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IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION

Neutral Citation Number  
**[2022] EWHC 634 (QB)**  
No. QB-2019-004230

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Friday, 4 February 2022

Before:

MASTER DAGNALL

B E T W E E N :

PAUL JOHN TONER

Claimant

- and -

- (1) TELFORD HOMES LIMITED
- (2) BISHOPSGATE APARTMENTS LLP
- (3) AVANTGARDE – BGR MANAGEMENT LIMITED
- (4) RENDALL AND RITTNER LIMITED
- (5) ESTATES AND MANAGEMENT LIMITED
- (6) BRIGANTE PROPERTIES LIMITED

Defendants

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THE CLAIMANT appeared in Person.

MS A. PROFERES (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the First and Second Defendants.

MR C. MOSS (instructed by Radar Limited) appeared on behalf of the Third Defendant.

MR J. BERESFORD (instructed by DAC Beachcroft LLP) appeared on behalf of the Fourth Defendant.

MR H. LEDERMAN (instructed by J B Leitch Ltd) appeared on behalf of the Fifth and Sixth Defendants.

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**APPROVED J U D G M E N T**

**(Hybrid Hearing)**

MASTER DAGNALL:

- 1 This judgment is consequential upon the written judgment which I handed down on 5 March 2021 (which I will call “the March judgment”) and the order made then (which I will call “the March order”) and various orders thereafter and applications from the claimant to amend of 26 November 2021, and for protective relief from sanctions dated 7 January 2022, and from the defendants to strike out in relation to the High Court claim by notice of application of 23 December 2021 and in relation to the County Court claim by notice of application of 22 December 2021.
  
- 2 This judgment is shorter than it might be as a result of, firstly, the time required to prepare it; secondly, the need to get on with the hearing and, thirdly, the fact that it can be filled out in relation to particular points if a transcript is sought and it is indicated that a particular point was not covered or is sought for further detail to be given; and, fourthly, because it seems to me that the parties need my essential reasons in order to be able to proceed with the hearing in accordance with the overriding objective.
  
- 3 I have borne in mind all the documents to which my attention has been drawn, together with the defendants’ skeleton arguments, the claimant’s position statement and the various submissions, oral and written, which I have received.
  
- 4 Essentially the March order followed the March judgment and required the claimant to produce revised amended particulars of claim and also Part 18 information. The claimant says he has now done so and says that he has complied with my order, at least with regards

to existing claims, and also wishes to amend in various respects, including to advance certain new claims.

5 The defendants say that, firstly, the claimant has been in breach of my orders; secondly, that he is still in breach of my orders; thirdly, that the claimant is subject to an implied sanction from the March order, which means that the claims cannot proceed unless relief from sanctions is obtained under CPR 3.9 in accordance with the well-known *Denton v White* principles; fourthly, that in any event the claimant has been in breach of my orders and the proportionate response is to strike out the claim; fifthly, if the claim is to proceed that the Part 18 information and proposed amendment should not be permitted as being contrary to the rules and the general law and amounting to an abuse, and that they should not be allowed, and including that new claims should not be allowed due to the law regarding limitation. It is said that the documents contravene the rules of pleading and stating cases, but also that amendment should be refused as a matter of either discretion or a sanction for breach of my orders or a combination of the two.

6 There are, of course, two claims, one in the High Court against defendants 1 to 6, and one in the County Court against Mr Kyriacos Prodromou but also against Rendall and Rittner Limited, who are at least presently the fourth defendant in the High Court claim.

7 I remind myself as to what these claims are about, being that the tenant purchased what is now Flat 57, Courtyard Apartments, 3 Avantgarde Place, London E1 6GU on a long lease; that the contract, which provided for the building of both the flat and the buildings in which it is located, was dated 21 December 2012 and made with the second defendant and the third defendant. The completion of that contract took place on 29 November 2013 by a long lease

being granted by the second defendant to which the third defendant was a party as the management company for the residential building.

- 8 The claimant tenant alleges, firstly, that he entered into the contract and then the lease as a result of fraudulent misrepresentations from the first three defendants, that is including the first defendant which is the group holding company and alleged to have been the agent of the second and third defendants. Those fraudulent misrepresentations were with regards to the external balcony of the flat and also the prospective level of service charges.
- 9 Secondly, the claimant alleges that the second and third defendants have both breached the contract in relation to defects to the flat and the building as well as with regards to the balcony which was installed. Further, that the third defendant has breached the contract by putting into the costs from which the service charge has been derived the costs of remedying certain of the defects rather than recovering them from the second defendant.
- 10 Thirdly, the claimant alleges harassment, essentially in the High Court claim, that all the defendants, or at least all the defendants apart from the fourth defendant, have pursued a strategy of constant acts of harassment designed to wear him down so that he does not pursue his legitimate claims, and, in the County Court claim, against the fourth defendant in the High Court claim, as the managing agents of the property, it being the second defendant in the County Court claim, and Mr Prodromou, being the first defendant in the County Court claim, and having been for a period of time the managing agent's concierge, on the basis that they have both assisted in that strategy but have also attacked him in numerous ways.
- 11 Fourthly, the claimant alleges that the managing agent Rendall & Rittner, the fourth defendant in the High Court claim and second defendant in the County Court claim (who I

will call “the fourth defendant” generally for these purposes) and the concierge, Mr Prodromou, have carried out numerous positive acts which have interfered in his enjoyment of the flat and have caused him harm, and also are guilty of various acts and omissions which have interfered with his health and safety, including in particular by the switching on and running of what the claimant says is a defective air conditioning unit, causing him very considerable deprivation of sleep and consequent ill health.

12 The summary of the matter seems to me to be perfectly clear as being the claimant’s case, at least in the proceedings as they are presently constituted, to both the defendants and the court and as also set out in the March judgment. If necessary, it, or something like it, can be included as a summary of the claimant’s case on the court file.

13 Mr Toner, the claimant, however, has also made in the past, and seeks to make by amendment now, various other claims. For the reasons given in the March judgment and this judgment, I have not permitted many of them to be advanced. I will come back to that in due course.

14 What happened following the issue and service of the proceedings and defences being filed by some of the defendants in the High Court claim, is that the first to fourth defendants, but not the fifth and sixth defendants, sought to strike out the High Court claim and/or to obtain reverse summary judgment on it, and in the County Court claim the defendants there, the managing agents and the concierge, sought strike out and for reverse summary judgment. I transferred the County Court claim to the High Court so that I could deal with those applications together at once. After three days of argument I reserved judgment and then, on 5 March 2021, handed down the March judgment.

15 The summary of my conclusions as to what I should do in consequence of those applications is set out in para.255 of that judgment:

“The upshot of the above is that:

a. I will strike-out or grant reverse summary judgment or an equivalent declaration in relation to:

i. The claims for negligent or statutory misrepresentation

ii. The claim for rescission of the Contract and the Lease

iii. The claims for breach of the Contract against THL

iv. The claims (presently made) for breach of the Contract (other than in relation to Service Charges) against Avantgarde

v. The claims for breach of contract against R&R

vi. The claims for breach of a duty of care in relation to purely negative failures (not being a negative failure in consequence of a positive act, or in relation to a danger to safety or health resulting in personal injury, and specifically not including in relation to the Air Conditioning Unit) against R&R and Mr Prodromou

vii. The claims in defamation

b. I will not (subject as follows) strike-out or grant reverse summary judgment in relation to the other claims, but I will require Mr Toner to file and serve a proper set of Part 18 Information setting out in numbered paragraphs (i) the alleged (alternative) misrepresentations (of then current fact) and (ii) the facts (and not the argument or the evidence) relied upon by him to state and infer fraud and deliberate concealment; in relation to the Balcony, and also (and without which there will be

strike-out, and which may lead to a renewal of the strike-out application) the Service Charges

c. I will not strike-out individual pleaded allegations of fact unless I have struck out all of the claims in law which rely upon them (including by way of assertions of damage caused).

For the avoidance of doubt, the strike-outs and reverse summary judgments are for the future in the sense that they have not occurred at this point in time but that the Order to be made at (the end of, including after any further adjournments of) the adjourned hearing referred to below will effect them. This is so that it is clear that all facts remain at this point in time in issue (and so as to avoid the problems identified in *Libyan Investment Authority v King* [2020] EWCA Civ 1690).”

In terms of what was going to follow from that, I dealt with that initially in para.256 of that judgment:

“I will hear the parties as to what should happen next but I am concerned that (1) these Claims should be managed and heard together, as otherwise there will be duplication and waste (2) I am unclear as to the quantum of these Claims and which may well be most suitable for the County Court (3) this hearing (and the length of this judgment) may well have been disproportionate and the matter needs to be taken to a resolution.”

16 I remain of the view that I have considerable concerns in my own mind that the procedural matters in this case have become somewhat disproportionate and, together with the

statements of case, have had the practical effect of obstructing the resolution of this claim, a claim which, as I said in the March judgment, seemed to me then, and still seems to me, to raise real issues (on which Mr Toner has real prospects of success) which ought to be determined by the court. This includes with regards to the balcony for the reasons I have set out in the March judgment, and also with regards to the defects, or alleged defects, which the defendants have not sought to argue simply have no real prospect of success as a matter of fact, although they do raise arguments that the claims based on them should not succeed as a matter of law, including the law of limitation.

- 17 With regards to progressing the matter, I dealt with that in para.257 of the March judgment which I now read into this one:

“This judgment is being handed down at a hearing which will be adjourned to a further date with a 2 hours listing on the basis of all questions of permission to appeal and time for appealing (which will be extended until further order), directions (including as to strike-outs and reverse summary judgments being effected and any amendments) and costs being adjourned to then and at least 14 days before which Mr Toner will have provided his drafts of (1) the Further Information required above and (2) any amendments he seeks to make (although those would have to be presented to the Court in a sensible form which would enable sensible response and it may be that Schedules listing material events in relation to different categories of claim might, if anything, be appropriate).”

I suspect that it might well have been better if I had just simply listed a hearing so as to make clear to Mr Toner, the claimant, as to what he would have to do next but, instead, I made the March order, which no one, including Mr Toner, sought to set aside or vary within



the period of time which I gave for an application to be made bearing in mind that I made that order on papers.

- 18 In that order I recited the handing down of the March judgment and made various directions, including for there to be an adjourned hearing to take place, initially listed for 17 May 2021. With regards to what was to be considered there, I set that out in para.2 of that order:

“(2) There shall be considered at the Adjourned Hearing:

- a. All questions as to costs (and costs are reserved to the Adjourned Hearing)
- b. What is to happen to the statements of case in the light of the Judgment and generally and all orders consequential upon the Judgment (and the actual occurring of any strikings-out and grants of summary judgment are postponed to the Adjourned Hearing (and any possible adjournments thereof)).”

- 19 In terms of what needed to be dealt with beforehand, I first required Mr Toner to produce various documents, as set out at para.3 of that order:

“(3) The Claimant shall by 4.30pm on 16 April 2021 file and serve:

- a. proposed revised amended Particulars of Claim to accord with the Judgment (with relevant elements being struck-out to comply with the Judgment), and to include any amendments (shown underlined or in red) which he seeks to make
- b. Further information setting out his allegations (including any alternative allegations) of:

- i. What were the Representations made regarding (1) the Balcony and (2) the Service Charge, and including whether or not such were continuing; and in relation to each such Representation
  1. What was false about it (and when it became false) and why
  2. All facts alleged from which it is alleged that Fraud is to be inferred in relation to the Misrepresentation (being that both the making of the Representation and its Falsity was known or that there was recklessness as to such)
- ii Deliberate Concealment and all facts alleged from which it is alleged that Deliberate Concealment is to be inferred in relation to facts constituting (1) the falsity of any representation (2) any breach of contract, in each case being what was concealed, and by whom and why it is said that such concealment was deliberate, and including (a) if it is alleged that there was any relevant breach of duty and if so then (b) (I) what was the duty and what was its breach and (II) why it is said that it should be inferred that such breach of duty was deliberate and intentional)
- iii Loss in terms of over-payment for the Flat (being the extent to which he paid more than the Flat was worth at completion)
- iv Loss in terms of undervalue of the Flat (being the extent to which the Flat was worth less at completion than it should have been).”

In paras.(4) and (5) of that order, I provided for the defendants effectively to respond and for the parties to propose directions to take the matter forward.

