



Neutral citation No. [2017]
EWHC 118(OB)

IN THE HIGH COURT OF JUSTICE

Claim No. HQ15X0380

QUEEN'S BENCH DIVISION

CENTRAL OFFICE

MASTER KAY QC

B E T W E E N

**HIGHWAYS ENGLAND
COMPANY LIMITED**

Claimant

-and-

**B.G. RODWELL LIMITED
ROBERT CHEADLE**

First Defendant
Second Defendant

ALLIANZ INSURANCE PLC

Third Defendant

Appearances:

For the Claimant: Miss Hitching instructed by the Government Legal Service

For the Defendants: Mr. Jason Evans-Tovey instructed by Keoghs

Hearing date: the 4th January 2017

JUDGMENT

Factual background / the claims

1. On the 16th September 2009 an HGV driven by the Second Defendant, Mr Cheadle, whilst acting in the course of his employment by the First Defendant, collided with a bridge over the A14

between Stowmarket and Stowupland ('the bridge'). The Claimant contends that the collision resulted in damage to the overbridge.

2. The Defendants admit that the HGV collided with the bridge. The extent of the collision and of the damage is in dispute.
3. Repairs were carried out to the bridge in August 2011 at a cost of £551,612.43. The Claimant acknowledges that some of the repairs were not attributable to the damage caused by Mr Cheadle's collision and accepts that an allowance must be made to reflect that.
4. The Claimant alleges that these matters give rise to a claim in negligence by the First and/or Second Defendant. It also alleges that the First Defendant is vicariously liable for negligence of the Second Defendant.
5. Negligence is denied by the First and Second Defendants. It seeks to cast the blame for the collision on the local police, unidentified 'appropriate local bodies' or 'others' contracted to 'attend along' the route. It is asserted that advice in relation to the route for the HGV as loaded had been taken from local police and use of the A14 was advised. It is also alleged that the First Defendant gave 'notice' to unidentified 'appropriate local bodies' of the proposed route and dimensions of the HGV and such bodies did not warn that the HGV would not pass under the overbridge. As to the contractor, the plea appears to be that it did not point out that the overbridge was an obstacle.
6. As to the Third Defendant, it is asserted that a direct right of action arises under regulation 3(2) of the European Communities (Rights Against Insurers) Regulations 2002.
7. The Claimant is a company wholly owned by the Secretary of State for Transport to carry out functions on behalf of the Secretary of State including maintenance of motorways and major A roads and, inter alia, the bridge. Prior to 1st April 2015 this function was carried out by the Highways Agency.

8. At the time of the collision the bridge was owned by the Secretary of State for Transport. At the date of the collision therefore duties of care in negligence were owed by the First and Second Defendants to the Secretary of State for Transport. In these circumstances the Defendants contend that the present Claimant does not have a claim.

The Procedural history

9. The procedural background to the claims is:
 - a. Proceedings were commenced on 9th September 2015.
 - b. A Part 18 Request in relation to the Particulars of Claim settled by counsel was served in January 2016.
 - c. A Defence was served on 4th February 2016.
 - d. Replies to the Part 18 Request were served on 4th February 2016.
 - e. The Claimant served a Part 18 Request settled by previous counsel on 15th March 2016.
 - f. The same was answered in a letter of 4th April 2016.
 - g. Directions questionnaires were lodged by the Defendant on 13th March 2016 and the Claimant on 18th March 2016.
 - h. On 31st March 2016 the matter was listed for a CMC on 4th July 2016.
 - i. On 14th June 2016 the Defendants applied for strike out or summary judgment in relation to the claim.
 - j. On 24th June 2016 the Claimant applied for relief from sanctions for having filed its costs budget a day late.
 - k. On 5th July 2016 the Claimant issued an application to amend.
 - l. On 30th June 2016 the CMC was adjourned to be heard together with the applications to 4th January 2017 with an increased time estimate of 2 ½ hrs.
 - m. A substitute draft amended Particulars of Claim (settled by present counsel) was served on 7th December 2016.

