Neutral Citation Number: [2020] EWHC 1856 (TCC)

Case No. HT-2020-000162

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice,
Strand, London WC2A 2LL

Date: 10 July 2020

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- - - - - - - - - - - - - - - - - - - -

Between :

NAZIRALI SHARIF TEJANI

Claimant

- and -

(1) FITZROY PLACE RESIDENTIAL LIMITED
(2) 2-10 MORTIMER STREET GP LIMITED AS A GENERAL PARTNER OF 2-10 MORTIMER STREET GP LIMITED PARTNERSHIP TRADING AS "EXEMPLAR"

Defendants

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David Berkley QC and **Kay Puvanesan** (instructed by **Mortimer Court Chambers**) for the **Claimant**
Gary Blaker QC (instructed by **Clyde & Co LLP**) for the **Defendants**

Hearing date: 10 July 2020

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Approved judgment

I direct that pursuant to CPR PD39A para. 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. This judgment concerns a short costs point, but lying behind it are more significant questions of practice as to the proper approach to pleading a statement of case and to applications to strike out.

BACKGROUND

2. By a contract dated 5 July 2012, Nazirali Sharif Tejani agreed to purchase the leasehold interest in apartment 801, Block 7, Fitzroy Place, London W1 for £2,595,000 from Fitzroy Place Residential Limited. The apartment was purchased off plan pursuant to a contract between Mr Tejani, Fitzroy Place and the developer, 2-10 Mortimer Street GP Limited Partnership.

3. The development was not completed until May 2016 when Mr Tejani entered into a lease with Fitzroy Place. By a claim issued on 1 May 2020 against both the freeholder and the developer, Mr Tejani complains that the apartment is blighted by an unexplained noise. He pleads that the noise can be heard throughout the apartment, that it is intermittent, variable in volume, that it happens both at day and at night, that it is loud enough to wake him and his wife when sleeping, that it cannot be suppressed or masked and that attempts to solve the problem have not been successful.

4. Mr Tejani pleads that the apartment is not fit for habitation and that the defendants are liable for breach of s.1 of the Defective Premises Act 1972. Further, he pleads a breach of clause 5.6 of the 2012 contract by which the developer agreed to take reasonable steps to procure that defects that were the responsibility of the building contractors would be remedied as soon as reasonably practicable, and a breach of clause 4.1 of the lease by which the freeholder covenanted to ensure that Mr Tejani would enjoy quiet possession of the apartment. In addition, he pleaded that the noise amounted to a nuisance and that the Defendants had caused or permitted such nuisance.

5. As to loss and damage, Mr Tejani pleaded at paragraph 31:

> "Further as a result of the noise the Claimant was unable to rent out the Apartment. The Apartment was and is not habitable and accordingly the Claimant could not rent the property causing further loss and damage and lost rental income."

6. Further, at paragraph 37, he pleaded:

> "The matters complained of have caused annoyance, discomfort, distress and loss of amenity to the Claimant who has been unable to occupy the property as he intended when he purchased it and is unable to rent the property out to a tenant."

7. After pleading the nuisance, he added, at paragraph 46:

> "That breach is an ongoing breach causing the Claimant loss and damage."

8. Under the heading "PARTICULARS OF LOSS & DAMAGE", he then pleaded the following particulars at paragraphs 47-51:

> "47. The Claimant is entitled to a refund of the purchase price of the Apartment being the total sum paid on completion to the Defendants being £2,595,000.00 plus interest.
>
> 48. In addition, the Claimant is entitled, for breach of the Sale and Purchase agreement, to claim the losses caused including;
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> a. The costs ancillary to the purchase of the property namely solicitors, and agents costs together with other miscellaneous costs totalling £14,597.73 as set out in the Completion statement together with;
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> b. Stamp duty paid to HMRC in the sum of £225,150.00;
>
> c. In addition, after completion, but before the Claimant was aware of the Noise defect, he improved the property and furnished it in the total sum of £49,269.20 for improvements and £63,961.27 for furnishings. The purpose of these works was in order to maximise his rental income for letting the Apartment. It was a reasonably foreseeable consequence of a purchaser buying a property of this nature that they would seek to rent the property and would furnish it and improve it to maximise its potential rental income;
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> d. Furthermore, it was the Claimant's intention to rent the property out to a tenant at the rate of per week £2,000. The property has to date stood empty for 205 weeks being the date of completion until 01 March 2020 giving a total loss of rental income of £400,000 accruing weekly at the rate of £2,000 per week.
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> 49. The total sum claimed excluding interest is £3,357,978.20.
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> 50. The Claimant also claims interest at the rate of 8% per annum in accordance with section 35A the Senior Courts 1981 (sic).
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> 51. Alternatively, the Claimant claims interest at such rates and for such periods as the court thinks fit."

