the Trust's claim.
11. Mr Kasem sought permission from the High Court to appeal against this Order. He argued that the Judge was in error on four grounds, which I summarise as follows:
 - i) error in finding that the principle of affirmation did not apply to Part 36 settlements having found that the test for affirmation was satisfied;
 - ii) error in finding that the Part 36 settlement could not be affirmed in a claim which contended fraud, on the basis that fraud "unravels all";
 - iii) having found that there was an abuse of process, error in holding the Trust should be permitted, in the absence of any explanation, to amend its claim. Further, the decision to permit the claim to continue having determined it as an abuse of process sufficient to strike it out was irrational and/or one which no reasonable judge could have made; and
 - iv) error in concluding that the claim in deceit was properly particularised.

12. On 8 October 2020, Freedman J granted Mr Kasem permission to appeal on the papers solely on Ground 4 (to which I will refer as “The Particularisation Issue”). He refused permission to appeal in each of Grounds 1-3 but directed that Mr Kasem could orally renew his application on those grounds at the hearing of the appeal on Ground 4, with the appeal to follow, if permission was granted.
13. Having heard oral argument on all the Grounds at the hearing of the appeal, I indicated that I would not grant permission to appeal in relation to Grounds 1-3, and would give my reasons for refusal together in my judgment on Ground 4. I do that in **Section IV** of this judgment.
14. I will begin by setting out the facts and procedural background in more detail.

II. The Facts

15. The original claim arose out of an alleged negligently performed Latarjet procedure undertaken on 22 May 2013 by Mr Carlos Cobiella on behalf of the Trust. Mr Kasem had a history of problems to the right shoulder following sporting trauma and required surgical intervention. The Latarjet procedure is a surgical procedure performed to treat shoulder instability by relocating a piece of bone with an attached tendon to the shoulder joint.
16. In summary, Mr Kasem’s position in the original action was as follows. He said that the initial Latarjet procedure undertaken on 22 May 2013 was carried out negligently in that a coracoid bone graft was not positioned or fixed in place correctly, giving rise, inter alia, to a requirement for further surgery. In any event, he argued that he had wrongly not been given the option of a Bankart repair, a procedure that did not involve the requirement for a bone graft or for screw fixation.
17. By reason of the alleged negligence, Mr Kasem said he had been left with permanent ongoing symptoms and serious problems with his right shoulder. In addition to damages for pain, suffering and loss and amenity he sought to recover future lost earnings of £466,023.29. The claim originally had a pleaded value in excess of £600,000.00. The Trust put both liability and quantum in issue.
18. The material procedural steps which followed issue of the original claim were as follows:

24 November 2017 Trust’s Part 36 offer of £75,000.00.

26 March 2018 Mr. Kasem’s Solicitors confirmed, with service of their client’s updated Schedule of Special Damages, that their client’s ‘...condition has not altered from that which was set out in the report served with his Particulars of Claim’.

3 April 2018 Mr. Kasem’s Part 36 offer of £250,000.00.

- 11 May 2018 The Trust requested release of DWP records, together with personnel papers from Dial A Flight (Mr. Kasem's employer).
- 14 May 2018 The Trust requested that Mr. Kasem disclose full and un-redacted bank statements, only partial disclosure having been provided.
- 16 May 2018 The Trust's Solicitors repeated its request for disclosure of bank statements, with the comment that – 'on the basis of the evidence as it currently stands, my client is unable to properly consider its position on the issue of quantum or indeed, the Claimant's recent Part 36 offer of £250,000.00. Please provide all items sought within 28 days hence – i.e. by 13 June 2018. In the event that you have not complied with the Defendant's request by that date I will take instructions on an application for specific disclosure'.
- 24 May 2018 Mr. Kasem provided authority for release of Dial A Flight records.
- 30 May 2018 The Trust learned for the first time of a successful claim against his former employers by Mr. Kasem. This was in light of clarification being sought from Dial A Flight as to whether the papers for disclosure should include those relating to a claim against them.
- 20 June 2018 The Trust's Counter Schedule of Loss and condition and prognosis evidence was served.
- 28 June 2018 Mr. Kasem's Solicitors confirmed that their client, would provide a form of authority for release of papers relating to the claim against Dial A Flight.
- 28 June 2018 Partial disclosure of bank statements was provided by Mr Kasem.
- 4 July 2018 The Trust confirmed that it would pursue an application for specific disclosure in the absence of full disclosure.

