In Summary: a review of summary disposal in light of recent caselaw, Part 3

Caytons
Changing Perceptions

INTRODUCTION

There has been a quartet of interesting recent judgments concerning the summary disposal of claims. This is the third in a series of five parts which consider this important jurisdiction with reference to the four decisions.

This note focusses on the judgment of HHJ Kramer (sitting as a High Court Judge) in *Morris v Knights* (Business and Property Courts at Newcastle, 5 October 2022)

THE FACTS

Mr Morris was a director and shareholder of a company which operated care homes. Knights acted as solicitors for him in a sale of the company. The sale was concluded in November 2006. The terms included an 'earn out' provision. This gave Mr Morris an option to continue to provide services to the company for a period of four years and such further period as may be reasonably agreed. Mr Morris took up the option. It earned him about £4m. In October 2010, he asked for the period to be extended. The buyer refused.

Mr Morris went back to Knights for advice in July 2013. They told him that he had a good case. Counsel agreed. He issued proceedings in March 2015. The claim failed. Judgment was handed down on 24 March 2017. The Judge found that it was clear from the words of the contract and accorded with common sense that the provision which he relied on was unenforceable.

Mr Morris dis-instructed Knights in April 2017. He retained his nephew's firm, Morris & Co, in their place. They wrote to Knights to ask for the files. In doing so, they told them to put their insurers on notice of a potential claim. They also appealed the judgment. The Court of Appeal dismissed the appeal in December 2018.

Just under a year later in November 2019, Mr Morris issued proceedings against Knights. He applied without notice for a stay until June 2020 to allow the parties to comply with the Pre-Action Protocol. The court granted the stay. The parties then entered into a consent order which provided for a stay of a further six months and for Mr Morris to provide a fully particularised Letter of Claim by 25 June 2020. The Letter of Claim arrived on the cusp of the deadline. In July 2020, Knights' solicitors wrote to Morris & Co asking for documents and for details of Mr Morris's case on date of knowledge. Chasers eventually flushed out a holding response in October 2020. Morris & Co blamed the delays on lockdown.

Further chasers elicited a substantive response in December 2020. This put the date of first knowledge at 24 March 2017, the date of the first instance judgment. It maintained that Knights already had all the relevant documents. The Judge found this to be the case.

The barrister who had advised Mr Morris, and who was also sued but took no part in the application, proposed a further stay of six months. The other parties agreed. The consent order of 25 January 2021 ('the Consent Order') provided that no later than 22 February 2021. Mr Morris was to clarify aspects of his claim and supply documents requested by Knights' solicitors in correspondence. He failed to do so. His solicitor provided some of the clarification requested in an email of 10 August 2021.

THE APPLICATION

In September 2021, Knights issued an application to strike out the claim and/or for summary judgment. As the rules permit and is common practice, they made the application in lieu of filing a Defence

The claim, they maintained, should be struck out on grounds that it was incoherent and could not be saved by amendment and/or that it had been 'warehoused' and was an abuse of process and/or for non-compliance with the Consent Order. Mr Morris, in turn, sought summary judgment on the grounds that Knights had no sustainable limitation defence and had disclosed no other grounds for defending the claim.

Shortly after the application was issued, Morris & Co provided the other parties with about 800 pages of contemporaneous documents.

THE LAW ON WAREHOUSING

The imagery of the warehouse originates in the speech of Lord Woolf in *Arbuthnot Latham v Trafalgar* [1998] 1 WLR. A claimant 'warehouses' a claim where it brings proceedings with no intention of getting on with them, either at all or until some future date which it might deem convenient. The applicable principles were summarised earlier this year in the case of *Alfozan v Quastel Midgen*. [2022] EWHC 66 (Comm):

1. It may be an abuse of process for a claimant to warehouse a claim by taking a decision not to pursue it for a substantial period of time, even if it decides to pursue it later.

2. However, mere delay, however inordinate and inexcusable, is not without more an abuse.

3. In deciding whether to strike out a claim for warehousing as an abuse of the court's process, it is necessary to apply a two-stage test:

    a. is the conduct an abuse; and if it is

    b. is it proportionate to strike the claim out.