- 20 Mr Toner's documents were to be produced by 16 April 2021, where I felt that slightly over one month would be sufficient for him to do so. In fact, Mr Toner only produced drafts of some of the documents by shortly before the 17 May date itself. In part, that was due to Mr Toner seeking to introduce substantial new claims into the litigation. In part, it seems to me it was because what I had in fact set him to do was somewhat of a heavy task. Mr Toner has adduced evidence to say that his health and other issues, such as the effects of the pandemic and himself catching Covid, contributed then and thereafter to his problems.
- 21 What did happen though was that the defendants agreed that the 17 May hearing ought to be vacated and adjourned and I acceded to that. Initially I refixed the adjourned hearing to November, due to difficulties in finding any earlier date which was convenient to all the parties and advocates involved. It then turned out that one of the counsel of one of the defendants became double-booked and, as a result, I vacated the November date and refixed the matter for the end of January and beginning of February 2022, simply because no other dates were convenient. The defendants had, in fact, said that, in the light of the need to vacate the November date, that an earlier date should be used. Mr Toner objected and said that he needed substantial preparation time and that the timetable would not work. I did not see as to why I should particularly assist the defendants in that regard in circumstances where there was potential prejudice to Mr Toner and the orderly course of the matter and it seemed appropriate to me to relist the January and February dates, as I did and as this hearing has actually taken place.
- 22 I set a new timetable by order of 6 August 2021, which included further orders as to what documents Mr Toner must produce in circumstances where it seemed to me that his previous drafts simply did not comply with my March order and, in particular, because they did not contain the further information document which I had required by it. I provided for

him to produce further documents by 29 October 2021, which it seemed to me would give plenty of time. Mr Toner did not, in fact, comply with that time period and sought various further extensions, although generally by applications made, strictly speaking, within time. I made further orders granting him further time on 20 October and 10 November 2021. However, I put in all those orders that the defendants were to be treated as having objected to the extension, and as having applied to set aside or vary those orders so as to effectively remove the provisions for those extensions of time, and with those objections and matters all to be dealt with at this hearing.

23 Mr Toner still, although he did produce the documents eventually in purported compliance, it seems to me, did not technically at least, in view of the precise timings, comply even with the various extensions which I granted. This has been a matter of considerable concern to me but, having assessed the material together and having considered the defendants' submissions, it does not seem to me that at the end of the day this has caused actually very real substantive prejudice or that it has disrupted the progress of the litigation so as to significantly prejudice this hearing, which would, it seems to me, have had to have taken place in any event and would always in any event have to have had a much longer listing than the 17 May original listing.

24 On the other hand, I do bear in mind throughout this judgment, that Mr Toner has not complied with numerous of my orders in the past, and which orders, it still seems to me, gave him lengthy and reasonable time periods. Secondly, that Mr Toner's various explanations and justifications for what has happened are heavily related to his desire to introduce new claims. If he had not sought to do so, it seems to me that even with his various health and other problems, he could have in much better time complied with my various orders. Also, what has happened has given rise to two sets of documents, the May

ones and then the replacement, namely those following the November orders. I also bear in mind that, although Mr Toner is entitled to apply to amend under the rules, the fact that he did not include the various new claims at the start, is very much his responsibility because he knew of all the material facts at the earlier points in time, although that does not apply to certain allegations of continuing harassment.

25 The defendants submit that the breaches of my various orders mean that I should strike out the claim now, although they confine those contentions to what they say are various breaches of the rules, both the Civil Procedure Rules and of pleading and stating cases. The fourth defendant in particular, although the others appear to join in with this, contends that my March order contained an implied sanction which effectively bars Mr Toner from pursuing his claims altogether. Mr Toner disputes that that implied sanction exists but says that if he does need relief from sanctions then he applies for it and he has made an application to that effect.

26 As I say, the defendants' alternative case is that the breaches of the orders and the rules mean that I should strike out Mr Toner's claims entirely, even though the March judgment says that certain of them, in relation to identified existing claims, have real prospects of success.

27 I have had to consider all of this in the context of the Civil Procedure Rules' overriding objective, as set out in 1.1 of the Civil Procedure Rules:

“(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;

(b) saving expense:

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.”

28 The overriding objective is that the court will seek to case manage so as to deal with the case justly and at proportionate cost, including, in particular, with regards to the various matters listed in sub-rule (2). I bear in mind that sub-rule (2)(f) includes within the overriding objective “enforcing compliance with rules, practice directions and orders.”

29 I have reminded myself also of CPR 3.1A:

“(1) This rule applies in any proceedings where at least one party is unrepresented.

(2) When the court is exercising any powers of case management, it must have regard to the fact that at least one party is unrepresented.

- (3) Both the parties and the court must, when drafting case management directions in the multi-track and fast track, take as their starting point any relevant standard directions which can be found online at [www.justice.gov.uk/courts/procedure-rules/civil](http://www.justice.gov.uk/courts/procedure-rules/civil) and adapt them as appropriate to the circumstances of the case.
- (4) The court must adopt such procedure at any hearing as it considers appropriate to further the overriding objective.
- (5) At any hearing where the court is taking evidence this may include—
- (a) ascertaining from an unrepresented party the matters about which the witness may be able to give evidence or on which the witness ought to be cross-examined; and
- (b) putting, or causing to be put, to the witness such questions as may appear to the court to be proper.”

Mr Toner is, of course, an unrepresented party and I must, and do, have regard to that.

30 The defendants have reminded me that r.3.1A was considered, amongst other things, by the Supreme Court in *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, and that, as stated in the **White Book at 3.1A.1**, “the rule does not lower the standard of compliance with rules or court orders which litigants in person are required to achieve. On an application for relief from sanction under 3.9, the fact that the person is unrepresented is most unlikely to amount to a good reason for breach. This being so, it is all the more important that the court should make allowances for litigants in person by setting clear and achievable directions under r.3.1A(2) or (3).”

31 However, I also need to bear in mind that since *Barton v Wright Hassall LLP*, the Civil Procedure Rules’ overriding objective has itself been amended. Paragraph 1.1(2)(a) now

includes provisions that the overriding objective includes ensuring that parties can participate fully in proceedings. Also there has been introduced a new practice direction, 1A, which I read generally into this judgment, and which seems to me to involve the court having to consider whether a party is vulnerable within the meaning of that practice direction. That can be the case for all sorts of reasons, including, as set out in para.(4), their own mental health conditions and the impact of the subject matter of the litigation or facts relevant to the case upon them. In that case, where the court identifies a vulnerability, as it should be keen to consider doing under para.(6) of the practice direction, it should consider as to whether it is necessary to make directions as a result, and there is provided in para.(7) and (8), that the court should consider making appropriate orders all designed to achieve the overriding objective.

32 I have in the bundle a witness statement from Mr Toner as to what he says are the major effects on him and his health, including effectively his mental health, as a result of the defendants' alleged conduct and wrongs. This litigation itself, he would say, is consequential upon those alleged conduct and wrongs and the way in which he contends that the defendants have pursued that litigation and their defences, linked with the effects on him of Covid and what he says are his other health problems. I have also read his various documents closely and heard from him and observed him in person.

33 It seems clear to me that, however Mr Toner presents and whatever capabilities he has in both written and, for that matter, oral English and information technology, that the general history of this matter, including the litigation, has had a very great effect on him. One way or another, it has affected his mental state and led him into a situation which is at least close to something of obsession. I say that "one way or another" because I cannot say that what has happened is the fault of the defendants. That would involve my having to determine the



underlying matters in the litigation and also to consider the very, very detailed history of how the litigation has been progressed. It seems to me that it would be quite contrary to the overriding objective to have to go into such an exercise.

34 But it does seem to me that Mr Toner is in a state where he is properly described as “vulnerable” and that he has difficulties in participating fully and properly in litigation of this nature, which involves complicated questions of fact and of law. It seems to me that this is a classic situation where, firstly, his being a litigant in person and, secondly, his being vulnerable, makes it somewhat difficult for him to understand, appreciate and follow the procedural rules of pleading and statements of case and that Practice Direction 1A, and the amendments to the overriding objective Rule 1.1(2)(a), drive me towards the situation where I ought to be taking steps to ensure that Mr Toner can properly put forward his case. But, on the other hand, I have to balance against that, firstly, that there are other relevant overriding objective factors going in the other direction, including the importance of compliance with rules, practice directions and orders, and also that dealing with a case fairly involves dealing with it fairly as far as the defendants are concerned as well as Mr Toner. Secondly, that there are limits, as a result of that, as to what the court can and should do.

35 I turn then to the rules with regard to statements of case and to that which used to be called “pleading”, and bearing in mind that there are both general rules and specific rules which exist with regards to pleading fraud and other conduct which has a wrongful mental element. I have dealt with the general rules and principles in a set of citations from previous case law which are set out in para.27 of the March judgment. I have sought to repeat those particular points and clarify them to Mr Toner in various orders that I have made and further reasons which I have added to those written orders.

36 The most important element of those rules are, in essence, firstly, that particulars of claim and statements of case should be concise. Secondly, that they should simply state the facts relied on, that they should not state either the evidence as to how those facts are going to be proved or argument, including as to why it is said the claimant is correct or why the court should decide in favour of the defendant. Thirdly, in relation to allegations of fraud or other wrongful states of a person's mind, which includes whether they know they are making certain representations and whether they know that they are not true, although here knowledge includes recklessness as to whether they are true or false, it is necessary also to set out the facts which are relied on, that is to say those facts which, if proved, without more, would result in a judge deciding that on the balance of probabilities such a wrongful state of mind existed. I do, however, bear in mind that that is all much easier said than done, especially in relation to litigants in person and all the more especially in relation to vulnerable litigants in person, although my experience, as has been the experience of the courts over the years, is that it is not necessarily an easy and simple task even for the most experienced professional litigators and counsel.

37 Mr Toner says, with some force, firstly, that the defendants submit that his statements of case are not concise and then complain that they need a vast amount of particularisation which he says, therefore, necessarily results in them being long. Secondly, that the boundaries between what are facts, on the one hand, and what is evidence and argument, are somewhat blurred and especially in relation to particulars of wrongful states of mind because, effectively, those particulars amount to an argument that a wrongful state of mind should be inferred.

38 I have borne those various competing matters in mind, although it does seem to me that the court needs to be astute that where a claim in fraud or wrongful state of mind is advanced,

that the matter does have to be properly particularised but also, balancing against that, that litigants, and in particular a vulnerable litigant in person, should not be barred from advancing a claim which appears to have real prospects of success by an overly technical approach to such matters as to what precisely is evidence or argument especially where it is blurred between whether a wording is simply that or is also an assertion of fact.

39 Turning to the actual issues before me, I deal first with the defendants' argument that Mr Toner cannot advance his case at all because he is subject to a sanction which bars him from doing so and for which he needs relief from sanctions. Submissions on this point primarily came from Mr Beresford, all of which I have borne in mind, and the following is essentially a summary. Mr Beresford accepted that the March order does not contain any express sanction if the time limit in it is not met. Rather, he says that there is an implied sanction that Mr Toner has to amend his case in order to proceed and that he is given a strict time limit within which to produce the relevant amendment document. He submits that that time limit was not complied with and that there is an implied sanction that if it is not complied with Mr Toner cannot amend and, since he requires an amendment document to proceed, he simply cannot proceed and that, therefore, there is a sanction that if the time limit is not complied with Mr Toner cannot proceed.

40 It seems to me that what is underlying this contention is that the defendants wish to be able to argue, as Mr Beresford has then sought openly to do, that the consequences of this is, firstly, that if Mr Toner seeks an extension of time he cannot simply rely on CPR 3.1 and a general discretion, but has to proceed on the basis that he is seeking relief from sanctions so that r.3.9 becomes specifically the rule which applies and that the full/*Denton v White* approach has to operate in order to decide whether or not relief from sanction should be given.

41 Secondly, Mr Beresford submits that since the implied sanction exists, the fact that to strike out is a draconian course and is generally stated, as, for example, in the **White Book** notes 3.4.17, to be the last resort in terms of the court's reaction to a breach of an order or rule or abuse is not in point. He submits that if there is an implied sanction then the court has already determined, or is deemed to have determined, that striking out or not permitting the claims to proceed is a proportionate response to the non-compliance of the order. While Mr Beresford would accept that whether or not a claim is prevented from proceeding is a matter to bear in mind at the third stage of the *Denton* analysis of what is just in all the circumstances of the case, he submits, since he contends the implied sanction exists, the court has effectively already decided that if Mr Toner does not comply with the time limit that it is proportionate for him not to be allowed to proceed with the claim.

42 In terms of asserting that there is such an implied sanction, Mr Beresford drew my attention to a number of cases, the first being *In the matter of Wolf Rock (Cornwall) Ltd* [2020] Bus LR 2348. There the question was whether an order giving an extension of time for service of evidence for the purposes of a final hearing carried with it an implied sanction that, if it was not complied with, the additional evidence could not be adduced, which would then bring into play r.3.9 and the full *Denton v White* approach. As in this case, there was no express sanction provided in the relevant order. HHJ Matthews, sitting as a Judge of the High Court, and therefore in a position where his fundamental reasoning is binding upon me, dealt with the question as to whether or not there was an implied sanction in para.17:

“No specific sanction is prescribed for breach of the orders. However, in recent years case law has built up the concept of *the implied sanction*, to which the *Denton/Mitchell* principles are equally applicable: see the decisions of the Court of

Appeal in *Sayers v Clarke Walker* [2002] 1 WLR 3095, CA, *Robert v Momentum Services Ltd* [2003] EWCA Civ 299, *Baho v Meerza* [2014] EWCA Civ 669 and *Altomart Ltd v Salford Estates (No 2) Ltd* [2015] 1 WLR 1825. In the last of these cases, the respondent to an existing appeal sought to file a respondent's notice out of time. Moore-Bick LJ (with whom Ryder LJ and David Richards J agreed) first of all pointed out the limited scope of the relief from sanctions provisions of the CPR (rules 3.8 and 3.9):

‘10. In my view it is clear from the language of rule 3.8 that it is concerned with a sanction imposed by the very rule, practice direction or order of which the applicant is in breach, hence the use of the words 'imposed by the rule, practice direction or court order.' In such cases the consequences of default are spelled out; a classic example is an 'unless' order. Rule 3.9 does not repeat the words 'by the rule, practice direction or court order', but Rule 3.8 provides the context in which rule 3.9 has to be read and in my view it is also directed to sanctions in the sense of consequences imposed by the rule, practice direction or order of which the applicant is in breach. Most rules, practice directions and orders, however, do not provide specific sanctions for their breach, leaving it to the court to decide what, if any, consequences should follow. In my view rule 3.9 does not, therefore, apply to such cases and an application for an extension of time is not one that falls within the scope of rule 3.9, either expressly or by analogy. Such applications are governed by rule 3.2(1)(a).’”