4 July 2018	Mr. Kasem's Solicitors requested further time in relation to disclosure, his solicitors confirming that they were reviewing PDF documents from their client.
4 July 2018	Mr. Kasem accepted Part 36 offer of £75,000.00 out of time, no further disclosure having been effected.
20 November 2018	The present fraud claim was issued by the Trust, it having not paid settlement sum.
21 January 2019	The original claim was stayed until further order pending resolution of the fraud claim.
21 March 2019	Defence.
23 May 2019	Reply to Defence.

19. The procedural steps which led to the Order under appeal are described by the Judge in the Judgment:

“3. In paragraph 4 of the particulars of claim in these proceedings, the claimant pleaded that it was not seeking to set aside the Part 36 offer in the Original Action. On 17 October 2019, I heard the defendant's application to strike-out the claimant's claim on the basis that the particulars of claim disclosed no reasonable grounds for bringing the claim and/or that the particulars of claim were an abuse. Without rehearsing the arguments advanced by Mr Roberts for the claimant and Mr Daniels, who appeared for the defendant on that date, I was satisfied that, on the pleaded case, the case should be struck-out pending any further application by the claimant. I, accordingly, ordered: (1) the claim is struck-out subject to any application by the claimant to amend its claim, such application to be made no later than 4.00pm on 15 November 2019, with a copy of the proposed amended particulars of claim, and be reserved for Her Honour Judge Baucher; (2) any consequential application made in claim C74YJ879 is also to be made no later than 4.00pm on 15 November 2019; (3) the defendant has liberty to file and serve a draft amended defence by 4.00pm on 29 November 2019.

4. Pursuant to that order, the claimant issued its application dated 15 November 2019 which reads: ‘What order are you seeking? An order in the attached form to reinstate the claim, amend the particulars of claim and for the proceedings to be case managed together with claim C74YJ879.’ and in the C74YJ879 action; ‘An application that an order for these proceedings to be case managed together with claim E03CL370 and preventing the

claimant from entering judgment against the defendant pending the outcome of claim E03CL370.’.

5. The claimant now seeks to amend its particulars of claim and within the embodiment of the revised pleading, seeks to set aside the Part 36 compromise; to have the original action case managed and tried thereafter; and seeks damages in the tort of deceit.”

20. As explained above, the Judge permitted this amendment and directed the claims be managed together. She also held that the fraud claim was sufficiently particularised which is the first issue before me.

III. The Particularisation Issue

21. This is the sole ground on which Freedman J granted Mr Kasem permission to appeal. Freedman J explained that although one might consider this a case management issue (where an appeal court would defer to a first instance judge), there was a case with a real prospect of success that, as pleaded, the case in deceit was lacking in particularity.
22. Before considering the Judge’s reasons for allowing the claim to proceed, I need to set out the precise pleaded case.
23. Having first pleaded the nature of the claims made by Mr Kasem and some of evidence he had relied upon by way of quantum (which I assume was intended to be the case as to “representations” for the tort), the draft amended Particulars of Claim (which remained in this respect in the same form as the original) continued as follows in the material paragraphs:

“16. It is the position of the Claimant [the Trust] that:

- a. Substantively the Defendant [Mr Kasem] contrived to present fabricated and/or exaggerated heads of damage and accordingly fraudulently misrepresented the true level of his claim. Specifically it is alleged that the Defendant has fundamentally sought to mislead the Claimant and/or the Court in relation to his claim for personal injury and/or associated special damages in particular alleged lost income, credit card interest and loss of rental income; and
- b. Procedurally the Defendant has:
 - i. Failed to effect disclosure and/or deliberately effected misleading and/or incomplete disclosure of relevant documentation which he must have known was harmful to his case;"

- ii. Endorsed his statement with a Statement of Truth seeking to support claims which he knew were fabricated and/or exaggerated.