4. In considering proportionality, the court should have regard to other powers it has to avoid unnecessary delay.

The Judge in *Alfazan* cited a passage from *Quaradeshini v Mischcon de Reya* [2019] EWHC 3523 to the effect that, under the present procedural regime:

1. it will be a relatively rare case in which the courts will strike out for delay in the first instance; and that

2. in a warehousing case, the courts will usually prefer to test the claimant's intention by making an unless order or imposing conditions.

But he went on to conclude that, if the court is satisfied that the claimant has no intention at all of pursuing the claim, proportionality ought to be no bar to striking out the claim. He allowed the application on the facts.

THE JUDGMENT

The Judge dealt shortly with the argument that the claim should be struck out for breach of the Consent Order. Mr Morris accepted that he was in breach but the Judge did not consider that this warranted striking out the claim. Factors which influenced his decision were that Mr Morris was not withholding anything. He had since given what disclosure he could. It emerged that he had been right to say that he held no documents which Knights did not already have, except the judgment of the Court of Appeal which they could have obtained from BAILII. They had enough information to respond to the claim, and in fact did when the Consent Order was made.

In support of their case that the claim had been warehoused, Knights relied on:

1. the lack of pre-action correspondence beyond the request for files and for the Insurer to be put on notice; and

2. a failure by the Claimant to follow the Pre-Action Protocol before issuing proceedings; and

3. serving proceedings at the very end of the four-month period of validity; and

4. applying without notice for a three month stay then doing nothing to progress matters during that period; and

5. repeated long delays by the Claimant in responding to correspondence to the extent of breaching the Consent Order.

They submitted that there were five reasons why the court should exercise its discretion to strike the claim out:

1. It was a professional negligence claim against a solicitor, which was a serious matter and could cause reputational damage.

2. The allegations were old, dating back to retainers in 2006, 2013 and 2015, respectively.

3. The Claimant was slow to seek consent to amend its Particulars and had not made any proposals to pay the Defendants' costs of and occasioned by the proposed amendments.

4. The proposed amendments did not rescue the claim and looked to have been put together in a hurry to meet the immediate need to put a document before the court.

5. Quoting from the judgment in *Alfozan*, *"The picture is of almost complete inactivity by the Claimant beyond the basics of issuing and serving the claim* (and) (t)*his history cries out for some explanation if the court is not to infer from it that the Claimant issued this case with no real intention of pursuing it."*

The Judge expressed difficulty in accepting that issuing proceedings on the cusp of a limitation deadline or serving them towards the end of the validity period was, without more, evidence of warehousing. As he pointed out, both were delays sanctioned by the law and procedural rules. Similarly, the Pre-Action Protocol expressly anticipates that proceedings might have to be issued before the Protocol is followed where limitation issues arise.

Moreover, the Judge concluded, the concept of abuse of the court's process necessarily involves conduct after proceedings are issued. He did, however, accept that pre-action conduct "*may betray a lack of commitment to a claim which can inform the court as to the whether the post service behaviour was intended to warehouse the claim".*

The Judge concluded that Knights had been wrong to insist that they did not have enough information to know the case they had to meet. Indeed, fairly or not, it comes across from the judgment that their solicitors were engaged in a cynical stonewalling strategy.

Despite this, he was highly critical of Mr Morris's solicitor, for whom the judgment cannot have been comfortable reading. He found his assertion that the files were difficult to process *"neither an acceptable explanation…nor…an excuse for ignoring correspondence".* After reciting that he was being asked to draw inferences as to the Claimant's reasons for not proceeding more swiftly, the Judge observed that *"the drawing of such inferences can be clouded by concerns as to the competence of the solicitor conducting the case. There are indications that* (the solicitor) *was out of his depth".*

Looking at the matter in the round, the Judge concluded that the case appears to have been run at minimal cost and to have *"hallmark of a case issued in the hope that the other parties will come to the table and settle if the claim grinds on long enough".* He was persuaded, on balance, that Mr Morris issued the claim with no intention of pursuing it in accordance with the rules of the court. His intention, the Judge found, was to pursue it at his convenience. It followed that he was guilty of an abuse.