In para.22 he said:

“Accordingly, as a result of this line of authorities, I understand the position to be that, although there are cases where the rule or order does not expressly state a sanction and the court by a process of interpretation nevertheless construes the rule or order as impliedly containing one, there are *also* cases where there is *no* intention to create a sanction but the law for policy reasons treats the case as one *analogous* to an application for relief from sanctions, and applies the *Denton/Mitchell* principles.”

He held that an order might well contain an implied sanction. In para.26 he said:

“I too respectfully agree with the view of Martin Spencer J that it would be wrong "to imply the need to apply for relief from sanctions in all cases where a rule or practice direction contains" the word 'must'. It is a question of construction and, as is well known, in questions of construction context is everything. Subject to one important caveat, I also agree with the Chief Master's view that counsel's tripartite categorisation of sanctions cases was "a helpful categorisation". The caveat is that, for the reasons already given I consider that counsel's second category of cases where there is an implied sanction, in fact is divided into two: (1) those where the intention of the rule-maker or judge is to impose a sanction which has not been expressed, and (2) those where the rule-maker or judge had no intention to impose a sanction, but for policy reasons the case is treated as one of relief from sanctions.”

He identified two categories of implied sanction, the first being where that was actually the judge's intention; the second being where for policy reasons the case is treated as one of relief from sanctions. I further read paras.27 and 28 into this judgment:

“27. All that said, I respectfully doubt whether some of the further comments which the Chief Master made are completely compatible with the approach taken, and the comments made, in the decisions of the Court of Appeal in *Altomart*, to which I referred earlier. I am thinking in particular of his comment in paragraph 34(1) that

‘since it is open to the court to impose an express sanction in an order, it will be rare of the court to be able to reach the threshold for implication. After all, if it is so obvious that the court intended there to be a sanction, why was it not expressed.’

28. That may be true of the case of implied intention *in fact* to impose a sanction (though in this case I need not and therefore do not so decide), but it is in my judgment irrelevant in the case where for policy reasons the case is treated as one of relief from sanctions. The question in the present case is whether, when the court has set a timetable for the filing and service of evidence leading to a hearing, and a party fails to abide by it, an application for relief from sanctions under CPR rule 3.9 is necessary. The respondent's argument here is not that the court *intended* a sanction, but that the setting of a timetable for evidence for a hearing requires that breaches of the timetable *be treated analogously* to cases where sanctions are expressly imposed.”

43 The judge actually considered that there was an implied sanction in relation to the case before him at para.35 of that judgment:

“It is impossible to believe that the court in its case management orders of 25 June 2019 and 23 July 2019 that evidence should be filed and served by certain dates was

implying that it was content that evidence that was not filed and served in accordance with those directions should nevertheless be admitted at the hearing without further ado. On the contrary, that would set at naught the whole point of the case management orders. The obvious inference is that such evidence would not be admitted at the hearing of the petition *without the permission of the court*. At the same time, no specific sanction was laid down, except in the philosophical sense that, if permission were not obtained the evidence could not be admitted. This is directly comparable to the example of an application to file an appellant's respondent's notice out of time: no appellant's notice, no appeal; no respondent's notice, no possible extra support for the decision under appeal. Accordingly, whilst I would not categorise the putting forward of further evidence in November as a *breach* of the earlier orders (because the appellant in the present case was under no *obligation* to file any evidence at all), the authorities to which I earlier referred make clear that, for policy reasons, the test for giving permission for evidence not filed and served in accordance with the court timetable was to be the same test is that for relief from sanctions under CPR rule 3.9. In my judgment, therefore, the district judge was not wrong in law to consider the question from the perspective of relief from sanctions in accordance with the *Denton/Mitchell* principles.”

Mr Beresford submits that this is a similar situation. He says that the court has effectively laid down a timetable for the case to proceed and that whether or not it was my intention to impose a sanction, that policy reasons dictate that there should be the sanction which he contends for in this case.

44 He also drew to my attention the decision in *Sayers v Clarke Walker* [2002] 1 WLR 3095 and, in particular, para.21:



“In my judgment, it is equally appropriate to have regard to the check-list in CPR 3.9 when a court is considering an application for an extension of time for appealing in a case of any complexity. The reason for this is that the applicant has not complied with CPR 52.4(2), and if the court is unwilling to grant him relief from his failure to comply through the extension of time he is seeking, the consequence will be that the order of the lower court will stand and he cannot appeal it. Even though this may not be a sanction expressly “imposed” by the rule, the consequence will be exactly the same as if it had been, and it would be far better for courts to follow the check-list contained in CPR 3.9 on this occasion, too, than for judges to make their own check-lists for cases where sanctions are implied and not expressly imposed.”

And also to the decision in *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472, and in particular paras.24, 25 and 36, which he submits demonstrate the implied sanction approach is one which is laid down by the law.

“24. I accept that all the applications before us are applications for extensions of time under CPR 3.1(2)(a) and are not formally applications for relief from sanctions under CPR 3.9. However, I do not think that Mr. Knafler is able to derive any assistance from rule 52.6, which is concerned with varying the time allowed for filing an appeal notice. Its purpose is to reserve to the appeal court the exclusive power to vary time limits applicable to appeals. The first sentence in parenthesis at the foot of the rule draws attention to rule 3.1(2)(a), which contains the court's power to extend or shorten the time for compliance with any rule, practice direction or court order, but it tells one nothing about the principles on which that power will be exercised under any particular circumstances. That will depend on the circumstances of the

individual case, although the principle that the discretion is one to be exercised judicially means that the power should be exercised in a broadly similar way in similar cases. The fact that there is no reference to CPR 3.9 cannot therefore be taken as an indication that in no case is an application for an extension of time under rule 3.1(2)(a) to be approached in a way similar to an application for relief from a sanction. Indeed, in *Sayers v Clarke Walker* this court considered that there was an analogy between applications under CPR 3.9 for relief from sanctions and applications for an extension of time for filing a notice of appeal made after the time for doing so has expired. It will be necessary to say more about that case in due course, but before doing so it is convenient to refer to *Attorney General of Trinidad & Tobago v Matthews*.

25. In *Matthews* the Privy Council was concerned with Parts 26 and 27 of the Civil Procedure Rules of Trinidad & Tobago, which contained provisions materially identical to those of CPR 3.1(2)(a), 3.8 and 3.9. The defendant in that case had failed to serve a defence within the time prescribed by the rules and the claimant had refused to agree an extension of time, arguing that it was necessary to apply for relief from a sanction. The defendant duly applied for an extension of time and the claimant made a cross-application for permission to enter judgment in default of defence. The judge allowed the defendant's application and dismissed that of the claimant, but the Court of Appeal allowed the claimant's appeal on the grounds that the consequence of failing to comply with the rule was the imposition of an implied sanction, from which it was necessary to obtain relief. The Privy Council, however, rejected that view for a number of reasons. First, it held that the rules imposed no sanction for the failure to file a defence within the prescribed time; provided a defence had been filed before a default judgment had been entered it was effective

and no sanction of any kind was imposed. Second, it held that rules 26.6(2) and 26.7 (the equivalent of CPR 3.8 and 3.9 respectively) were to be read together and that rule 26.6(2) was directed to rules, practice directions and orders which themselves imposed or specified the consequences of a failure to comply (paragraph 15). No such sanction was provided for failing to file a defence within the prescribed time and accordingly the case did not fall within rule 26.6(2). In reaching that conclusion the Board expressly rejected the concept of the implied sanction on which the Court of Appeal's decision had been based. The decision in *Matthews* formed an important part of Mr. Knafler's argument.

36. I confess to finding that submission attractive, but having re-examined the authorities I am not persuaded that that course is open to us. As the authorities demonstrate, for the past twelve years it has been consistently understood that in *Sayers v Clarke Walker* this court deliberately equated applications for extensions of time for filing a notice of appeal with applications for relief from sanctions because in its view the implied sanction of the loss of the right to pursue an appeal meant that the two were analogous. Following the decision in *Mitchell* the courts have continued to proceed on the basis that applications for extensions of time for filing a notice of appeal should be approached in the same way as applications for relief from sanctions under CPR 3.9 and should attract the same rigorous approach. It might even be said that the decision in *Mitchell* has provided an independent basis for a similar approach to applications of that kind. The clearest example is perhaps to be found in *Baho v Meerza*, to which I have already referred. Whatever one may think of the doctrine of implied sanctions, therefore, particularly in the light of the views expressed by the Privy Council in *Matthews*, I think that the approach to be taken to applications of the kind now under consideration is now too well established

to be overturned. It follows that in my view the principles to be derived from *Mitchell and Denton* do apply to these applications.”

- 45 I do not seek to in any way depart from those various judgments. However, I do not agree with Mr Beresford, whose submissions I effectively pick up in what follows, that there is any implied sanction in my March order. It seems to me that the first thing which I should do is construe the March order itself and to consider what is its true construction and meaning. I construe it on the usual basis that the court considers the various competing constructions in a holistic manner, looking at the words used and the underlying purpose of the order in order to consider what it actually means and does and asking itself as to how would the hypothetical reasonable reader interpret it.
- 46 It seems to me that there are numerous matters which tend against the order imposing any sanction as a matter of construction. The order does not provide for any sanction at all. In para.2 it states that at the adjourned hearing what is to be considered is what is to happen to the statements of case in the light of the judgment generally. It does not seem to me that that is at all consistent with the order meaning that there is a sanction that the court is not going to do that unless Mr Toner complies with its para.3.
- 47 Thirdly, para.3 of the order merely provides that Mr Toner, by a particular date, will provide proposed revised amended particulars of claim. That is, it seems to me, something which has to be read with paras.255 onwards, and in particular 257, of the March judgment, since the March order is itself consequential on the March judgment and itself refers to it. In other words, what Mr Toner is being asked to do is to produce something consequential upon the March judgment and he is being given a particular period of time to do so. It does not seem to me that it follows, or would follow in any way, from that wording that if he does

not do so then what is set out in the March judgment as to how the case is going to proceed to determine particular matters means that, in fact, the court is simply not going to proceed to determine the matter at all, and, instead of striking out parts of the particulars of claim, is going to strike out the entirety and simply not allow the matter to proceed. It also seems to me that, looking at the way in which consequential orders normally work, that it would be highly unusual for the intention of a consequential order to be that if a particular consequential point about producing a document to accord with a judgment is not complied with that that will simply result in the claim being struck out. A judgment and order might say that but it would usually do so expressly.

- 48 Looking at the wording, and also the underlying policy, it seems to me that those are numerous matters contrary to Mr Beresford's construction. He, however, submits that since what I used as a wording was that Mr Toner should provide "proposed revised amended particulars of claim", he submits that it must follow that if amended particulars of claim are contemplated but are not provided that, firstly, amended particulars of claim cannot be provided and, secondly, if the court's intention was that there should be amended particulars of claim, the court could not be intending that there should stand the present particulars of claim whether or not cut down by various strike outs. Mr Beresford submits in those circumstances that the order effectively provides that in the circumstances which have happened there is nothing, there are no amended particulars of claim, there cannot be remaining the existing particulars of claim, therefore, there is nothing; therefore, Mr Toner has no statement of case and his claim should be struck out and prevented from proceeding.
- 49 It seems to me that while that contention might be capable of being framed in a logical manner, that I should reject it for two essential sets of reasons. Firstly, it depends on there being no amended particulars of claim which itself depends on Mr Toner not obtaining an

extension of time. It does not seem to me that, even if Mr Beresford was right as to his second stage, that that means that there is an implied sanction that Mr Toner, if he does not provide his proposed amended particulars of claim within a set period of time, simply is not allowed to provide them at all and needs relief in order to be able to have an extension of time. It seems to me that this is just simply an ordinary order, giving a particular period of time to do something, and that there is no particular reason to imply such a sanction within it.