THE APPLICATION

9. On 11 June 2020, the Defendants issued an application seeking to strike out parts of the Particulars of Claim pursuant to rr.3.4(2)(a) and (b) of the Civil Procedure Rules 1998. The draft order served with the application notice clarified that the target of the strike-out was paragraphs 47-51 of the Particulars of Claim that I have quoted above. In addition, the Defendants sought a number of orders consequential upon the strike-out:

    9.1 First, an order that the Claimant file Amended Particulars of Claim, failing which his whole claim would be struck out.

    9.2 Secondly, a stay for alternative dispute resolution.

    9.3 Thirdly, an order that the Claimant should pay the costs of the application on the indemnity basis.

10. The application was supported by the witness statement of Keith Conway of Clyde & Co. LLP, the solicitor acting for the Defendants. Mr Conway explained, at paragraph 1 of his statement, that it was made in support of the strike-out application, but continued:

> "Further, the Defendants also put the Claimant on notice that it (sic) .will use this application hearing to apply for an order in relation to the Part 18 requests that are being served at the same time as this application. This is in the event that the Claimant fails to deal with the Part 18 requests adequately. Thirdly, the Defendants have been seeking to deal with the issue raised in this claim. The Claimant has in recent months refused the Defendants' contractors access to his flat in order for remedial works to be carried out. The Defendants seek an order staying proceedings after the point that the Claimant has remedied his defective Particulars of Claim."

11. Kay Puvanesan, the Claimant's junior counsel who is also conducting this litigation on behalf of his client, filed a witness statement in response dated 8 July 2020. Subsequently, leading counsel on each side were able to discuss this application. As a result of those discussions, this application has been compromised subject only to the question of costs. The parties have agreed the following directions:

    11.1 Mr Tejani will file and serve Amended Particulars of Claim "providing particulars of his loss and damage and the basis of assessment of such losses" by 2 August 2020.

    11.2 By the same date, Mr Tejani will give further information in response to the Defendants' Part 18 Request.

    11.3 Thereafter, the matter will be stayed for alternative dispute resolution.

12. The recitals to the parties' draft order also records Mr Tejani's agreement to allow Fitzroy Place and its agents access to his apartment for the purposes of inspection, further diagnostic testing and any necessary remedial works.

13. The parties' agreement is, however, silent as to what should happen to the Defendants' application. Gary Blaker QC, leading counsel for the Defendants, argues that it should be adjourned generally with liberty to restore. Such course would, he submits, allow the Defendants to restore their application in the event that the Amended Particulars of Claim do not rectify the perceived defect, alternatively if there is some new problem with the statement of case. David Berkley QC, leading counsel for the Claimant, resists such order and submits that the application has effectively been compromised. Accordingly, it should, he submits be dismissed.

14. The strike-out application was listed for hearing today. Absent any order adjourning the hearing, it fell to the Defendants either to argue their application or withdraw it. The Defendants have taken neither course, but argue that in any event they have obtained the relief that they really sought by their application, namely the amendment of the allegedly defective Particulars of Claim. In those circumstances, I consider that the June application is now at an end. If the Defendants had wished to argue that paragraphs 47-51 should be struck out, their opportunity was this morning.

