Neutral Citation Number: [2023] EWHC 792 (Comm)

Case No: CL-2021-000687

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Build
Fetter Lane, London, EC4A 1NL

Date: 03/04/2023

Before :

CHARLES HOLLANDER KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

FREE LEISURE LTD (T/A "CIRQUE LE SOIR")	**Claimant**
- and -	
(1) PEIDL AND COMPANY LTD (NOW DISSOLVED)	**Defendant**
(2) QBE UK LIMITED	

- -
- -

Stephen Innes (instructed by **Edwin Coe**) for the **Claimant**
Timothy Killick (instructed by **Keoghs**) for the **Second Defendant**

Hearing dates: 28 March 2023

- -

Approved Judgment

.....

DEPUTY JUDGE CHARLES HOLLANDER KC

CHARLES HOLLANDER KC :

The applications before the court

1. This is an application by the Second Defendants to strike out the claim or alternatively for reverse summary judgment. At the end of the oral hearing I gave judgment in favour of the Defendants for reasons to be given later. These are my reasons.

Factual summary

2. The Claimant (company number 07744743) operated a nightclub from the basement of premises at 15-21 Ganton Street, London W1F 9BN under the name Cirque Le Soir ("the Club");

3. Until it was dissolved on 12 October 2021 by compulsory strike off from the register, the First Defendant (company number 07154359) had been in the business of providing the services of "handymen", carrying out maintenance, repairs and similar work. The work was carried out by, amongst others, its director, Mr Adrian Peidl;

4. The Second Defendant provided a policy of insurance to the First Defendant;

5. In November and December 2015 the First Defendant carried out work to install a Christmas set at the Club, which involved attaching strings of lights to the ceilings and walls using a staple gun, as well as the use of fabric drapes;

6. On 19 December 2015, at approximately 04.50, a fire broke out in the Christmas installation and caused substantial damage to the Club;

7. On 31 March 2016 Edwin Coe LLP wrote on behalf of the Claimant to Mr Peidl, putting him on notice of a possible claim, on the basis that he was the contractor responsible for the Christmas lighting which caused the fire, and asking him to notify his insurers ;

8. On 20 July 2016 a pre-action Letter of Claim was sent on behalf of the landlord, Shaftsbury Carnaby Limited, and its insurers, Aviva, to the First Defendant. The letter made allegations of negligence concerning the installation of the lights and the application of fire retardant additive to the drapes; it alleged that a staple had been driven through the wire to the lights, causing localised heating of the wire and ignition of the drape material;

9. Also on 20 July 2016, a similar Letter of Claim was sent on behalf of Shaftsbury Carnaby Limited and Aviva to the Claimant;

10. Crawford were appointed by the Second Defendant in relation to the claim made by Shaftesbury Carnaby Limited against the First Defendant. On 1 February 2018 Crawford wrote to Edwin Coe LLP. Crawford noted that allegations had been made against the First Defendant in relation to the installation of Christmas decorations including LED lights at the night club where the fire occurred. The letter sought assistance with Crawford's ongoing investigations into the claim;

11. The solicitors for Shaftsbury Carnaby Limited agreed to engage with the Claimant's solicitors to pursue a claim against the First Defendant on a joint basis;

12. On 9 December 2020 the Claimant's solicitors were provided with a copy of a report dated 21 March 2016 by Burgoynes, prepared on behalf of Shaftesbury Carnaby Limited The report expressed the view that the decorative lights provided the only credible source of ignition and that the fire developed and spread as a consequence of the readily combustible characteristics of the decorative drape material, to which fire retardant spray had not been applied effectively;

13. On 29 November 2021 the Claim Form in the present proceedings was issued ;

14. On 28 March 2022 the Claimant's solicitors served the Claim Form and sent a Letter of Claim to the First and Second Defendants. This set out the nature of the claim in negligence and breach of contract against the First Defendant and the claim against the Second Defendant under the Third Party (Rights against Insurers) Act 2020 . It provided details of the different heads of loss claimed;

15. Pursuant to an agreed extension of time, Particulars of Claim were served on the Defendants on 23 May 2022;

16. The Second Defendants have not served a Defence. On 29 July 2022 they applied to strike out the Claim Form and for summary judgment. The Claimants respond by applying if necessary to amend the Claim Form by Application Notice dated 15 March 2023.