50 However, even if Mr Beresford was right to say that Mr Toner only has a set period of time to produce amended particulars of claim, it does not seem to me either that it follows that if he does not produce amended particulars of claim the court is in some way or other ruling that his existing particulars of claim simply disappear so that he has no statement of case at all. All my March judgment did in para.255 was to say that I was going to strike out certain claims and allow certain others to remain, although some of those others only on a conditional basis. Paragraph 2 of the March order, with which para.3 has to be read, provided that what was to happen to statements of case was to be considered generally at the adjourned hearing, that is to say, this hearing.

51 It simply does not seem to me to follow that in some way or other I impliedly determined by this order that if amended particulars of claim are not provided the existing particulars of claim will be struck out in their entirety. It simply seems to me that that is neither what my order nor my judgment says. They simply provide, as set out in the judgment, that certain claims be struck out or not allowed to proceed at all, others were only to be able to proceed on a particular basis and that this document is to be provided in order to assist the court as to how matters should proceed, either by way of such amended particulars of claim or by way of a modified version or by the court deciding that they are not appropriate and that some

other way of proceeding, such as the existing particulars of claim, perhaps modified, is the appropriate way to proceed.

52 That is with regards to construction of the order. Mr Beresford, however, also relies on implication. Implication, it seems to me, can take one of two forms. One is obviousness and the second is the policy approach which he has derived, it seems to me correctly, from the case law. As far as obviousness is concerned, Mr Beresford did not really seek to advance that and it does not seem to me that an implied sanction is obvious at all, essentially for the reasons I have already given.

53 As far as policy is concerned though, Mr Beresford relies on the case law to which I have referred and submits that it is a helpful analogy. I, however, do not find that case law a helpful analogy to the circumstances of this case. As far as the *Wolf Rock* case is concerned, that was with regards to an evidence provision within a timetable to a final hearing. A party was given a chance to adduce evidence for that hearing in circumstances where advance notice to the court and the other side as to what the evidence is going to be is an essential part of modern civil procedure, and where it is usual and a standard policy that there should be particular dates given which should be complied with because otherwise the orderly course of the litigation towards a fixed final hearing will be altogether disrupted. It seems to me, particularly in the light of the authority of the *Wolf Rock* case, that that is something where an implied sanction may exist for a particular policy reason underlying the need for final hearings to be set up appropriately and a particular course adopted with regards to the provision of evidence.

54 It does not seem to me that that is particularly analogous to an attempt to amend. Firstly, because an attempt to amend, at least in this context, does not relate to any final hearing. No

such final hearing has been fixed or even envisaged. Secondly, that the policy underlying the timetable for the production of evidence and any timetables with regards to an application to amend are very different. Thirdly, that amendment is also different from evidence insofar as it is always open to a party to seek to amend simply as a matter of ordinary procedure. If an amendment is late, that may be a reason against allowing it. However, amendment is treated very differently from production of evidence where effectively parties are required to do so under a case managed timetable.

55 I also bear in mind that even if there is an evidence timetable, and a party seeks to adduce further evidence once the evidence timetable has expired in terms of time, that in no way prevents that party from relying on what it has already served and put before the court. It seems to me that in the context of a strike out, where the court is only prepared to strike out certain of the claims, that the question as to whether or not a party is able to supplement evidence which they have provided within time out of time is an altogether different type of question and that *Wolf Rock* is not analogous.

56 The *Sayers v Clarke Walker* and *Hysaj* cases were dealing with the question of applications for extension of time with regards to the filing of notices of appeal. There it was held that the various provisions of the rules imposed time limits which contained implied sanctions so that the 3.9 approach had to be adopted to an application to extend time to file a notice of appeal. The notice of appeal is an initiating process and one which seeks to challenge and overturn an existing judgment of the court. It seems to me that there are very obvious policy reasons as to why rules giving time periods to do so should carry with them an implied sanction that, if a party is going to seek to challenge an existing judgment, they should do so within a strict time limit and, therefore, that the full 3.9 and *Denton v White* approach should apply in relation to an application for an extension of time, again essentially for the reasons



which I have given. It seems to me that the situation before me, and the situation of my March order, is altogether different.

57 It seems to me, for all those reasons, I simply reject the contention that there is an implied sanction. It seems to me though that I should add that I have reminded myself of what was my own intention in terms of making the March order. I have approached this with some caution because it was nearly nine months ago, but I am sure that in my own mind I did not intend any such sanction to exist. If I had so intended, I would have inserted such a sanction both in order to bring that home to Mr Toner and because, as judges are constantly reminded by the higher courts, including recently, orders ought to be clear and it ought to be clear where a sanction is intended. It seems to me that all I was intending to do was to set an ordinary time limit which could be subject to ordinary applications rather than invoking the 3.9 process. I, therefore, would go further than saying that it was not my intention to impose a sanction but that it was positively my intention not to impose a sanction.

58 In those circumstances, it seems to me that para.4 of PD 40B of the Civil Procedure Rules is in point:

“Correction of errors in judgments and orders

**4.1** Where a judgment or order contains an accidental slip or omission a party may apply for it to be corrected

**4.2** The application notice (which may be an informal document such as a letter) should describe the error and set out the correction required. An application may be dealt with without a hearing:

- (1) where the applicant so requests,
- (2) with the consent of the parties, or

(3) where the court does not consider that a hearing would be appropriate.

**4.3** The judge may deal with the application without notice if the slip or omission is obvious or may direct notice of the application to be given to the other party or parties.

**4.4** If the application is opposed it should, if practicable, be listed for hearing before the judge who gave the judgment or made the order.

**4.5** The court has an inherent power to vary its own orders to make the meaning and intention of the court clear.”

And it is always open to me, including now, to clarify my intention which existed at the then time in making the March order.

59 Mr Beresford submits to me not only that I should be cautious in terms of seeking to remember back, which I quite accept I should be but I have been, but also that I should not exercise any such jurisdiction here because the order is effectively a public document which, of course, court orders are and, therefore, I should adopt a similar approach as the courts have laid down that should be adopted to documents which have a public status, such as documents which have been the subject matter of entries onto the Land Register, and should generally not vary them.

60 While that case law exists, it does not seem to me that it applies to this particular circumstance. True it is that the order which I have made is a public document but its purpose is primarily to deal with this particular litigation before these particular parties, rather than relating to the public generally in a way in which a document which features on the Land Register does.

61 Secondly, in any event, even if there was such a general public policy consideration, PD 40B expressly says that the court's power to clarify its orders continues to exist and can be exercised. Although the practice direction does not have the status of a statutory instrument, it is nonetheless a practice direction which was made under the provisions of the Civil Procedure Act 1997. It seems to me that were there to be an implied sanction on the existing wording of the order, that I should simply clarify it to provide that that is not the case. However, that is not necessary in light of the fact that I consider that there is no implied sanction.

62 The defendants though go on to say that, in light of what they assert are numerous breaches of the rules on the part of Mr Toner, and numerous other matters, that I should be simply striking out his claims and, for that matter, not allowing the relevant amendments, which is a separate but related point. In terms of striking out, they rely on, firstly, CPR 3.4(2)(b):

“(2) The court may strike out a statement of case if it appears to the court –

...

(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.”

And say that what he has done and what he is now seeking to do amounts to an abuse of the process of the court with statements of case which would obstruct the just disposal of the proceedings.

63 Secondly, they rely on CPR 3.4(2)(c):

“(c) that there has been a failure to comply with a rule, practice direction or court order.”

They say that Mr Toner has been in breach of my various orders and also has been and continues to breach particular rules, including, in particular, CPR 16.4, which requires statements of case to be concise, and the Queen’s Bench Guide and Practice Direction to the effect that statements of case should generally not be longer than twenty-five pages and, if they are, that they should contain a summary, which it is said is lacking here.

64 As far as summary is concerned, it seems to me that that is a minor point. If, indeed, the defendants wish to have a summary in circumstances where it seems to me that they perfectly well appreciate what is Mr Toner’s case by at least summary terms, then the way to deal with that is to make a direction of what I said earlier, a summary of Mr Toner’s case should simply be typed up into a document and put on the court file and, of course, a document which the defendants will then have full knowledge of.

65 The other matters though, it seems to me, deserve considerably more consideration. As far as abuse of process and contents of statements of case is concerned, and what to do about it if that is the case, I have been taken to various judgments and authorities. In particular, I was taken to the decision of *Towler v Wills* [2010] EWHC 1209, where in terms of what had happened is set out in para.2 of that judgment:

“The Claimant represented himself at the hearing of the application. He did not provide a Skeleton Argument but made oral submissions. It appears that he has had the benefit of legal advice and representation in the recent past. He told me that his claim was so complex that he had decided that it was better that he represented

himself. At the end of the hearing he requested an opportunity to make submissions on the authorities which had been relied upon by counsel for the Defendant on the grounds that, although they had been provided to him before the hearing, he had not had a sufficient opportunity to consider them. I granted him that opportunity since he was representing himself. I ordered that any submissions by him on the authorities to which reference had been made during the hearing should be made by 4 pm on Wednesday 21 April. Such submissions were emailed to the Court at 1556 on that day but were not forwarded to me until 1140 on the following day after I had sent out a draft of this judgment in the mistaken belief that the Claimant had made no further submissions. I have now considered the Claimant's further submissions.”

Which led to Teare J considering that claimant’s statements of case.

66 In paras.17, 18 and 19 of that judgment Teare J set out the underlying purpose of a statement of case and, in particular, the concerns which the court would have as to it being potentially an abuse if it was vague or incoherent.

“17. In dealing with the first point made on behalf of the Defendant it is necessary to consider whether the Amended Particulars of Claim and the Further Information are unreasonably vague or incoherent. I have come to the conclusion that they are and on that account are an abuse of the process of the Court and obstruct the just disposal of the case.

18. The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in

response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies; see *Spencer v Barclays' Bank* 30 October 2009 per Mr. Bompas QC at paragraph 35. The Amended Particulars of Claim are, perhaps, concise but they are not clear or coherent. The transactions which the Defendant is alleged to have conducted in the name of the company without disclosing his conflict of interest and which have caused loss have not been clearly identified. The Further Information could perhaps have cured these defects but it has not done so. The particular transactions cannot be identified with ease. Moreover, additional claims, not foreshadowed or pleaded in the Amended Particulars of Claim, appear to have been added. They have no place in the Further Information since they had not been pleaded in the Amended Particulars of Claim. Further, evidential material has been added in such a way as to make comprehension of the Further Information difficult.

19. It is not fair and just that the Defendant cannot be sure of the case he has to meet. It may well be that, with appropriate legal advice, the Claimant could have pleaded a concise, clear and particularised case against the Defendant but that has not been done. If the Amended Particulars of Claim are not struck out there is a very real risk that unnecessary expense will be incurred by the Defendant in preparing to defend allegations which are not pursued, that he will be impeded in his defence of

allegations which are pursued and that the Court will not be sure of the case which it must decide.”

I note that Teare J in that case regarded as what was particularly important was the fact that that claimant was complaining about unspecified transactions which left the defendant in a situation where they simply did not know what case that they would meet.

67 I also read into this judgment paras.20 and 21 of Teare J’s judgment, which, it seems to me, are the core of his decision as to why he struck out those amended particulars of claim in that case.

“20. This application has not been sprung upon the Claimant. He was given notice by the Defendant that his Amended Particulars of Claim were regarded as deficient. Thus he was requested on 15 October 2009 to particularise his case so that the Defendant could understand properly the case he had to meet. Further, the Defence served on 27 November 2009 informed the Claimant that the Amended Particulars of Claim were embarrassing for want of particularity and that the Defence was served without prejudice to the Defendant's right to apply to strike out the Amended Particulars of Claim. After the Claimant served his response to the request for further information pursuant to Part 18 on 19 January 2010 the Defendant's solicitors wrote again to the Claimant on 9 March 2010. The purpose of the letter was to provide details of the areas of the claim which were likely to be struck out and to request the Claimant to "particularise the specific transactions which you allege constitute a breach of contract by [the Defendant] and to clarify what [the Defendant] is said to have done or not done in relation to each of them." The Claimant replied on 12 March 2010 and stated that he regarded the Defendant's letter as bullying. He replied

again by letter dated 19 March 2010 but on this occasion stated that he was pleased to have received the Defendant's letter. He refused to withdraw any parts of his claim and confirmed that at least part of his claim concerned the alleged conflict of interest in which the Defendant had placed himself which "resulted in serious and multiple breaches of the relevant Shareholders Agreement, as previously identified.....It was the actions and or inactions of [the Defendant] that were ultimately shown to be of the gravest financial detriment to COL and it is these actions and or inactions that constitute and evidence multiple material breaches of the Shareholders Agreement dated 1 November 2002, as previously specified." However, no further amended pleading was proffered or promised at that time. The specific transactions relied upon were not further identified (at any rate with sufficient clarity) despite the Defendant's reasonable request.

21. In these circumstances I have concluded that it is fair, just and proportionate to strike out the Amended Particulars of Claim. I have taken into account the observation of Lord Templeman in *Williams & Humbert Ltd. v WH Trade Marks (Jersey) Ltd.* [1986] AC 368 that striking out is only appropriate in plain and obvious cases (upon which reliance is placed by the Claimant in his submissions served after the hearing) but I consider that it is plain and obvious that this claim, as pleaded in the Amended Particulars of Claim and Further Information, should be struck out."