Particulars of the Claimant's position

17. The Claimant is now in receipt of evidence which confirms:

- a. The Defendant is not in truth suffering from physical symptoms to the extent alleged, for example:
 - i. On one occasion, whilst working at Virgin Gyms, social media confirms he assisted in the lifting of an individual into a swimming pool.
 - ii. It has also been confirmed that the Defendant has, on at least one occasion, participated in boxing sparring, featuring on Youtube as part of, it seems, a promotional campaign.
- b. The Defendant has misled the Court about his social life. In addition to enjoying nine foreign holidays over a four year period from 2013, he also attended the Coachella Music Festival in July 2016.
- c. The Defendant is not impecunious. In addition to his foreign holidays, it is equally clear from the partial disclosure of bank statements that there are other accounts in the name of the Defendant. Specifically, they make reference to a transfer of £120,000.00 on 30 September 2014 to a separate account which remains undisclosed. The Defendant's accounts also reveal that between February 2015 and February 2017 he paid £650 per month for rent on a property at WA11 1AR. It is inconceivable that this rent was for the sofa at his friend's residence as he has alleged".

24. Before the Judge, it was argued on behalf of Mr Kasem that this was a deficient fraud pleading. Having directed herself to the relevant authorities on amendment and fraud pleadings, including CIP Properties (AIPT) Limited v Galliford Try Infrastructure Limited and others [2015] EWHC 1345, and Lipkin Gorman v Karpnale Ltd [1998] 1 WLR 1340, the Judge rejected this submission and gave the Trust permission to amend (but in reality to pursue this original pleaded case which had not been amended).

25. The Judge's reasons were as follows:

"50. This then leaves the outstanding aspect of the pleadings. The central thrust of Mr Daniels' attack related to the inadequacy of the pleadings. He submitted that there are only two

particularised allegations which, on their face, were insufficient to establish fraud and the other paragraphs were of a generic nature. Indeed, he went so far as to invite me to strike-out the proceedings, presumably under CPR 3.4, or to give summary judgment.

51. In contrast, Mr Roberts submitted that the pleadings set out a clear case that the defendant fabricated or exaggerated the nature and extent of his claim for damages. He submitted the examples cited provide strong evidence to support the claimant's case that it was induced to make the Part 36 offer.

52. I have given careful consideration to the respective arguments and in so doing, I have considered the statements of Mr Navsaria, Ms Bagnall and, in fairness to Mr Daniels, given the absence of any further oral submissions, the proposed draft amended defence. Mr Navsaria attacks the focus of the pleadings on paragraph 22 onwards of his statement. In the main, the perceived deficiencies are maintained in the proposed amended pleading. Whilst there is a robust assault on the particulars of claim, I do not consider the claimant is required to set out each and every aspect, but such particulars so that the defendant knows the case it is expected to meet.

53. I am satisfied that, in the words of May LJ in *Lipkin Gorman v Karpnale Ltd* [1998] 1 WLR 1340, that, 'Where fraud or dishonesty is material, this must be clearly pleaded, if not explicitly, then in such terms that the reader of the pleadings can be left in no reasonable doubt that this is being alleged.'.

54. I am satisfied that, standing back and considering the pleading as a whole, the defendant can be in no doubt as to the substance of the allegations as per paragraphs 3 and 16-18. I, accordingly, decline to strike-out the pleadings and/or grant summary judgment."

26. Counsel for Mr Kasem forcefully argued on appeal that the Judge failed to deal with his essential complaints (which I have summarised in para. [27] below). He relied upon Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2003] 2 AC 1(HL), and Lipkin Gorman v Karpnale Ltd [1989] 1 WLR 1340 (CA), where May LJ observed at 1351H-1352A:

"... where fraud or dishonesty is material this must be clearly pleaded, if not explicitly, then in such terms that the reader of the pleading can be left in no reasonable doubt that this is being alleged. ... where an element in the alleged fraud or dishonesty relied on is the other party's knowledge of a given fact or state of affairs, this must be explicitly pleaded. It is ambiguous and thus demurrable, if fraud is relied on, to use the common "rolled

up plea” that a defendant knew or ought to have known a given fact.”