17. The Claim Form provides no details of the claim. It simply provides "brief details of claim" as follows:

"A claim arising out of breach of contract and/or negligence"

The Limitation Position

18. Prima facie, limitation expired on 18 December 2021, six years after the fire. As concerns the claim against the Second Defendant under the 2010 Third Party (Rights Against Insurers) Act, as section 2(4) permits an insurer to rely on any defence which would be available to the insured against the third party, this should also include any limitation defence available to the insured. Indeed, this is the view taken by the editors of *MacGillivray on Insurance Law* (15th Ed.) at 28-030. Counsel for the Claimants reserves his position on the correctness of this, but accepts that the point is at least arguable and, in accordance with authority as to seeking leave to amend when a claim is arguably time barred, accepts that he cannot raise the point on this hearing.

The Second Defendants' case

19. The Second Defendants' case can be summarised as follows:

    a. First, the claim form should be struck for disclosing no reasonable grounds for bringing the claim against the Defendants.

    b. Second, alternatively, the claim form should be struck out for failure to comply with CPR 16.2(1).

    c. Third, the issuing of the bare claim form, purely in an attempt to stop the limitation period running and thus deprive the Defendants of any potential limitation defence, amounts to an abuse of process and so the claim should be struck out.

    d. Fourth, the latest date for the accrual of any cause of action against the Defendants, was 19 December 2015, the date of the fire. Any claim brought against the Defendants after 18 December 2021 is therefore time-barred.

    e. Fifth, for the above reasons, the issuing of the bare claim form is insufficient to stop time running for the purposes of limitation and any new or amended claim brought by the Claimant will also now be time-barred.

    f. Sixth, the Claimant's application to amend the claim form out of time must fail as

there is no question of the proposed amendments arising out of the "same facts" as already stated in the claim form in circumstances where the claim form contains no statement of facts at all.

g. Seventh, accordingly, the claim has no reasonable prospects of success and (if not struck out), summary judgment should in any event be entered in the Defendants' favour.

The Claimants' case

20. The Claimants accepted that, as it contained no facts at all, the Claim Form was defective. However, they did not accept any other part of the Defendants' case

21. The Claimants' case was as follows:

a. When issuing the Claim Form in the present case, the Claimant was in a position to identify the essence of the tort and breach of contract complained of, and could have formulated Particulars of Claim. In particular, the Claimant's solicitors identified the essence of the claim when they put the First Defendant on notice of a claim on 31 March 2016 , the landlord's solicitors letter of 20 July 2016 to the Claimant sought to hold the Claimant responsible for breaches by the First Defendant and this identified the specific breaches by the First Defendant; Crawford's letter of 1 February 2018 to the Claimant's solicitors again identified the essence of the allegations against the First Defendant; by 9 December 2020 (nearly a year before issuing the Claim Form) the Claimant's solicitors had the report from Burgoynes dated 21 March 2016 which identified the cause of the fire and therefore provided an evidential basis for the claim;

b. the Claimant was able to formulate a detailed Letter of Claim sent on 28 March 2022 at the time of serving the Claim Form. This particularised the nature of the claim against both Defendants. It did not rely on any information which had not been available at the time when the Claim Form was issued.

c. "*Statement of Case*" is defined in rule 2.3 as follows:
"'Statement of case' – (a) means a claim form, particulars of claim where these are not included in a claim form, defence, Part 20 claim, or reply to defence; and (b) includes any further information given in relation to them voluntarily or by court order under rule 18.1…"

d. The court looks at a party's Statement of Case in the light of this definition. It is not right to look at a pleading such as the Claim Form in isolation; it needs to be looked at in the light of the other documents constituting the Statement of Case. In the present case, the Claim Form needs to be construed in the light of the other documents: the pre-action correspondence, the Letter of Claim and the Particulars of Claim. When one looks at those there is no question of the Statement of Case not disclosing a reasonable cause of action or being defective; the facts are there set out. At the very least, the Claim Form needs to be interpreted in the light of the Letter of Claim sent when it was served.