68 I remind myself from that judgment that it seems to me to be essential, firstly, that the statement of case is understandable. Secondly, that it is sufficiently specific and hence not vague, and sufficiently coherent, and hence not incoherent, to be a proper statement of case. Thirdly, that it needs to advance matters which the claimant is actually going to advance at trial so that the defendant knows what is actually going to be advanced and what is not



going to be advanced. It does seem to me that in this case that is not a potential problem. Mr Toner seemed to me to be determined to advance at trial each of the various heads of matters which he seeks, in either his particulars of claim or amended particulars of claim. Fourthly, as stated again by Teare J but also elsewhere, striking out is a matter of last resort.

69 There was also drawn to my attention the decision of Master Matthews (as he then was) in *Jones v Longley* [2016] EWHC 1309, and, in particular, in terms of dealing with what was a proper or improper statement of case, paras.13 and 14:

“13. Unfortunately, the style of the witness statement and of the counterclaim in the original version is both pedantic and prolix, meandering and lacking in particularity in important places. There are no headings or paragraph numbers, and, although there are separate paragraphs, they are often very long. The counterclaim thus pleaded did not comply with the procedural rules, practice directions and other guidance (which so far as relevant are set out in paras 15-18 below). As a result it was not possible to get a clear or precise hold of the substance of the claims which the First Defendant was seeking to make against the Claimant. Coupled with the fact that the First Defendant is not trained to be able to sift out the legally relevant from the irrelevant, this in turn made it difficult for the Claimant to plead to the counterclaim. Unsurprisingly the Claimant did not do so before the hearing of 30 July 2015 to which I have already referred.

14. At the conclusion of that hearing, and at the request of the Claimant, I directed that

‘By 4 pm on 30 September 2015, the First Defendant shall file and serve on the Claimant a brief statement of case summarising his counterclaim, which

shall comply with the requirements of part 16 of the Civil Procedure Rules 1998 and its Practice Direction, and with the requirements of Chapter 2 and Appendix 2 of the Chancery Guide’.

My intention was that the First Defendant should prepare a short but well-organised statement of his counterclaim, which could refer to and use the existing counterclaim as voluntary further particulars, thus acting not only as a statement of case in its own right, but also as a kind of road-map and index to the existing documents, which need not then be wasted. The First Defendant appears however to have misunderstood my purpose. In paragraphs 5 and 7 of his witness statement dated 22 February 2016, he says that I directed that the original counterclaim stand as the particulars of the claim, and that a short summary be provided to aid transparency.”

And also problems which were identified in para.19:

“On 29 September 2015, the First Defendant filed and served a fresh statement of case in purported compliance with my direction of 31 July 2015. In the first paragraph on page 2 it stated that it was "filed and served on behalf of the Beneficiaries (the three Defendants)". (I should say that there are statements to similar effect in other documents filed by the First Defendant.) This statement of case was some 23 pages long, again single-spaced, and again without individual paragraph numbers. It comprised an "Introduction to Statement of Case" (1.5 pages), a "Statement of Case" (8.5 pages) and an "Elaborative context for CC" (12.5 pages). There were however some cross-headings and numbering of sections of the document. There were also a further 32 pages of further documents exhibited (without any coversheet, or index) to this pleading.”

I note that in paras.20 onwards numerous deficiencies with the document were identified, which were roughly summarised in paras.33-36:

“33. In my judgment there is force in each of these three criticisms. The first is obviously a matter of impression. However, having read the second version of the counterclaim, I have to say that, although there are some points that would be clear enough to respond to, there are many more for which it would be impossible. Overall this could properly be described as a nightmare pleading to deal with. The rules of procedure must equally protect the person responding to a claim as much as they enable the claimant to put forward his or her claim.

34. Second, it is quite clear that claims of different kinds have been mixed together, contributing to the degree of difficulty of properly responding. Although in his witness statement of 22 February 2016, paragraph 5, the First Defendant says his case "has consistently been the simple one that the Claimant ... caused delays to estate administration, and that these delays produced losses to the estate..." the counterclaim is beyond any doubt not so confined, even if it is very difficult to see exactly how far it does go. Third, I agree that the provision of particulars is hit and miss. Some topics are clearer than others. But there is certainly no coherent case on causation, for example.

35. I also accept that, as Mr Bowmer also says, the statement of case even in its revised form is still formally defective as well. It does not properly comply with CPR Part 16 or the Chancery Guide. By way of example only, it is not a concise statement of the facts on which the claimant relies, it does not number the paragraphs consecutively, each paragraph does not contain only one allegation, and it does not

throughout deal with the case on a point by point basis. All of these things are necessary in order to facilitate a point by point pleading of his defence to the counterclaim by the Claimant. Only in this way will the parties and the Court be able to see what is truly in issue between the parties. This matters because efficient case management and trial depend on accurately identifying that. Accordingly, to that extent at least the counterclaim does not comply with the order of 30 July 2015.

36. In his post-hearing written submissions, Mr Bowmer repeats some of this. He argues that, in addition, the counterclaim does not "properly set out all the necessary elements of a claim in terms of duty, breach, causation and loss," and as a result there are "no reasonable grounds for bringing the claim and CPR 3.4(2)(a) is applicable". I have already said that there is some force in these criticisms (above, paras 33-35). But I doubt that rule 3.4(2)(a) is appropriate for dealing with cases where the real vice is that the statement of case is impossible to plead to rather than that it does not contain the elements of a claim. In any event, as will be seen, I need not dwell on that sub-rule."

70 The Master went on to deal with the fact that the relevant defendant in that case was a litigant in person in paras.56-59:

"56. Many, perhaps most, of the problems which I have identified stem from the fact that the First Defendant is not a qualified lawyer, and appears to have no experience of this kind of litigation. So far as I am aware, no explanation has been given as to why the First Defendant has chosen to act in person throughout this litigation (cf para 3 of his witness statement of 7 December 2015, where the First Defendant says that the defendants "may well seek legal representation to professionally plead the

Counterclaim in court"). I accept of course that (1) he is not obliged to explain himself, and (2) he has every right to act for himself if he wishes. However, it is desirable to stress that there are not in our system two sets of rules, one for those who employ lawyers, and one for those who do not. There is only one set of rules, which applies to everyone, legally represented or not. The courts cannot and do not modify the rules for those who are not represented: see eg *Elliott v Stobart Group* [2015] EWCA Civ 449, [39].

57. It may be that, at the margins, and where the courts are properly exercising discretion, the courts will allow a little more leeway to litigants in person than to those who have professional lawyers: cf *Tinkler v Elliott* [2012] EWCA Civ 1289, [32]. And there are occasionally legal procedural rules where the elements needed for the application of a rule may be impacted by the absence of knowledge or experience of legal processes. But such cases are by their nature rare. The general proposition is that there are no special rules for litigants in person as compared with those litigants who are represented. So I judge the position in this application by reference to the ordinary procedural rules applicable to everyone.

58. Significantly, what is being considered in this application is not the original counterclaim made by First Defendant. Instead, it is the revised version produced by First Defendant after comments by the Court and specific criticisms by the Claimant. The First Defendant knew what was wrong with the statement of case he had produced. He had a second chance, either to take professional advice, or at least to consider the specific rules to which his attention was expressly drawn by the order of the Court, and to produce a compliant statement of case (which of course he could submit to a professional lawyer for his opinion before actually filing and serving it).

I do not know whether the First Defendant in fact took any advantage of these opportunities, but it is right to record that he had them: *cf Kim v Park* [2011] EWHC 1781, [40], cited by the Claimant.

59. I do not doubt the First Defendant when he told me at the hearing in January that he thought his revised counterclaim was coherent. He wrote, he said, in the manner of a forensic psychologist, and was surprised that the Claimant's lawyers were unable to understand. But, with respect, the test is not whether he as a former forensic psychologist finds it coherent, but whether the Court does. It is however right to record that the First Defendant said at the hearing that if the counterclaim was not compliant and the Claimant could not extract a cause of action from it, then he was sorry about that.”

I do bear in mind very much as to what the Master said there, that only limited leeway might be allowed to a litigant in person, although I do also bear in mind that this was before the amendments to CPR 1.1(2)(a) and the insertion of PD 1A, to which I have referred earlier in this judgment. It does seem to me to be entirely correct what Master Matthews said in para.49. It is a matter for the court to assess whether or not a statement of case is coherent, not for an individual party.

71 Master Matthews summarised his conclusion with regards to the actual statement of case in para.60:

“In accordance with CPR rule 3.4(2), in my judgment there has been a serious failure to comply with the relevant rules and practice directions, and also therefore with the court order of 30 July 2015, as I have already said (see para 29). More importantly,

in my judgment this counterclaim as it stands is likely to obstruct the just disposal of the proceedings. The wealth of verbiage and over-elaboration is embarrassing. It is largely impossible to plead to, even if some allegations emerge from the mass of detail just about clearly enough to be able to form the object of a defence by the Claimant. I am thinking for example of the allegation of failure to pursue the Hong Kong bank in relation to the face-value of the bank passbook, in section 5 of the counterclaim, at pages 7-9. But most of the counterclaim is not as clear as this. I readily accept the argument of the Claimant that it is not possible to plead to it in practice. I also accept that that is why the Claimant has not so far attempted to plead to it.”

And then went on to strike him out following, in effect, the decision in *Towler v Wills*.

72 I was next taken to *Yu-Ting Cleeves v University of Oxford* [2017] EWHC 702. In that decision, Whipple J effectively summarised both her conclusion and her approach in paras.34-37:

“34. But in any event, I conclude that this claim cannot proceed because it is abusive in nature and / or otherwise likely to obstruct the just disposal of the proceedings. It is on this point that I rest my decision, and accede to the Defendant's application. The Defendant relies on three authorities to support its submission that this claim is abusive: *Towler v Wills* [2010] EWHC 1209 (Comm), *Cohort Construction (UK) Ltd v M Julius Melchior (A Firm)* [2001] CP Rep 23, and *Eatwell v Smith and Williamson* [2003] EWHC 2098 (Ch).

35. Those authorities establish the following propositions:

- i) A pleading which is unreasonably vague or incoherent is abusive and likely to obstruct the just disposal of the case. (*Towler*, [16])
- ii) One factor for the Court to consider is whether there is a real risk that unnecessary expense will be incurred by the Defendant in preparing to defend allegations which are not pursued, or will be impeded in its defence of allegations which are pursued, or that the Court will not be sure of the case which it must decide. (*Towler*, [19])
- iii) Another factor for the Court to consider is whether the Defendant will be able to recover its costs, if successful at the end of the day; and if not, whether it may well feel constrained to make some sort of payment into Court, not because the case merits it, but simply as the lesser of two evils and for the avoidance of costs (*Cohort Construction* [20]).
- iv) A claim can still be struck out even if it discloses a reasonable prospect of success (*Cohort Construction* [18], [22], [23]).

36. Those propositions are all relevant in this case:

- i) The Particulars of Claim as drafted are vague and incoherent. In consequence, the Defendant does not know the case it has to meet and the Court does not know the case it has to decide.
- ii) There is undoubtedly a real risk that the Defendant will, if this claim continues, be put to considerable expense preparing to defend a claim which may not be pursued or may not be pursued as understood.
- iii) The Claimant is a litigant in person, who lives in Canada. This Court has no information about her finances, but there is a strong prospect that the Defendant, if successful, would not be able to recover its costs against the Claimant. Indeed, this is just the sort of case where the Defendant might well be forced to attempt settlement



of the case simply to reduce the likely costs of the exercise overall, and as the lesser of two evils.

iv) This is not a case where it can be said positively that there are reasonable prospects of success. I have concluded that the merits of this claim are difficult to evaluate with precision given the lack of adequate pleading. This last proposition must be moderated in its application to this case: I cannot exclude the possibility that the claim has some merit in it, although the likelihood is that it has none.

37. There are two further considerations in this case which lead me to conclude that this case is abusive. The first is the Claimant's repeated assertion that the Defendant, and those who represent the Defendant, are dishonest. Within the Particulars of Claim, such allegations appear in terms at paragraphs 93-6 which assert conspiracy to commit theft, theft and deceit by the Defendant. As I have noted, the Particulars of Claim do not set out any cogent basis for these claims, which rest on the Claimant's assertions without more. Having re-read the Particulars since the hearing, I see that allegations of dishonesty, fraudulent misrepresentation, undisclosed conflict of interest and "egregiously insidious" conduct are sprinkled liberally throughout the Particulars, in each case asserted without any factual or evidential underpinning (although plainly reflecting the Claimant's personal views). Even beyond the Particulars of Claim, it seems that the Claimant readily accuses those who challenge or resist her case of dishonesty: as an example, the Claimant's skeleton supporting her own application to strike out the defence (the third application, to which I shall shortly come) illustrates this trait: see § 9, where she asserts that the Defendant's statement – seemingly innocuous - that the various academics who published the 8 articles are unconnected with the Defendant, is "*misleading and false*"; and § 10, where she asserts that the Defendant's characterisation of her claim as relating to a

single idea that Yuan Mei is a maverick – an understandable reading of the Particulars which I initially shared until put right by the Claimant – is a "*fraudulent misrepresentation*". That skeleton also asserts that the Defendant's Counsel, Mr Greatorex, has made "*untrue and/or misleading statements in his submissions to the Court*" and quotes at length from the Bar Code of Conduct (§ 22). Mr Greatorex has conducted this case with absolute professionalism and there is not the slightest reason to suggest that he has misled the Court.”