27. In terms of specific problems with the pleaded case, the following points of complaint were the focus of submissions on behalf of Mr Kasem before me (by reference to the paragraphs of the pleading I have set out above):

- i) Paragraph 16a, whilst suggesting that it is setting out specifics, is in fact generic in terms. Paragraph 16b is not an allegation of fraud, but a complaint about the manner in which the clinical negligence case was progressed.
- ii) Paragraph 17a refers to two minor incidents which it is suggested contradict the evidence in Mr Kasem’s witness statement but it does not particularise why this means he was fraudulent.
- iii) Paragraph 17b suggests Mr Kasem misled the Trust as to his social life in that he took a number of holidays. It is impossible to understand this in the absence of any explanation as to why this led to the Part 36 offer being made.
- iv) Paragraph 17c is an assertion that Mr Kasem was untruthful about his impecuniosity but again fails to set out how this led to the Part 36 offer being made or made in the sum that was accepted.
- v) Of particular concern is the use of the phrase “*for example*” in paragraph 17b which suggests the Trust intends to rely on further allegations which it has not particularised. That this is the intention is confirmed in paragraph 7b of the Trust’s skeleton argument below on the amendment application which stated:

“Further, it is inappropriate, within a Particulars of Claim, to recite each and every piece of evidence upon which the Claimant intends to rely. This would fly in the face of common sense. A pleading is there to set out the framework of the case, not provide a checklist which forewarns the Defendant for cross examination. It is worthy of note that in the substantive action, there would be no obligation on the Defendant NHS to plead fraud at all, per Howlett v Davies [2017] EWCA 1696.”

28. In response, Counsel for the Trust supported the Judge’s reasons for permitting the case to proceed as pleaded. He argued that the issue of amendment was essentially a case management matter and relied upon the well-known principles set out in Wallbrook Trustee (Jersey) Limited v Fattal [2008] EWCA Civ 427. He also took me to Howlett v Davies and Anor [2017] EWCA Civ 1696, and Pinkus v Direct Line [2018] EWHC 1671. Counsel argued that these cases demonstrated a more flexible approach to allegations of fraud which did not require the type of particularity which was the subject of the complaints made on behalf of Mr Kasem. Both of these cases concerned qualified one way costs shifting (“QOCS”).

29. Relying on the principles he drew from Howlett, in particular, Counsel for the Trust persuasively argued that the Particulars of Claim set out a clear case against Mr Kasem, namely that he has fabricated and/or exaggerated the nature and extent of his claim for damages. He said that the pleaded examples provide strong evidence to support the Trust's contentions and this is despite the fact that Mr Kasem, in the original action, was in default of his disclosure obligations and as such, there will, almost certainly, be other evidence to support the Trust's position. He also relied on the fact that the acceptance of the Part 36 Offer was out of time and when Mr Kasem was under considerable disclosure pressure. I refer to the procedural chronology in **Section II** above.
30. In relation to Lipkin, Counsel for the Trust argued that Mr Kasem could be in no doubt or ambiguity as to what is being alleged. He submitted that the Judge in "standing back and considering the pleading as a whole" (Judgment, para. 54) not only adopted the correct test for assessment of the pleading (specific reference being made by the Judge to Lipkin), but then exercised her case management powers/discretion, to reach the conclusion that Mr Kasem could be in no doubt as to the substance of the allegations.
31. These were attractively presented submissions but, in my judgment, the Judge was in error in permitting the fraud pleading to go forward. Even bearing in mind that one might call this a form of case management issue, I consider that the Particulars of Claim fail properly to comply with basic pleading requirements for a dishonesty and deceit case.
32. In short, there is substantial force in the submissions made on behalf of Mr Kasem in relation to the nature of the case set out in paragraphs 15 and 16 of the draft amended Particulars of Claim, summarised above at para. [27].
33. My more detailed reasons for this conclusion are below but I must begin with some basic principles.
34. The starting point is to underline that in any common law deceit claim a claimant must plead and prove at least the following five matters with sufficient particularity:
 - i) A representation of fact made by words or by conduct and mere silence is not enough;
 - ii) The representation was made with knowledge that it was false, i.e. it was wilfully false or at least made in the absence of any genuine belief that it was true or made recklessly, i.e. without caring whether the representation was true or false;
 - iii) The representation was made with the intention that it should be acted upon by the claimant, or by a class of persons which will include the claimant, in the manner which resulted in damage to him;
 - iv) The claimant acted upon the false statements; and
 - v) The claimant has sustained damage by so doing.