The Applications

10. There were three applications for consideration

- a. By the Application Notice dated the 14th June 2016 the Defendant has applied for the claim to be struck out pursuant to CPR Part 3.4(2)(a) or for summary judgment pursuant to CPR Part 24. This application is based upon the contention that no duties were owed to the Claimant at the date of the incident.
- b. By the Application Notice dated the 24th June 2016 the Claimant has sought an order for relief from sanction for filing its Precedent H one day late.
- c. By the Application Notice dated the 5th July 2016 the Claimant has sought permission to amend its Particulars of Claim.

Consideration

11. *The Claimant's application to serve its costs' budget out of time*

- a. The Claimant served its costs' budget on the day after it was due. The explanation for the default is set out in the witness statement of Andrew Turek.
- b. The application for relief from sanction, and permission to serve the costs budget out of time is not opposed subject to the Claimant bearing its own costs in relation to making the application.
- c. In my view, and in the present circumstances, it is appropriate to order relief from sanction providing the Claimant bears its own costs of making the application.

12. *The Defendant's Application to strike out dated the 14th June 2016*

- a. The only evidence in support of this is contained in the Application Notice itself signed by Ms Jill McVerry. This raised the contention that the Claimant did not have any legal interest in the bridge at the time of the incident on the 16th September 2009 and therefore no obligations were owed in law to the Claimant at that time, and further that the Claimant was not an entitled party under the European Communities (Rights against Insurers) Regulations 2002.

- b. Mr. Jason Evans-Tovey, for the Defendants has argued that the claim is bound to fail and therefore the application should be allowed. Further he has submitted that the Claimant should not be allowed to amend the Particulars of Claim to remedy the deficiency in the original Particulars of Claim because the amendment seeks to introduce a new cause of action after a period of limitation has expired which is not permissible by s. 35(3) of the Limitation Act 1980 and CPR Part 17.4 made pursuant to s. 35(4) of the Act.
- c. *The principles with respect to striking out and summary judgment.* These are well known but the following points may be made
- (i) It is well established by the decision in *Taylor v. Midland Bank Trust Co. Ltd (No.2)* [2002] WTLR 95 that, in a suitable case, an application for summary judgment may be combined with an application to strike out under CPR Pt 3.4 or the court may treat a defendant's application to strike out as if it were an application for summary judgment and that the principles to be applied with respect to each aspect are very similar.
 - (ii) CPR Part 3.4(2) provides: "*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; (c) That there has been a failure to comply with a rule, practice direction or court order.*"
 - (iii) With respect to this rule the White Book contains the following guidance: "*The statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (Harris v Bolt Burdon [2000] L.T.L. Feb 2, 2000, C.A.). A claim or defence may be struck out as being not a valid claim or defence as a matter of law (Price Meats Ltd. v Barclays Bank PLC [2000] 2 All ER (Comm) 346, ChD. However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (Farah v. British Airways, The Times, January 2000 referring to Barratt v. Enfield B.C. [1989] 3 W.L.R. 83, HL, [1999] All E.R. 193). A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (Bridgeman v. McAlpine-Brown [2000] LTL January 19, CA). An application to strike out*

should not be granted unless the court is certain that the claim (or defence) is bound to fail (Hughes v. Colin Richards & Co. [2004] EWCA Civ. 266; [2004] P.N.L.R. 35, CA)."

- (iv) On *Summary judgments*. CPR Part 24.2 provides: "*Grounds for summary judgment - The court may give summary judgment against a claimant or defendant on the whole of a claim or a particular issue if—(a) it considers that—(i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.*"
- (v) There are a number of authorities which provide guidance on how CPR Pt 24 is to be applied which are set out in the 2016 Edition of the White Book. They include: *Swain v Hillman* [2001] 1 All E.R. 91 (CA), *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550 (CA), *Three Rivers DC v Bank of England (No.3) (Summary Judgment)* [2001] UKHL 16; [2003] 2 A.C. 12; [2001] All E.R. 513; [2001] Lloyd's Rep. Bank. 125 (HL), *ED&F Man Liquid Products v. Patel* [2003] EWCA Civ 472, *Trustees of Sir John Morden's Charity v Mayrick* [2007] EWCA Civ 4 (CA), *Nigeria v. Santolina* [2007] EWHC Civ 437 (Ch) and *Easyair Ltd. (t.a Openair) v. Opal Telecom Ltd* [2009] EWHC 339 (Ch).
- (vi) From the authorities referred to the following principles may be derived:
- (1) Although the Court should not conduct a mini trial or adopt the standard of proof, ie a balance of probabilities which would be used at a trial, the court should consider the evidence which can reasonably be expected to be available at the trial. It has been said that the rule "*is designed to deal with cases which are not fit for trial at all*";
 - (2) the test of "*no real prospect of succeeding*" requires the judge to take an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment;
 - (3) the power is discretionary;
 - (4) the court must carry out the necessary exercise of assessment but not by conducting a trial or a fact finding exercise;