73 Again, it seems to me that the authority requires me to consider whether the statement of case is unreasonably vague or incoherent and whether there are allegations which might not be pursued at trial (and which latter aspect does not seem to me to be particularly relevant in this case, for the reasons I have already stated). However, additional matters were introduced such as the question as to whether or not costs recovery will be possible. That is a matter which has not been gone into in any particular way in the evidence in this particular case. It seems to me that to do so would be potentially unfair to Mr Toner, who, it does not seem to me, has been given particular advance notice of that matter as being one with which he should be dealing. In any event, the case is distinguishable since there the claimant was a litigant in person in Canada, whereas here Mr Toner is a litigant in person resident in this jurisdiction.

74 Lastly, in particular in this area, I was taken to the decision to *JSC VTB Bank v Skurikhan* [2020] EWCA Civ 1337, and, in particular, para.51 of that judgment:

“It is clear from the above authorities that, contrary to Berenger's contention, proceedings can be struck down as an abuse of process where there has been no unlawful conduct, no breach of relevant procedural rules, no collateral attack on a

previous decision and no dishonesty or other reprehensible conduct. Indeed, the power exists precisely to prevent the court's process being abused through the lawful and literal application of the rules, and most likely would not be needed or engaged where a party was acting unlawfully or in breach of procedural rules, where established rules of law or procedural sanctions would usually suffice to protect the court process. In my view *Thevarajah* is an example of such protection via the rules, alternatively the recognition of an issue estoppel, rather than a finding that the application in that case was an abuse of process. Recognised aspects of abuse of process include *Henderson v Henderson* abuse, bringing the administration of justice into disrepute and proceedings which are manifestly unfair to the other party (aspects which may well overlap), but the crucial question is whether, taking a broad merits-based approach, a party is misusing or abusing the process of the court.”

Which makes clear, as is made clear in other case law, the concept of abuse of process is a wide and flexible one where the court ends up having to look at a situation in the round and comes to effectively a value judgment as to whether or not a particular situation amounts to an abuse of process.

75 The defendants also submit that the court should not engage in a line by line analysis of statements of case and should be very careful about assisting a litigant in person, at least in terms of suggesting drafting amendments, and they submit that it is not for the court to re-write a defective statement of case so that it actually effectively works in law.

76 I am, of course, concerned that the court should not be seen as entering into the arena and that it is for the claimant, as with any other party, to construct and advance their own case. The court is an independent arbiter considering, amongst other things, as to whether or not

what has been constructed and advanced is actually proper. However, I am also mindful that the court is always mindful to seek to achieve compliance with the rules, including the procedural rules of pleading, so that the real dispute can be determined. That is precisely what the overriding objective says in various of its provisions and that, therefore, there is a balance to be exercised here. I also bear in mind that, as in many reported authorities, the court will often go through a statement of case on a line by line basis to consider what is acceptable and what would not be acceptable and often, as part of a judgment, state what would be potentially acceptable. However, this approach has limits.

77 It seems to me, having considered the documents in this case and the submissions from the parties, that it is a workable solution to the various problems which have been identified to consider the material which Mr Toner has actually advanced, and sought to advance, and effectively to cut out and excise from it certain portions which, to my mind, are objectionable for reasons to which I will come, and then to ask myself whether or not, with some relatively minor (at least in terms of size) alterations of wording, as to whether the end result is something which I would regard as satisfactory and presenting a sufficiently specific and coherent case. That is what I sought to do both in the interim approach, which I outlined at the end of the second day of this matter, and which I seek to come on to in this judgment.

78 This process, of course, has not been helped particularly by Mr Toner, including by the fact that although there was a two day gap in this hearing he did not produce his various revised documents by effectively noon yesterday but by distinctly late yesterday. However, I am conscious that what did not seem to be an unduly onerous task at that time may well have turned out to be an onerous task for a litigant in person with Mr Toner's particular vulnerabilities. Nonetheless, I am concerned that the defendants should not be prejudiced,

which is why what I am going to now deal with is not final in the sense that I am not going to prevent them from making submissions with regards to particular paragraphs and the like this afternoon, should that be appropriate.

- 79 I have also asked myself generally as to whether I should go down this course or, alternatively, should strike out the claim in the light of the various breaches of my orders which have occurred and the potential effects on the defendants. It seems to me though that, as I have said, if I apply various excisions and some limited modifications that the result would be to produce documents which would both satisfy the rules, and including so that there is a sufficiently coherent and understandable case with proper particularisation of fraud and deliberate concealment, and also my intentions in the March judgment and the March order and subsequent orders.
- 80 In the light of that, and since I am not proceeding down the existence of an implied sanction basis, it seems to me that this course is an appropriate and proportionate response to the breaches and that to strike out, which is draconian and the last resort, is not appropriate or proportionate. I suspect that I might have come to the same conclusion (simply because striking-out is a matter of “last resort” and I do not think that such a point has been reached) even in the absence of Mr Toner’s vulnerabilities but they, and PD 1A and the new CPR1.1(2)(a), all reinforce my coming to it.
- 81 In considering what to allow, I have borne in mind, in particular, not merely what I have already said in my judgment, but, firstly, that the claim needs to be specific and coherent. Secondly, that it must be something where the defendants, acting reasonably, can understand well what the claim is. Thirdly, it must plead the facts which are relied on. Fourthly, that conciseness is important but also important is the need to provide sufficient material to amount to proper particularisation. Fifthly, that I have already held that there are real

prospects of success in relation to the balcony claim and the harassment claims, and the limited duty of care claim, and also, as a matter of fact and in my judgment, as a matter of law, the various defects claims which have not been sought to be struck out on a breach of rules as to pleading basis. Sixthly, that Mr Toner is clear that he intends to pursue all of his claims. Seventhly, in relation to the fifth and sixth defendants, whose position I will return to, their position is somewhat curious insofar as they did not originally seek to strike out the particulars of claim but have joined in with the general recent strike out application.

82 I also bear in mind that when the court is considering amendments, unlike when the court is considering a strike out application in relation to an original statement of case, the court can, and generally should, scrutinise the amendments which are proposed and that it is not simply a question of the court asking would it strike out this particular proposed amended statement of case, but the court can both scrutinise what is sought to be brought in and also apply a more general discretion if there are other discretionary matters, and as it seems to me there are in this case where there have been breaches of my orders.

83 In carrying out this exercise, I have already in my interim judgment/declared approach effectively dealt with a number of particular specific points on particular paragraphs. It seems to me that it is necessary in this judgment effectively to deal with a set of questions of principle which exist, in particular, with regards to certain classes of amendment for which Mr Toner seeks to have permission to incorporate.

84 Firstly, Mr Toner seeks to introduce a claim in fraudulent misrepresentation with regards to the defects. In essence, he seeks to say that it was represented to him that they, the first to third defendants, at least believed that the development was going to be a high quality development free from defects when that representation was false and fraudulent because

their actual belief was that the development was to be carried out on a cheap basis, using low-quality materials and services such that it would have defects and, moreover, that the intention was that those defects that would exist be dealt with by being effectively funded by the tenants under service charges which would be high as a result. Mr Toner seeks, in asserting this, to rely not merely on the existence of the defects, which he says existed and were remedied to some extent but with their costs being improperly worked into the service charge rather than being paid by the developer, but he also says precisely the same occurred in relation to two other developments carried out by the Telford group.

85 It seems to me that his attempt to amend to introduce those fraudulent misrepresentation claims is subject to a fundamental problem in limitation law. As far as I am concerned, I see that as being a new claim. It is not within the existing claims for fraudulent misrepresentation. It seems to me clear from the existing particulars of claim that those cases in fraudulent misrepresentation are based either, firstly, on the balcony aspect or, secondly, simply in relation to the level of service charge. The existing claims of fraudulent misrepresentation are not about the defects. It is true that in the existing particulars of claim para.23 states that the contract said that there were going to be high specification installations and para.41 states, under "Misrepresentation", that the relevant defendants misrepresented the service charges payable and incorrectly charged the leaseholders for repairing defects caused by faulty and substandard workmanship during the original construction. However, when particulars of fraud are given, no reference was made to defects and it does not seem to me that any claim in fraudulent misrepresentation was being advanced with reference to defects.

86 As to the limitation period for the fraudulent misrepresentation claim with regards to defects which is now sought to be advanced, completion took place in December 2013 and, on Mr

Toner's own case, relevant defects and much more became apparent in 2014. It is now 2022. If a new claim was issued in relation to such matters now then it seems to me that it would be clearly limitation barred because the claim would be issued more than six years after not only the occurrence of the relevant wrong but also Mr Toner's discovery of it. If, however, an amendment was to be allowed, then such a claim would relate for limitation purposes back to the issue of the claim form in the High Court claim, which was itself slightly less than six years from the completion. That would have a potential effect of improving Mr Toner's position in the law of limitation as against the position if a new claim had to be issued.

87 Under s.35 of the Limitation Act 1980 it is provided:

**“New claims in pending actions: rules of court.**

(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—

- (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
- (b) in the case of any other new claim, on the same date as the original action.

(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—

- (a) the addition or substitution of a new cause of action; or
- (b) the addition or substitution of a new party;

and “third party proceedings” means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action,



other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings.

(3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.

For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action.

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) above are the following—

- (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and
- (b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.

(6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as necessary for the determination of the original action unless either—

- (a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or
- (b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.

(7) Subject to subsection (4) above, rules of court may provide for allowing a party to any action to claim relief in a new capacity in respect of a new cause of action notwithstanding that he had no title to make that claim at the date of the commencement of the action.

This subsection shall not be taken as prejudicing the power of rules of court to provide for allowing a party to claim relief in a new capacity without adding or substituting a new cause of action.

(8) Subsections (3) to (7) above shall apply in relation to a new claim made in the course of third party proceedings as if those proceedings were the original action, and subject to such other modifications as may be prescribed by rules of court in any case or class of case.”

Subsection (1) effectively enables such a relation back to occur but subsection (3) provides that new claims shall not be allowed in such circumstances except as provided by rules of the court.

88 The relevant rule of court is now CPR 17.4:

“(1) This rule applies where –

(a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and

(b) a period of limitation has expired under –

(i) the Limitation Act 1980;

(ii) the Foreign Limitation Periods Act 1984; or

(iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.

(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

(3) The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question.

(4) The court may allow an amendment to alter the capacity in which a party claims if the new capacity is one which that party had when the proceedings started or has since acquired.”

In particular, sub-rule (2), that the court may allow an amendment which effect will be to add or substitute a new claim only if it arises out of the same facts or substantially the same

facts as are already in issue. That particular wording being a slight gloss on the wording of the rules but required by the Court of Appeal decision in *Goode v Martin* [2002] 1 WLR 1828.

89 A question then arises as to whether a claim for fraudulent misrepresentation in relation to the standard of a property would arise out of substantially the same facts as are already in issue. In terms of fraud claims, the court takes a very restrictive approach to this following the decision in *Bristol and West v Mothew* [1998] Ch 1, and where it concludes that it takes the approach that an introduction of a claim of fraud, even in relation to something which is already pleaded, is generally a matter which is based on a fact which is not already in issue, namely the question as to whether or not the relevant person was fraudulent in the way now sought to be alleged.

90 It seems to me that notwithstanding that other claims of fraud are made, that this is effectively an attempt to introduce a new claim of fraud which, therefore, does not arise out of substantially the same facts as are already in issue, even though the question of the existence of the defects is already in issue. The additional fraud element means that it comes on the wrong side of the line. In those circumstances, CPR 17.4(2) and s.35 of the Limitation Act bar the introduction of such a claim by way of amendment.

91 In those circumstances, it seems to me that I have no real need to consider as to whether or not I would allow the amendment were there no limitation problem. It does seem to me that I would have some considerable doubts as to whether or not I would allow the amendment, that proceeds on the basis, in essence, that if there are two, to use a colloquialism, shoddy developments constructed by a developer causing a problem, that the developer actually intends that that will be the case with regards to the third development. Obviously Mr Toner

says that there are further facts upon which such an inference can be based in terms of the third development actually having all the relevant defects. However, it seems to me that it is going a long way to say that it should be inferred that just because someone might even believe that they are doing things “on the cheap”, so to speak, that they believe that that will actually give rise to a series of substantial problems, especially in circumstances where the building will be subject to building regulations and other statutory approvals. I would, therefore, be somewhat hesitant in considering as to whether or not sufficient facts were pleaded to justify an inference of fraud. But, in any event, and as a matter of discretion, I would also bear in mind that this set of allegations could always have been in the original proceedings and there is some question as to how much they actually add to the claim, since Mr Toner is in any event suing in relation to the defects on the basis of breach of contract, albeit I appreciate that a fraudulent misrepresentation claim may extend to the first defendant in the way in which a contract claim does not. I also bear in mind that for this claim to be introduced would effectively extend this litigation to considering what had happened and why with regards to other substantial developments.