35. See Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All ER 205 at 211 and the helpful summary in Ludsin Overseas Limited v Eco3 Capital Limited [2013] EWCA Civ 413 at [77]. Equally helpful is the summary of the law and example of model deceit pleadings in Bullen, Leake and Jacob, Precedents of Pleadings (Nineteenth Edition 2020) at Section 58, pages 47-56. These cases and text were not cited to me but contain what I regard as uncontroversial principles.
36. It is not enough to make a bare assertion of fraud when seeking to comply with these requirements. It is well-established that any allegation of fraud must be made clearly, unequivocally and with sufficient particularity so that the defendant understands the case made against him. It is of particular importance to underline in the context of the present appeal that the representation which is said to have been made fraudulently must be identified with precision.
37. As explained by Lord Millett in Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2003] 2 AC 1(HL) at [186]:
- “It is well established that fraud or dishonesty...must be distinctly proved; that it must be sufficiently particularised... The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him... this involves knowing not only that he is alleged to have acted dishonestly but also the primary facts which will be relied on at trial to justify the inference...this is only partly a matter of pleading. It is also a matter of substance”.
- (My underlined emphasis)
38. Those principles are not only well-established in case law but are also reflected in the CPR. See CPR PD 16, para.8.2(1) (requiring specific details of fraud and misrepresentations relied upon); the Admiralty and Commercial Courts Guide at C1.2, which provides that “full and specific details should be given of any allegation of fraud, dishonesty, malice or illegality” and that “where an inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged must be fully set out”; and the Chancery Guide at 2.8(1) to like effect.
39. It is equally well-established that if a case alleging fraud or deceit (or other intention) rests upon the drawing of inferences about a defendant’s state of mind from other facts, those other facts must be clearly pleaded and must be such as could support the finding for which the claimant contends. In any event, if a case alleging fraud or deceit (or other intention) rests upon the drawing of inferences about a defendant’s state of mind from other facts, those other facts must be clearly pleaded and must be such as could support the finding for which the claimant contends. Useful guidance to this effect appears in Portland Stone Firms Limited v Barclays Bank plc [2018] EWHC 2341 at [25-32] and JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm) at [20].
40. I do not accept that the cases Howlett v Davies and Anor [2017] EWCA Civ 1696, and Pinkus v Direct Line [2018] EWHC 1671 are relevant to the issues before me. The cause of action pursued before me is common law deceit. These two decisions are concerned with a very different issue. So, in Howlett, as explained by Newey LJ at [29-31], the issue was whether a trial judge can find that the QOCS regime had been displaced because of “fundamental dishonesty” without fraud having been alleged in terms in the insurer’s defence. He explained that the classic fraud authorities were of

limited assistance on this issue. That was because, as Newey LJ observed, those authorities arose in situations where a claimant wished to maintain a claim that depended on a fraud. Such a person was required to clearly both allege it and prove it. The focus was not, as it was in the Howlett appeal, on what a defendant must plead and prove.

41. By contrast, the appeal before me is concerned with what the Trust must plead and prove. The Trust's entire claim depends on proving fraud. Nothing in Howlett seeks to undermine the well-established principles about pleading fraud which I have summarised above.
42. Applying these principles, the Trust's Particulars of Claim should in my judgment have contained at least the following:
 - i) The precise representations made by Mr Kasem in the course of his civil claim (and whether they were express or implied);
 - ii) The precise respects in which representations made by Mr Kasem were factually false;
 - iii) The state of knowledge of the Trust at the point of making the Part 36 offer and how the Trust relied upon the representations;
 - iv) The material received by the Trust subsequent to the acceptance of the Part 36 offer which showed that Mr Kasem had provided false information, identifying when such information was received and the precise respects in which the information subsequently received showed the falsity of the representations; and
 - v) The facts relied upon to the effect that Mr Kasem made the representations knowing the same to be false and/or reckless as to the truth of the same.
43. When one compares the contents of the crucial paragraphs 16 and 17 of the draft Amended Particulars of Claim (which I have set out above at para. [23]) to these basic requirements (and even taking the pleading as a whole), the amended pleading falls far short. I emphasise that the Trust was not required to plead evidence but rather the "primary facts" (adopting Lord Millett's language in Three Rivers) under each of the heads I have identified in para. [42] above.
44. The pleading suffers from a number of problems. I will identify five main problems. First, there is no obvious connection for example between the fact that Mr Kasem has been on holiday on a number of occasions (or that he attended a specific music festival at Coachella) with any false representation on his behalf. The pleader clearly has in mind some fact or inference which he will ask the Court to take into account or draw but has not explained what it is.
45. Second, the reader of the draft pleading would be left puzzled by the suggestion that there had been some necessarily false earlier (unpleaded) representation given the fact that Mr Kasem had been seen on social media assisting in lifting someone into a swimming pool at Virgin Gyms.