He then turned to consider whether he should strike the claim out. While he accepted that the allegations could cause serious reputational damage, he made the stinging observation that "*lawyers who draft unenforceable agreements or advise parties that they have a very strong case when it is established at trial that the case in law was otherwise suffer reputational damage anyway*". He accordingly attached little weight to this. Nor did he find the age of the allegations to be a compelling factor. The claim was *prima facie* brought in time, albeit Knights raised a limitation defence. He accepted that the Particulars of Claim required amendment but found that the necessary amendments related to secondary allegations. Contrary to Knights' case, "*The core allegations have always been present and are perfectly understandable".*

This also largely disposed of Knights' argument that the claim should be struck out as being incoherent. The Judge referred himself to authority that the courts should ordinarily refrain from striking out a statement of case without giving the party concerned an opportunity to put a defective pleading right. It was relevant that the existing Particulars had been prepared in house by Morris & Co and that Mr Morris had Leading Counsel acting for him by the time of the hearing.

The Judge did not consider that the abuse he had identified would prevent a fair trial. Knights had all the relevant documents throughout. He concluded that active case management would be likely to avoid any further drift and, therefore, that striking out was not appropriate. He distinguished *Alfozan* on this point.

Turning to the competing applications for summary judgment, the Judge rejected Knights' approach as misconceived. It is not for a claimant to plead a case on date of knowledge in Particulars but for a defendant to raise the issue in its Defence. Although Knights were able to advance a case for various dates of knowledge earlier than judgment in the underlying action, none was sufficiently compelling to persuade the Judge to give summary judgment in their favour. His analysis of the limitation question is of interest in its own right but outside the scope of this note.

On the Claimant's application, the Judge accepted in principle that it was no answer for a Defendant to resist summary judgment on the basis that the court does not yet know what the defence will be. He indicated that, without more, he would have given judgment for Mr Morris. However, the flipside of his finding on date of knowledge defeated the application. Just as it could not be said that Mr Morris had no realistic prospect of establishing that he acquired the requisite knowledge at the date of judgment, it could not be said that Knights had no realistic prospect of establishing that it was in fact acquired at an earlier date.

DISCUSSION

It is no surprise that the Judge was unwilling to strike out the claim for non-compliance with the Consent Order. Knights' Counsel was unable to point to any authority in which the court struck out a claim on the first offence. By contrast, Mr Morris's Counsel relied on *Candy v Holyoake* [2017] EWHC 373 as authority for the proposition that striking out would be inappropriate where the default had not made a fair trial impossible and there were other, less onerous, ways to enforce compliance.

The courts will be much more receptive to applications on this basis where there has been a repeated failure to comply with orders, as one often sees in botched litigation claims against solicitors.

The case is also an illustration of how a claimant may avoid having an incoherent or otherwise defective claim being struck out by seeking leave to amend. However, this will not succeed in every case. Litigants in person will commonly be given the benefit of doubt but in cases involving legally represented parties, it will depend on all the circumstances.

The Judge's conclusions on warehousing are at the same time encouraging and disappointing for defendants. It is a familiar scenario for litigation to be brought on the cheap in the hope of railroading the defendant into settlement. It is welcome to see that the courts view this as an abuse. But the practical value of this is limited if it will not lead to the claim being struck out.

The approach taken to the two summary judgment applications reflects the courts' general inclination to allow cases of any complexity to proceed to trial. The case of *Harrington Scott v Coupe Bradbury* [2022] EWHC 2275 (Ch) which we looked at in Part 2 is a counterpoint to this.

One alarming aspect of the case is the Judge's willingness to entertain the argument that a defendant which has made an application for summary judgment in lieu of filing a Defence is itself vulnerable to summary judgment if the application fails. This might prompt a rethink of what has, until now, been widespread practice.

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