15. Of course, the agreed directions give Mr Tejani general permission to amend his Particulars of Claim in respect of issues of loss and damage. Given that agreed order, unusually he will not need to obtain the Defendants' agreement to his proposed amendments or seek further permission of the court. As both counsel recognised, the Defendants' remedy if Mr Tejani pleads some new case that either discloses no reasonable grounds for bringing the claim or is an abuse of the court's process is to make an application pursuant to r.3.4(2). In so far as such application seeks to attack some new formulation of Mr Tejani's case then it should be the subject of a fresh application and is not a proper basis for adjourning the current application.

16. I therefore dismiss the application.

THE COSTS ARGUMENT

17. Mr Blaker argues that the Defendants' application has been conceded and that, since his clients were the successful parties, the general rule pursuant to r.44.2 is that they should recover their costs. Alternatively, he argues that the application was properly made and that the Particulars of Claim were very obviously defective. By his oral submissions, Mr Blaker focused on the following matters:

    17.1 First, he argues that Mr Tejani has failed to show any causative link between the alleged breaches of contract and duty and losses.

    17.2 Secondly, he complains that no expert evidence was provided to support the astonishing assertion that the apartment has no value.

    17.3 Thirdly, he argues that Mr Tejani pleaded no details of the steps taken to mitigate his losses. Mr Blaker contends that the pleader should have set out the efforts made to market the apartment for sale and to find a tenant. Further, he asserts that Mr Tejani should explain the advice that has been obtained from selling or letting agents.

17.4 Fourthly, he argues that the Particulars of Claim contain broad-based allegations that are not supported by explaining the evidence upon which Mr Tejani relies. Consequently, Mr Blaker contends that his clients do not understand the case that they have to meet.

17.5 Fifthly, he says that the claim is obviously bad in that it seeks both to recover the original purchase price of the apartment and ancillary expenses and Mr Tejani's rental loss. That, Mr Blaker argues, is double recovery.

18. Further, by his written submissions, Mr Blaker contended that the Part 18 element of the application remained live until Mr Tejani's belated agreement to provide further information by 2 August 2020, and that the claim was not supported by diary entries detailing the noise problems.

DISCUSSION

19. The application notice sought to strike out paragraphs 47-51 of the Particulars of Claim. The settlement does not involve any strike-out and imposes no obligation upon the Claimant to remove those passages from his Particulars of Claim. He simply has an unfettered right to amend his pleading generally as to loss and damage. I do not accept that the Claimant has conceded the application and that the Defendants have secured the relief sought.

20. I turn therefore to the merits of the underlying application. It was made pursuant to rules 3.4(2)(a) and (b) which provide:

> "The court may strike out a statement of case if it appears to the court–
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; …"

21. The principles are not controversial:

21.1 The whole or part of a statement of case may be struck out pursuant to r.3.4(2)(a) if it does not disclose a ground of claim or defence known to law (e.g. Price Meats Ltd v. Barclays Bank plc [2000] 2 All E.R. (Comm) 346) or where the court is otherwise certain that the claim or defence is bound to fail (Harris v. Bolt Burdon [2000] C.P. Rep 70; Hughes v Colin Richards & Co. [2004] EWCA Civ 266, [2004] P.N.L.R. 35).

21.2 As Clarke LJ (as he then was) observed in Royal Brompton Hospital NHS Trust v. Hammond [2001] EWCA Civ 550, at [104], the focus in applications under r.3.4(2)(a) is upon the statement of case rather than the evidence. In that respect, the approach differs from applications for summary judgment under Part 24. Accordingly, on this application, the court must assume the truth of the Claimant's pleaded case.

21.3 While there are other categories of abuse that are not relevant to this application, the court may strike out Particulars of Claim under r.3.4(2)(b)

where they are so badly drafted that they fail to identify the case that the defendant has to meet. In such cases, strike out is, however, very much a remedy of last resort and the court should usually first allow the claimant an opportunity to file a coherent and intelligible claim.

21.4 The hurdle is, as one would expect, high. Striking out is an exceptional course and most cases should simply be defended on their merits.

22. In my judgment, the argument that paragraphs 47-51 of these Particulars of Claim should be struck out because they fail to plead the evidence relied upon is hopelessly misconceived. It entirely loses sight of the purpose of statements of case:

22.1 Rule 16.4(1)(a) provides that Particulars of Claim must include "a concise statement of the facts on which the claimant relies."