46. Third, the same goes for the fraud claim based on the fact that Mr Kasem has a “social life”. How this is said to establish relevant falsity of some earlier representation relied upon by the Trust in deciding to settle the claim with a Part 36 payment remains a mystery.
47. Fourth, the Trust cannot use the language of “for example” (as it does) when alleging particulars of why a representation is false. That would be to drive a coach and horses through the pleading requirements and allow ambush in the course of trial. That is never permissible as a basis to allege fraud as part of a deceit claim.
48. Fifth, in relation to reliance on representations, the pleaded case is also defective. All that is said is: “...in consequence of the foregoing the Claimant's position is that it relied upon the foregoing misrepresentations to its detriment and suffered loss in consequence. Accordingly, the Claimant claims against the Defendant in the tort of deceit”. An explanation of the way in which the Trust relied upon the representations is making the specific Part 36 Offer is missing. Like other parts of the case, the reader is left guessing. It is clear that the Trust made an offer far below the claimed quantum of the claim. How did it then rely on what was said to have been represented as to the nature and scale of injury? One might consider that settling a £470,000.00 claim for just £75,000.00 suggests the Trust had not relied upon the truth and accuracy of the evidence of Mr Kasem as to his losses.
49. In oral argument, Counsel for the Trust sought to defend the pleading by arguing that the position as to the more precise nature of the fraud claim made would “crystallise” in the course of disclosure and following witness statements. That is not satisfactory. A clear and sustainable fraud case, if it is to be made at all, must be made at the time the Particulars of Claim seeking relief in deceit is settled. It is not an answer to say the case might become clearer or sustainable at a later stage.
50. Insofar as the Trust says (as it did in evidence and argument before the Judge) that it is not necessary for it to set out every allegation of fabrication and exaggeration in its pleading, I would reject the breadth of that submission. If the Trust is to argue that the fabrication or exaggeration of any specific matter establishes the falsity of a pleaded representation for the purposes of its common law claim, it is incumbent on it to plead that matter so that Mr Kasem knows the case he is to meet.
51. I emphasise that this must be done in the pleading and not in evidence. Counsel for the Trust sought to explain in argument (using the boxing/sparring plea) how the fraud case in relation to that issue worked. But that is a case which needs to be set out in the pleading supported by a statement of truth.
52. Finally, even applying the broad assessment invoked by the Trust as to whether Mr Kasem knows overall the case he is to meet, I do not consider that is established. The case is vague in the extreme. The case has been pleaded in the form of a complaint within section 57 of The Courts and Criminal Justice Act 2015 (which provides no cause of action in itself), as opposed to a deceit claim.
53. For these reasons, which reflect to some extent the initial observations of Freedman J when granting permission to appeal on this ground, the Particularisation complaint under Ground 4 succeeds and the appeal is allowed.

54. The Judge should have struck out the claim as pleaded and maintained in the draft amended Particulars of Claim.

IV. Additional Grounds of Appeal

55. As indicated above, I refused permission to appeal in relation to Grounds 1-3 at the hearing following oral submissions made by Counsel on behalf of Mr Kasem. My reasons for concluding that these grounds do not have a real prospect of success within CPR 52.5(1)(a) are, in brief, as follows. I have set out the Grounds at para. [11] above.

56. The first two grounds turn on the issue whether the principles of affirmation in contract law apply to Part 36 settlements. The Judge decided that they did not. Freedman J, in refusing permission on these grounds, observed:

“As regards the matters relating to affirmation, if that were the only issue, the Court would refuse permission to appeal on the basis that the originally pleaded case appeared to be saying that sufficient relief could be obtained through damages. The Judge understandably said that the appropriate relief was a setting aside, and permitted that to be done. As the case appears presently, the detailed jurisprudence about whether there is an analogy with affirmation does not advance the matter. If a claim in deceit is to proceed, the only question was the form of the relief. It is doubtful that the analysis or analogy of affirmation is probative: if it is, there may be no reason why it could not be withdrawn absent injustice, as an admission can be withdrawn and similarly a court of equity can in an appropriate case in the exercise of its discretion overlook ‘discretionary’ bars to rescission.”