- (5) it is the assessment of the case as a whole which must be looked at; accordingly, "*the criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is the absence of reality*";
- (6) ". . . *There are many cases where it is inappropriate to decide the question whether a public authority owes a common law duty of care without a full consideration of the facts which can only be undertaken at a trial. But there are some cases where it is possible to decide the question without a trial. Such a case is one where it is clear that, even if it is assumed in the claimant's favour that all the facts that he alleges are true, the claim must fail . . .*", see *In Rowley v Secretary of State for Work and Pensions* [2007] EWCA Civ 598 [2007] 1 WLR 2861 at paragraph 22 *per* Dyson L.J, as he then was;
- (7) it is not appropriate, on an application for summary judgment, to resolve a complex question of law and fact, the determination of which requires the trial of the issue having regard to all the evidence, see *Apvodedo NV v. Collins* [2008] E.W.H.C. 775 (Ch).

(vii) In addition the position was helpfully summarised by Lewison J. (as he then was) in *Easyair Ltd t/a Openair v Opal Telecom Ltd* [2009] EWHC 339:

- (1) The court must consider whether the Claimant has a "real" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
- (2) A "realistic" case is one that carries some degree of conviction. This means a case that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
- (3) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
- (4) This does not mean that the court must take at face value and without analysis everything that a party says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
- (5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for

summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

- (6) Where a summary judgment application gives rise to a short point of law or construction the court should decide that point of law if it has before it all the evidence necessary for a proper determination and provided the parties have (as here) had sufficient time to address the point in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim.
- d. Although the Defendants have made their case upon the basis that as the Claimant did not exist in 2009 and they cannot have owed any duties to this Claimant that misstates the fundamental issues which are:
- (i) whether the Defendants owed duties with respect to the then owners of the bridge,
 - (ii) were they in breach of those duties and,
 - (iii) does the present Claimant have title to sue in respect of those duties.
- e. In bringing a claim it is inherent that the Claimant asserts title to sue. That there was doubt as to whether the Claimant does have title to bring the claim was raised by the Defendants through the request for further information drafted by Mr. Jason Evans-Tovey. In my view the answer to that request provides a complete response to the present application because it explains that:
- (i) Title to the bridge was transferred to the Claimant on 1st April 2015 by a Transfer Scheme dated 30th March 2015 made pursuant to the Infrastructure Act 2015, and
 - (ii) Causes of action including the cause of action in negligence in the instant case, and the related claim against the Third Defendant were also transferred by the Transfer Scheme.
- f. In these circumstances the claim was sufficiently pleaded and what remains are issues of fact which are to be decided at trial. There is insufficient material to support the assertion that the existing claim is bound to fail and therefore it must be rejected.

13. *The Claimant's application to amend*

a. Mr. Jason Tovey has argued that, in order to remedy the defect in its pleading the Claimant needs to apply for permission to amend and that permission should not be granted because of the effect of s.35 of the Limitation Act 1980. In my view this submission is to be rejected because:

- (i) As I have already stated the existing pleading is adequate and therefore no amendment is necessary;
- (ii) The amendment does not, in my view substitute a new claim;
- (iii) Even if the pleading is to be considered as substituting a new claim it is one which clearly arises out of the same set of facts as already pleaded, namely the collision with the bridge and it would be appropriate to exercise the court's discretion in favour of the Claimant.

b. Miss Hutchings submitted:

- (i) The Claimant is not seeking to amend to introduce a new cause of action. The cause of action pleaded against the First and Second Defendants is in negligence (and against the First Defendant also vicarious liability for the negligence of the Second Defendant). The Claimant does not seek to bring any other claim against them.
- (ii) Similarly, the Claimant does not seek to bring a new claim against the Third Defendant. Its claim always has been and remains one under the European Communities (Rights Against Insurers) Regulations 2002.
- (iii) By the proposed amendment the Claimant seeks better to particularise why it is entitled to bring the claims that it has always advanced. Rather than simply doing so by way of replacement answers to the Request for Further Information served by the Defendants it does so by way of amendment to the Particulars of Claim.
- (iv) The dictum of Longmore LJ in *Berezovsky v Abramovich* [2011] 1 WLR 2290 at para 59 is pertinent to the present case. He said: "*A cause of action in tort has, as its essential ingredients, a plea of duty, breach of duty and consequent damage to the claimant. If it happens to be the case that an element of one of those essential ingredients is misstated, misdescribed or omitted, it does not mean that a correct statement, description or inclusion is a new cause of action; even if the formal*

result of such a statement misdescription or omission might technically be that an unaltered claim would have to be dismissed, that still does not mean that a corrective alteration involves or constitutes a new cause of action.”

- (v) The proposed amendments do not introduce any new cause of action. They simply address the lack of clarity and particularity as to one ingredient of the causes of action already pleaded, namely the Claimant’s standing to sue. The Particulars of Claim at paragraphs 1 and 11 attempted to address this, so the failing is (at most) a misstatement or misdescription. However even if there had been no mention of the Claimant’s standing to sue an amendment to particularise it would not amount to bringing a new cause of action, but would fall under Longmore LJ’s category of ‘omission’.
- c. In my view Miss Hutching’s submission on the above points should be accepted. In coming to that conclusion I have in mind the dictum of Coleman J in *BP PLC v Aon Ltd* [2006] 1 Lloyd’s Rep 549 at p.558 which was approved by the Court of Appeal in *Ballinger v Mercer* [2014] 1WLR 3597. Colman J said:

“52. At first instance in Goode v Martin [2001] 3 All ER 562 I considered the purpose of section 35(5) in the following passage: ‘Whether one factual basis is “substantially the same” as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which the qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.

“53. In Lloyd's Bank plc v Rogers [1997] TLR 154 Hobhouse LJ said of section 35: ‘The policy of the section was that, if factual issues were in any event going to be litigated between the parties, the parties should be able to rely on any cause of action which substantially arises from those facts.’

54. The substance of the purpose of the exception in subsection (5) is thus based on the assumption that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the

pre-existing matters [in] issue, already have had to investigate the same or substantially the same facts.”

- d. As I have already stated it appears to me that title to sue is the central ingredient with respect to this application and that was a matter which was always potentially before the court even if it was not clarified until the response was provided to the request made by the Defendants. It does not appear to me that the Defendants will be placed in a position where they will be obliged to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which could reasonably be assumed to be within the ambit of the claim when first brought.
- e. To the extent that it is necessary to consider the exercise of the court’s discretion under CPR 17.1(2)(b) the following matters are, in my view, relevant:
 - (1) The Defendants will not need to make any new investigations. Title to sue was a matter which stood to be considered from the moment the claim was made;
 - (2) Although the Defendants may wish to review the Transfer Deed and the statutory framework that was always a matter facing them if they wished to take issue with the Claimant’s right to sue. In any event any additional time and cost should be modest and may have been incurred already, as the Transfer Deed was supplied in August 2016 and the Defendants have raised questions in respect of it.
 - (3) No delay should be caused to the progress of the claim going forward. The amendment is not one that will slow down any of the steps in the timetable.
 - (4) The amendment is sought due to failings in the original pleading. If the application is refused satellite litigation is likely (subject to the argument that the claim would not necessarily be struck out). It is preferable that the substantive issue is dealt with in these proceedings rather than in other proceedings.

Conclusion

14. For the reasons set out above:

- a. The Defendant's Application dated the 14th June 2016 is dismissed.
- b. The Claimant's Application dated the 24th June 2016 (for relief from sanction) is allowed.
- c. The Claimant's Application dated the 5th July 2016 (for permission to amend the Particulars of Claim) is allowed.

Dated this 27th day of January 2017