22.2 Lord Woolf MR observed in McPhilemy v. Times Newspapers Ltd [1999] 3 All E.R. 775, at page 793A, that statements of case are required to "mark out the parameters of the case that is being advanced by each party." He explained that a statement of case should identify the issues and the extent of the dispute between the parties, making clear the general nature of the case being advanced, but that the exchange of witness statements should avoid the need for extensive detail. Excessive particulars, he warned, risk obscuring rather than clarifying the issues in a case.

22.3 In Tchenguiz v. Grant Thornton UK LLP [2015] EWHC 405 (Comm), [2015] 1 All E.R. (Comm) 961, Leggatt J, as he then was, observed, at [1]:

> "Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial."

22.4 It is important that parties properly distinguish between a concise statement of facts and recitation of the evidence upon which they seek to prove such facts. Every bar student is taught that they should plead facts and not evidence, but it is regrettably a distinction that is all too often lost sight of and is increasingly responsible for extraordinary prolixity in pleadings. In Essex County Council v. UBB Waste (Essex) Ltd (No. 1) [2019] EWHC 819 (TCC), I observed, at [28], that while the TCC does not follow the practice of the Commercial Court in requiring parties to make an application for permission to file a statement of case in excess of 25 pages in length "that does not give pleaders carte blanche to file prolix statements of case in this court."

22.5 Not only is there no merit in the complaint that Mr Tejani did not plead the evidence in support of his case, but he was right not to do so.

23. Equally, there is no merit in Mr Blaker's submission that Mr Tejani should have pleaded the expert evidence that supported his claim. Not only do the Defendants again insist on evidence, but the parties cannot of course rely on expert evidence without the permission of the court: r.35.4. Exceptionally, paragraph 4.3 of Practice

Direction 16 requires claimants in personal injury claims to serve a medical report with their Particulars of Claim. There is, however, no general rule requiring the service of expert evidence at the pleading stage.

24. Further, there is no merit in the complaint that Mr Tejani did not plead the steps that he had taken to mitigate his losses. On analysis, Mr Blaker was again seeking evidence, but in any event it is of course for the Defendants to plead and prove any alleged failure to mitigate loss. Mr Tejani was under no obligation to plead anything about the issue in his Particulars of Claim, unless he sought damages for additional losses incurred in a reasonable attempt to mitigate his loss.

25. More generally, I reject Mr Blaker's overarching submission that his clients do not know the case that they have to meet. Whether it be a good case is a matter for trial, but the pleading makes clear the nature of the noise problem and that Mr Tejani claims that his apartment is as a result not fit for habitation, worthless and incapable of being let. One instinctively suspects that he overstates the position, but that is an issue for evidence and not a strike-out application under r.3.4. It is a perfectly intelligible case with which the Defendants can engage.

26. Mr Blaker is right to observe that the current formulation of Mr Tejani's losses appears to involve double counting and that he probably cannot recover both the value of the property, consequential expenses and interest and his alleged rental loss. I suspect it is more likely that at trial Mr Tejani will argue his rental loss in the alternative in the event that he fails to succeed on his primary case. That is not, however, a reason to strike out either formulation and Mr Blaker can perfectly easily plead his objection that the claim appears to seek double recovery in his clients' Defence.

27. Finally, there is no merit in the argument that Mr Tejani should pay costs because he has belatedly agreed to give further information. This was not an application for an order under Part 18. Indeed, it would have been premature to have sought an order for further information given that the Defendants only served their Part 18 request with their strike-out application.

28. For these reasons, this was therefore a bad application that, in my judgment, would have been dismissed had it not been compromised. Accordingly, I reject the Defendants' argument that they should have their costs. While I did not call upon Mr Berkley to deal with the merits of the Defendants' claim for an immediate costs order, he made plain that he did not resile from the Claimant's pre-hearing position that the proper order was for the Defendants' costs in case, although he did seek a different order in respect of the costs of today. I remarked during the course of argument as to the surprising lack of ambition in such position, but - upon the Claimant's express concession - I award the Defendants their costs of the application (but not this hearing) in the case, and will now hear counsel as to the discrete costs of this hearing.