57. I respectfully endorse these observations but add some additional reasons addressing certain points made to me orally by Counsel for Mr Kasem.
58. In my judgment, whether or not an affirmation at common law had been established on the facts was irrelevant. The Judge was right to conclude that common law principles had no application to the self-contained regime under Part 36. See Gibbon v Manchester City Council [2010] EWCA Civ 726 at [5]-6]. The principles of affirmation/election have been developed by the courts of common law and equity for specific purposes and there is no obvious lacuna in the law concerning Part 36 which requires one to transport these historically developed principles to a new area.
59. Counsel for Mr Kasem argued, as he had before the Judge, that if the principles did not apply this would “create uncertainty and allow either party to resile from their position” (Judgment, paragraph 15). As I observed during the hearing, the point that seemed to be being made was that some form of mechanism was necessary to deal with such injustice and affirmation was being selected as the candidate, based on analogy with the operation of that principle in contract law.

60. In my judgment, the Court has a ready-made mechanism to deal with the position where a party seeks to resile from a pleaded position. That is the law relating to amendment and admissions. Civil procedural law has no need to resort to common law principles of affirmation because it has its own mechanism.
61. The correct procedural analysis of the situation was that the Court had to consider whether the Trust should be permitted to withdraw what was, as Freedman J explained, effectively an admission in paragraph 4 of the original Particulars of Claim. The Court's powers to supervise and control if and when an admission may be withdrawn, or an amendment made, provide an effective mechanism for dealing with claimed abuse and injustice. The considerations which would apply would focus principally upon the injustice of withdrawal or amendment.
62. On the facts, there was no injustice or prejudice identified if the plea was withdrawn and Counsel for Mr Kasem fairly conceded when I asked him that he could identify no specific prejudice from the amendment (other than costs).
63. For completeness, I saw force in the argument that the fact that this was a fraud case made no real difference if the doctrine of affirmation applied (see para.11(ii) above). Here there was a form of affirmation after knowledge of a claimed fraud (indeed, the very pleading claiming fraud also contained a form of affirmation). But the Judge's decision was in my view correct independently of what she said in relation to fraud "unravelling all".
64. I accordingly refuse permission to appeal on Grounds 1 and 2 but would add a further observation. Given the flexible procedural powers of Court to deal with the situation which arose in this case (where permission was being sought by amendment to withdraw a plea), unless compelled by authority I would have been most reluctant to import a concept such as common law affirmation into the CPR Part 36 regime. That is because, even in its own area of application, that doctrine has over time become encrusted with extensive barnacles of intricacy which one would not readily import into civil procedure concerning amendments. See for example the extensive learning and jurisprudence governing the principles of affirmation described over many pages with nearly 100 footnoted cases in Chitty on Contracts, Vol. 1 (33rd Edition) at para. 24-003, and following.
65. As to Ground 3, the fact the original plea in paragraph 4 of the Particulars amounted to an abuse did not establish that amending the pleading to remove that plea had to be barred, whatever the circumstances. It was a case management decision for the Judge as to whether, applying the principles on amendment, this plea could be withdrawn. No error of principle was identified in the Judge's approach such as to support the plea that her decision was irrational.
66. Specifically, I repeat the point that no prejudice to Mr Kasem was identified if the Trust was to be permitted to merely alter the relief it would seek if the fraud claim was made out.
67. The Judge's conclusions were expressed as follows and I detect no arguable error in them:

“42. The instant case is not one where a judgment has been obtained, nor yet where fraud has been established. However, based on the principles expounded by the higher courts in both Hayward and Takhar, I consider that to find that the claimant was not entitled to amend its proceedings and seek to set aside the Part 36 settlement, would be an affront to the administration of justice.

43. I do not consider that the proceedings should remain struck-out as per paragraph 1 of my order of 17 October 2019. I am satisfied that the proceedings are not an abuse of process, as the proceedings no longer maintain that the Part 36 settlement remain and that the settlement was improperly induced, which was clearly inconsistent. I am not persuaded by Mr Daniels’ submission: ‘ that the claimant should not simply be permitted to alter its pleaded case, having wrongly and deliberately chosen to previously plead its claim in an abusive way, for its own advantage and to the defendant’s prejudice.’

...”

V. Conclusion

68. In the result, I allow the appeal on the Particularisation Issue (Ground 4) and refuse permission to appeal in relation to Grounds 1-3. A hearing to consider consequential relief will be arranged, if the parties cannot agree an order.