92 It seems to me also that in terms of considering whether I should permit Mr Toner to amend, I do have to bear in mind the defendants’ general complaints about breaches of orders and timing where, since the grant of permission to amend is discretionary; it seems to me that that would factor into the overall question as to whether or not I should exercise a discretion. However, I say no more than that I would have had doubts as to whether or not to allow the amendment since it seems to me that I should not allow the amendment for the limitation reasons I have given.

93 Secondly, Mr Toner wishes to amend, as envisaged by my March Judgment, in order to better particularise and advance his claims with regards to misrepresentation as to what the

service charges would be. That, it seems to me, is not a new claim as such. The misrepresentation was asserted and, for reasons given in my judgment, it appeared to be a claim in fraudulent misrepresentation. But, as set out in my judgment, I was distinctly unconvinced as to whether or not a proper pleading existed and I required Part 18 information to be provided, in part because I thought that it should be required in any event for the matter to be properly particularised and also because it would enable it to be tested as to whether or not a sustainable, or a potentially sustainable, case existed, in particular with regards to whether or not facts were being advanced on which a trial judge might properly infer a wrongful subjective state of mind on the balance of probabilities.

94 I do bear in mind here that the misrepresentation, as I said in the March judgment, cannot be simply that the service charges would be a particular amount because that is a statement with regards to the future rather than a statement of existing fact. The only way in which fraudulent misrepresentation can be advanced, and in circumstances where, as set out in para.157 of my judgment, a claim in negligent misrepresentation cannot be advanced, is in relation to an assertion that the representation included a representation that the forecast service charge was actually believed in i.e. that it was believed that this was an appropriate forecast and it was believed that the service charge would actually turn out to be the relevant amount. That is crucial both in terms of the law of general misrepresentation and also the law of fraud. The fraud, or potential fraud, is that somebody states that they believe that the service charge will turn out to be amount X whereas, in fact, they do not believe it will turn out to be amount X, rather they believe it will be something in excess of amount X.

95 That, I believe, is actually what Mr Toner intends to be his case, although it requires a modification of a paragraph in his Part 18 information but only to a very limited extent. But in terms of asserting that the court should infer the wrongful subjective intention, i.e., the

belief that a forecast was not accurate, Mr Toner principally seeks to rely on three or four sets of matters. The first one or two is that he contends and asserts that the developer believed that there would be defects and that those defects would be picked up by the service charge rather than by the developer, thus increasing the amount of the service charge. Mr Toner seeks to rely on what he says happened with regards to the other two developments, as far as that is concerned. Secondly, Mr Toner seeks to rely on what he says was a change whereby certain heating costs were to be brought into the service charge and where he asserts that he was told that that would not result in the service charge going above the forecast figure although in fact that was and was obviously always have been going to be the outcome. Thirdly, he seeks to rely on what he says was throughout an intention on the developer's and management company's part, they being part of the developer's group at that point, to bring into account for service charge purposes what was called a "loan" in terms of funding equipment for the gym which was to form part of the overall development, this loan being in an amount of £50,000, where he says that effectively the gym equipment cost was being brought into the service charge, or was intended to be brought into the service charge, notwithstanding that that would result in the service charge being a higher figure than that forecast.

96 He says that each of those particular three classes of item were known to the relevant defendants, yet, notwithstanding that they knew that the resultant costs would form part of the service charge, and intended that that would be the case, and therefore knew as a result that the forecast figure which had been provided was simply too low, they nonetheless represented by implication that they believed that the figure stated would be the ultimate service charge figure.

97 I have found the question as to whether or not I should allow this fraudulent misrepresentation claim to proceed with the identified Part 18 information supporting by way of particulars the claim in fraud, to be a somewhat difficult one both generally and because I have found much of what Mr Toner has sought to advance regarding this in his Part 18 information as being incoherent, not necessarily in terms of its contents of the individual sentences, but rather in terms of trying to make sense of the Part 18 information from the perspective of a reasonable reader. Part of the trouble being that Mr Toner has very much mixed up the questions with regards to defects and the alleged fraud of intending defects to be funded through higher service charge with his attempts to introduce new claims with regards to fraudulent misrepresentations about the envisaged standard of the development, with which I have already dealt.

98 I have come to the conclusion that I am going to permit this claim to be advanced on the basis that the points with regards to heating and the gym equipment seem to me, either separately or together, when combined with the fact that the actual service charges were, on Mr Toner's case, considerably in excess of the forecast amount, to justify the pleading of a case in fraud. In essence the case is that (i) the relevant defendants produced one forecast and then maintained it notwithstanding that two further matters had to be added into it, and (ii) that, where the resultant service charge was considerably higher than what was forecast, this would seem to suggest that the increase was at least in part due to these two particular matters, and (iii) which, if Mr Toner was assured in relation to one of them that it would not result in an increase above the forecast amount and was not told about the other one at all, forms a real basis for saying that the relevant defendants either knew their forecast was going to be inaccurate or, alternatively, were at least reckless with regard to that and, therefore, that they did not hold a genuine belief in what they were saying. It seems to me



that those facts, if pleaded, would enable a trial judge to infer a fraudulent state of mind on the balance of probabilities test.

99 However, it does not seem to me that I should allow the particulars with regard to the case that it was always intended that there would be defects and that their rectification costs would be reflected in the service charge for the following essential reasons. Firstly, that allowing it in would effectively enable the limitation point, which I have previously identified, to be circumvented via a back door. Effectively, it would allow to be introduced the defect fraudulent misrepresentations, albeit not in a full form. Secondly, I have considerable difficulties with the analysis of that part of the claim particularly as, if Mr Toner is correct, then the relevant works could not be included within the service charge anyway. Thirdly, I find the formulation of this aspect as being somewhat vague and something of a conspiracy theory. Conspiracy theories may always be justified but they should be looked at with caution. Fourthly, and where allowing this in by way of amendment is discretionary, I bear in mind that it would necessarily involve a substantial amount of evidence being given with regards to other developments which, it seems to me, are peripheral and apart from this particular claim. Fifthly, I have exerted a general amount of caution with what I am allowing Mr Toner to do as, in effect, a partial sanction and consequence which I consider to be a proportionate response in relation to his various breaches of my orders. I will come back to the practical effect of that in due course.

100 Thirdly, Mr Toner seeks to introduce by way of amendment various claims against the third defendant and the second defendant founded on alleged breaches of the lease. As far as these are concerned, having looked at Mr Toner's statements of case by way of summary, firstly, I am not satisfied that they are presented in a coherent and proper way. Effectively what Mr Toner does is just list clauses of the lease and just says in extremely general terms

that they have been breached in various ways. There is no attempt to identify individual breaches by particular time and subject matter or to identify how they are breaches by reference to particularly specific wordings of the clause, very little is actually said and what is said is only stated in a very general way. Perhaps more importantly, there is no attempt to identify what is said to be the consequence (if any) of each individual breach. Secondly, it seems to me that the claims which have been advanced so far have not been advanced on the basis of their amounting to breaches of individual clauses of the lease and that to introduce those aspects into these particular claims will substantially expand on them and which it does not seem to me, where the claims effectively already extend over and are based upon a particularly coherent subject matter of breach of obligation, is particularly desirable. Thirdly, as ever with regards to discretion, I bear in mind Mr Toner's various breaches of my orders, etc.

101 It seems to me that, in circumstances particularly where I am not satisfied as to the coherency or the intelligibility of what Mr Toner is seeking to do, that I should simply refuse his attempt to amend these claims to introduce those particular matters. What I am not doing is barring, by refusing to permit amendment in these Claims, Mr Toner seeking to issue a newly issued claim in relation to those matters in a proper pleaded way. If he does that, then the relevant court will no doubt consider them, although I suspect that the defendants might try to say that it was an abuse of process (although, at first sight, it seems to me they might have some difficulty in doing that).

102 For the reasons I have given, I am not going to allow him to introduce those matters in relation to this particular High Court claim and County Court claim.

103 The next matter is the defendants have said in the past that what are the relevant defects have not been particularly helpfully pleaded. Mr Toner perhaps accepts that in some ways it

might be helpful if he was to better set out his case as to what he says not merely as to what are the defects but also as to which he says have been remedied and which have not, and in relation to which have been remedied, as to when they were remedied and whether or not the relevant cost was included within the service charge.

104 It seems to me that with regards to what are the defects, Mr Toner has, in his Part 18 information, sought to provide a more comprehensive version of what they are and that it would be sensible if those more comprehensive versions were reflected within what are going to be the revised particulars of claim. I can see reason as to why it might be appropriate to direct a Scott Schedule along the lines that I have just said, so that it is clear what everybody's position is with regards to defects. I will consider that later, should any party ask me to go down that route, although an alternative is that it be left up to subsequent case management which might be a better way of dealing with it.

105 Fifthly, Mr Toner seeks to introduce a claim under the Defective Premises Act 1974, to which the defendants object, that claim being on the basis that his residence, and associated matters, were not constructed in a good and workmanlike manner, using proper materials, although he would also add not so as to be fit for human habitation, a matter which is a rather wide concept in defective premises law.

106 The defendants object to that, seemingly mainly on limitation grounds. It seems to me that they are entirely correct to say that in circumstances where there is a bill passing through Parliament to extend the limitation period in relation to matters within the Defective Premises Act 1974 but which bill has not yet become an Act of Parliament, that that bill is effectively "writ on water" in the sense that it has no legal effect. That, it seems to me, is entirely correct and if Mr Toner was seeking to achieve a present limitation advantage by

making this amendment, that it would be objectionable for similar reasons to those which I have already set out regarding fraudulent misrepresentation.

107 However, it does not seem to me that that is either the situation here or is a difficulty, primarily because Mr Toner is not seeking to rely on anything other than the facts which are already in issue in this claim, since all he is seeking to do is to say that the various factual matters which he has identified in terms of defects also amount to breaches of the Defective Premises Act. In other words, he is simply seeking to rely on the presently pleaded facts and say that they give rise to a claim in defective premises law under the Act of Parliament, as well as amounting to breaches of contract. In those circumstances, it seems to me that there is simply no limitation problem. Firstly, the matter arises out of substantially the same facts as are already in issue in the proceedings and, therefore, amendment would be permissible even if it did give rise to a limitation advantage. Secondly, in terms of the adverted limitation advantage being under the bill which is not yet an Act, there is no such advantage unless and until the Act becomes law, if the Act ever becomes law (and if it does then there would still be no problem because even if a new claim was issued now Mr Toner would be within the relevant limitation period envisaged by the draft Act) and, therefore, there is no limitation advantage to be obtained by the amendment. Although, even if I am wrong as to that and any limitation advantage does arise due to an amendment being permitted at this point in time, Mr Toner is only seeking to rely on the same facts as already in issue and, therefore, this amendment should be allowed.

108 Next I deal with the fact that Mr Toner is seeking to update the facts he relies on as constituting harassment to include matters which took place following the issue of these proceedings. The defendants object to this, but on grounds that these are post-issue matters rather than saying that they are incapable to adding to the harassment case. It seems to me

that the court has a discretion as to whether or not to allow in post-issue matters and these matters simply flow on from what has happened in the past and that it would be a waste of time and expense, and contrary to the overriding objective, to compel Mr Toner to issue a new claim in relation to them which would simply result in that claim being heard with these claims and all the matters then being dealt with together. It seems to me that I should allow those amendments.

109 Mr Toner also seeks to add the management company, that is Avantgarde, as the third defendant to the County Court claim. This seems to me to be partly to include claims against Avantgarde for alleged breaches of the lease, though again all that Mr Toner seeks to do is to identify a set of clauses in the lease and list them. I do not regard that as the appropriate way of dealing with such a matter for the reasons already given. If there is to be a claim for breaches of the lease, that would need to be in a proper pleading which identifies each clause, how each clause has been breached and what the relevant consequences are. It seems to me to be also an attempt in part to seek to render Avantgarde liable for the conduct of the managing agents and their concierge. At first sight, I have some difficulty in seeing precisely how Mr Toner seeks to advance that. But, in any event, a harassment claim already exists against Avantgarde in the High Court particulars of claim and which, it seems to me at first sight, extends to at least some matters regarding the air conditioning, but also other matters regarding the managing agent and Mr Prodromou. In circumstances where the claim already exists there as far as harassment is concerned, it does not seem to me to be appropriate to allow Mr Toner to amend the Claims to assert breaches of the lease on the basis of the documents he presently advances and bearing in mind, as ever, his other breaches of my previous orders. I do not see it as appropriate to add Avantgarde as the third defendant to the County Court claim. Again this is not intended of itself to bar Mr Toner from issuing a separate claim against Avantgarde should he otherwise be able to do so.

110 I next deal with a minor matter to which the defendants object, which is Mr Toner's attempt to introduce an alleged recent non-compliance with data protection law in these proceedings. It seems to me that I am wholly unclear, as would be the defendants, as to precisely what is the allegation here as there is no identification of the relevant subject matter request or its response or as to what Mr Toner says that he would get out of this request and as to how it has caused particular damage. Mr Toner says he simply wishes to rely on this as an item of harassment but it seems to me to be a somewhat unusual item of harassment. But, in any event, it is not sought to be properly pleaded in terms of the way in which he seeks to introduce it. He may seek to introduce to bring some separate claim in relation to breach of data protection law if, in fact, he wishes to pursue this, but it does not seem to me that I should allow it to be introduced into these two actions.

111 I should say that although I consider I have a general discretion and that CPR 3.9 does not apply, I have borne in mind that the *Denton* analysis is always a useful tool in terms of anyone seeking to effectively do something different from what they have done so far and to seek what is a discretionary exercise of a jurisdiction by the court. I do bear in mind that Mr Toner is effectively seeking to introduce various new matters, albeit I am only really allowing them as particulars of existing matters and not that has not been done before. As to whether or not the factor has not been done before is serious and substantial, I can see as to why that might be the case and also I can see as to why that is the case in relation to various breaches of time limits in my orders, albeit that he has made in time applications to have them extended.

112 As far as the general question as to whether or not Mr Toner had a good reason for what has happened, where he blames his health and litigation which he says has been forced on him

as a result of misconduct by the defendants, which has itself caused him numerous problems, again I have some hesitancy as to whether or not he has good reason bearing in mind the long periods of time which I gave him to carry out the various steps. However, even assuming that there are matters which could be categorised as breaches which are serious and substantial and without good reason, when considering all the circumstances of the case it does seem to me that this matter ought to be able to proceed along the lines that I have outlined and will continue to outline. In particular, because, firstly, as I set out in the March judgment, there are claims which ought to be allowed to go forward and which have real prospects of success. Second, insofar as there is prejudice, that that can be met, including with regards to costs. Thirdly, that this hearing, it seems to me, was always going to take place anyway. Fourthly, that a party can always seek to apply to amend but it is much better to deal with matters now. But also, fifthly, that it seems to me that striking out in all these circumstances would be draconian and as a matter of last resort, and where the last resort has not been reached. It seems to me that this case is very different from the various authorities I have had cited to me where, effectively, what was being sought to be adduced was, and could only be seen to be and remain, vague and incoherent and unreasonably vague and incoherent. It seems to me that when one looks at Mr Toner's documents with the excisions that I have already directed, and some further which I will come to, then the matter is sufficiently specific and coherent.

113 There are three other matters which I should deal with, relatively briefly. Firstly, the question as to whether the fourth defendant should remain in the High Court claim. The only real allegation in the existing particulars of claim is one of harassment but before the hearings which resulted in the March judgment Mr Toner has expressly said in witness statements that he proposed to sue those managing agents for harassment in the County Court and not in the High Court and, therefore, that he was not seeking to pursue them in the

High Court. Mr Beresford submits that in those circumstances those should be removed from the High Court claim. Mr Toner agreed with that submission in his own submissions on Tuesday in response to direct questions from me. He now says that he had not properly considered the point and wanted to say that the managing agents were part of the strategy, which I have identified, and therefore should remain in the High Court claim.

114 It seems to me that Mr Toner's claims against the managing agents for harassment are really completely present in the County Court claim and I am not at all clear as to how much this point really actually matters. I suspect it will end up being something to do with costs. However, a court should not be driven by such questions. It seems to me that Mr Toner should be held as to what he has said, which he said so affirmatively on numerous times where he had had full chances to consider what he was doing and where the previous hearing was conducted on that particular basis. I should add that that does not mean necessarily that some drastic costs order should necessarily follow in circumstances where Mr Toner is essentially advancing his full case in the County Court claim anyway. However, it does not seem to me that, in circumstances where he said that he wished to sue the managing agents in the County Court claim alone, where he is doing so and where, moreover, removing the fourth defendant from the High Court claim will result in the considerable saving that it will not have to plead a defence, that they should remain there. It seems to me that the fourth defendant should be removed from the High Court claim.

115 Secondly, in relation to the County Court claim, Mr Toner seeks to rely against the managing agents and Mr Prodromou, on factual matters, which he had previously only said in his particulars of claim supported a claim in defamation. Mr Beresford submits to me that since I have struck out the defamation claim that should mean that Mr Toner should not be able to re-raise the relevant factors as part of a harassment claim. He refers me to



para.255(c) of the March judgment, which provides that I would not strike out individual allegations of fact unless I struck out all the claims in law which relied on them and since the various derogatory remarks, or alleged derogatory remarks, were only relied on in the particulars of claim in relation to defamation, Mr Toner should not be allowed to reintroduce them in relation to harassment.

116 It seems to me though that my judgment has to be read as a whole and including that in para.255, when I said that I had not yet decided as to what was actually to be struck out of the statements of claim, and also that in para.240(d)(iv), I specifically identified as a matter of alleged harassment that Mr Prodromou had alleged slandered Mr Toner to others. It seems to me that, reading the judgment as a whole, that Mr Beresford is categorising my intention as going much further than I actually intended and that even if the judgment at para.255(c) can be read as saying that the words are to be removed; when one looks at the judgment as a whole, including also the provisions in para.257 about Mr Toner being able to produce a statement of case which includes such amendments as he desires, that my judgment is not intended to simply mean that those allegations go and cannot be used in relation to the harassment case and, in any event, should not prevent an application to amend to do precisely that, which it seems to me I should allow (but subject to the point which Mr Beresford quite correctly made, that the wording which Mr Toner originally sought to include with regards to defamation should be removed because defamation has gone).

117 Thirdly, there is the question of the position of the fifth and sixth defendants. I have some considerable concerns as to whether Mr Toner has any claim against them at all which has real prospects of success, although it does seem to be a somewhat unfortunate situation if, although I have not decided this in any way at all, the second defendant, as developer and who became the original lessor, was bound to provide a balcony in a different form from

that which actually exists and Mr Toner can have in some way or other lost his rights with regards to that as a result of a sale of the reversion to his lease to the sixth defendant.

However, he has, it seems to me, advanced no counter in law to that particular proposition that that is precisely what has occurred.

118 However, Mr Toner does wish to say that he wishes to make more clear that he is actually pursuing the fifth and sixth defendants in harassment, including by reference to the way in which he says that they held him out on a string of hope that the balcony was going to be rectified and then engaged in a deliberate bashing of his hopes rather than simply saying from the start, "Sorry, we will not allow you to do this." Mr Lederman, for the fifth and sixth defendants, seemed to accept that such a harassment case had potential for being arguable. I also bear in mind particularly that the fifth and sixth defendants did not seek originally to strike out the particulars of claim or seek reverse summary judgment and only joined in an application which was effectively based on breaches of my orders.

119 In the circumstances, it seems to me that I should allow the amendments sought but make clear to Mr Toner that he ought to consider very carefully as to whether or not, in reality, he has any case against the fifth and sixth defendants.

120 I should also deal briefly with the question as to what I envisage happening with the proceedings next as far as this judgment is concerned. It seems to me that, in circumstances where the defendants seek for these claims to be transferred to the County Court, and where having considered the loss and damage particulars which Mr Toner has sought to advance, that although he claims that what has happened has wrecked his life and he should be able to claim some large amount of damages as a result, that the main essence of this case is in relation to claims which, as far as damages are concerned, would only sound in limited

amounts and would seem at first sight to be unlikely – and I am making no determination as to this – to be at the sort of level which ought to remain in the High Court, where one would envisage claims of at least quarter of a million pounds and quite possibly more. It seems to me that this is a matter where not only the quantum but also very much the subject matter, where I refer in particular to the harassment claims, are very much a case which ought to be in the County Court and I propose to transfer both the High Court and the County Court claims back there.

### **LATER**

121 As far as permission to appeal is concerned, as, effectively, counsel has quite properly reminded me, under Civil Procedure Rule 52.6,

“permission to appeal may be given only where the court considers that the appeal would have a real prospect of success; or there is some other compelling reason for the appeal to be heard.”

Various grounds of appeal have been mooted before me, although they somewhat overlap.

122 Firstly, it is said that, having ordered proposed revised amended particulars of claim to accord with the judgment, it was wrong for me to go back to the original particulars of claim and order for them to be amended to reflect my judgment and be served with Part 18 information rather than going down the new amended particulars of claim route. It seems to me that that was just simply a case management decision. It was in my March order made quite clear that this hearing was to be open as to how to deal with the consequences of the judgment and I simply had to consider a number of different options. As far as I am

concerned, my decision was simply within the ordinary realm of discretion and did not involve me improperly going back on a decision that I had made and I cannot see a real prospect of success in relation to such a case management decision.

123 The second set of grounds are that I unduly assisted the claimant in drafting, that I had excessive regard to CPR 3.1A, applying a lower standard of compliance with the rules than would be required of an ordinary represented litigant, also that I did not behave fairly, in terms of invoking Practice Direction 1A, by merely raising it when it came up with Mr Lederman rather than going through it with each of various counsel before me, and that I, effectively, misapplied the Practice Direction itself: firstly, in concluding, or possibly in concluding, that Mr Toner was vulnerable.

124 Secondly, in terms of using the Practice Direction, effectively, to impose a lower standard upon him, in relation to how he brought the claim, rather than confining Practice Direction 1A to the ways in which someone could participate in a particular hearing.

125 It is submitted that all those matters give rise to a real prospect of success or, alternatively, that there is compelling reason for the claim to be reviewed by the higher courts, so that the question of the level of impact of Practice Direction 1A and how it should be treated by masters and other judges can be reviewed and opined upon by the higher courts, bearing in mind that the Practice Direction is new.

126 It seems to me that I have not proceeded down the route of redrafting the claimant's pleadings or unduly assisting the claimant in drafting. It does not seem to me that I have redrafted the proceedings, rather what I have done is mainly provided that, firstly, a number of matters sought to be put forward by Mr Toner should simply be deleted; secondly, that

certain alterations should be made, which were actually required by my judgment; and, thirdly, that some other what seemed to me to be limited alterations should be made to what Mr Toner was proposing in order to provide clarification and/or to provide that the allegation of what he was seeking to say was clear was made clear appropriately or to effect a limited amount of re-ordering, where re-ordering is simply for convenience.

127 It seems to me that all of that, as I said in my judgment, is something which the court would regularly engage in, even with a represented litigant. Rather than simply to say that you cannot put forward this, that and the other to ascertain precisely what allegation was being made, a judge would usually ask the litigant, "Is what you are trying to say X?" and, if the answer is "Yes", then saying, "Well then we will include those words within the relevant element of the pleading". It seems to me that that is all standard and it does not involve the court entering into the arena. All the more so because what the court is not doing is deciding anything substantive, it is simply ensuring that a case is properly put forward in accordance with the rules and precisely what it seems to me is appropriate for the judge to do. Here, as I say, what I have done throughout has been to tend to limit what Mr Toner can put forward rather than adding particular matters.

128 Therefore, it does not seem to me that anything of that goes beyond ordinary case management and gives rise to any real prospect of success.

129 As far as CPR 3.1A and Practice Direction 1A are concerned, their interaction, where Practice Direction 1A is new, I accept is something of a new matter. However, firstly, it does not seem to me, in terms of their particular wordings and purpose, that I can be really said to have gone beyond what is a new policy, which is designed to protect vulnerable litigants. Secondly, I did raise this with Mr Lederman, in circumstances where there was

only limited time for this hearing, where it seems to me to raise it with one counsel, where other counsel did not actually volunteer that they wished to object and say that what had been raised was simply not enough, it seems to me that it was perfectly within my ordinary case management discretion, where the hearing needed to be progressed in order to achieve the overriding objective, for me to pursue the course that I did.

130 In any event, it seems to me that the overall result in this is simply ordinary case management, where, as I said in my judgment and as has been repeatedly stated by the higher courts, to strike out is a matter of last resort. It does not seem to me that this case was a last-resort case at all. The matter might have been different if the situation was that there was, actually, a sanction for which Mr Toner was seeking relief and I have not been asked to grant permission to appeal on the basis that my conclusion about implied sanctions was wrong. However, in any event, I see no real prospect of a contention succeeding that it was wrong.

131 In all those circumstances, it does not seem to me that there is a real prospect of success. It just seems to me that what I have dealt with is a matter of case management. It is quite possible that other judges would have dealt with it in other ways, but that is not sufficient for there to be a real prospect of success. It does not seem to me that there is a real prospect of success in arguing that I was simply wrong.

132 While I understand Ms Proferes' submission that this part of the CPR and its Practice Directions are new, it does not seem to me that this case is the sort of case which could be such as to give rise to a compelling reason for an appeal to be heard.

133 For all those reasons, I am going to refuse the applications for permission to appeal as far as those matters are concerned.

134 It seems to me that the same reasoning applies with regards to Mr Beresford's submission with regards to the county court and where it also seems to me, as far as the county court is concerned, that even less has happened in terms of alteration to the proceedings than in the high court.

Approved by Master Dagnall  18.3.2022

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**CERTIFICATE**

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