e. Thus whilst the Claim Form may when looked at in isolation have been defective, it was not under the rules a nullity and to the extent necessary it can be validated by other documents such as the Letter of Claim which explain it and against which it can be interpreted

f. Thus the test in CPR 3.4(2) is not concerned with whether the Claim Form in isolation fails to disclose reasonable grounds, but rather with whether that is the case

for the Claimant's case as set out in its pleadings as a whole. That includes, here, the Particulars of Claim, and it is not disputed, and cannot sensibly be disputed, that the Particulars of Claim do disclose reasonable grounds for bringing the claim.

g. Alternatively, in determining whether reasonable grounds are disclosed, the Claimant submits that Claim Form is to be considered in the light of (a) the Letter of Claim served at the same time and (b) the Particulars of Claim.

h. If necessary, any defect can be cured by leave to amend.

Authorities

22. CPR 16.2(1) requires a claim form to:

"(a) contain a concise statement of the nature of the claim;
(b) specify the remedy which the claimant seeks"

23. While the details of the claim contained in the claim form can be concise, there is a certain minimum which must be included; see *Libyan Investment Authority v King* [2020] EWCA Civ 1690 at [61].

24. In the pre-CPR case of *Marshall v London Passenger Transport Board* [1926] 3 All ER 83, at 90, Romer LJ considered it impermissible for a claimant to indorse a writ merely with a claim for damages for breach of contract or damages for negligence "*without giving the defendants some indication of the contract which he … alleges has been broken, or some idea of the duty which he says the defendants have failed to perform."*

25. The relevant commentary in the RSC was based on Marshall:

> *"a concise statement of the nature of the claim" means that, where the claim arose out of a contract, the endorsement should give details of the relevant contract and where the claim arose out of a tort it should give the date and place of the occurrence and the nature of the tort alleged. It is necessary to at least give some idea or inclination of the duty which it is alleged the defendant has failed to perform."*

26. *Marshall* and the RSC commentary were referred to by Cooke J in *Nomura International Plc v Granada Group Limited* [2007] EWHC 642 (Comm), at [39]. There the judge considered the passages relevant when looking at CPR 16.2(1) owing to the similarity between the wording and underlying policy of CPR 16.2(1) and the equivalent rule in the RSC. More recently, and to similar effect, in *Libyan Investment Authority* at [61], Nugee LJ considered that there will "*always be facts stated in the claim form".*

27. There is some authority on whether another document such as a Letter of Claim can be used as an aid to construction of a Claim Form. This was summarised by Nugee LJ in *Libyan Investment Authority v King [*2020] EWCA Civ 1690 at [65]:

> *"65. [Counsel] relied on two cases in support. The first was Evans v Cig Mon Cymru Ltd [2008] EWCA Civ 390 ("Evans"). Here the claimant had issued a claim form claiming loss and damage arising out of abuse at work. The claim form was issued just within the limitation period, but served some time later after the limitation period had expired. Particulars of claim and a medical report were served with the claim form, both of which made it clear that the claim was actually intended to be a claim for personal injury arising out of an accident at work. When the defendants took the point that the*

particulars of claim departed from the abuse claim in the claim form, the claimant sought to amend the claim form by substituting "an accident" for "abuse" but was met with the argument that that was a new claim that was statute-barred and prevented by CPR r 17.4. That argument succeeded before both the district judge and the circuit judge, but the Court of Appeal allowed an appeal. The reasoning is found in the judgments of Toulson LJ at [26] and Arden LJ at [30]-[32] and is to the effect that the claim form, when read with the benefit of the particulars of claim served with it, contained an obvious clerical error. That meant it could be corrected as a matter of interpretation and hence that to substitute "an accident" for "abuse" in the claim form was not in truth to raise a new claim at all but to correct an error in expression of the claim that had been brought all along.

66. That seems to me to be a particular application of two well established principles applicable to the interpretation of documents, namely (i) that documents intended to be read together can be read together, and (ii) obvious mistakes can be corrected as a matter of interpretation. I have no difficulty with either proposition, or their application to the circumstances in that case, but they do not seem to me to establish Mr Onslow's proposition or have any direct bearing on the present case. There is here no difficulty in interpreting the Amended Claim Form. It is clearly worded and no one has suggested that it is ambiguous, let alone that it contains a clerical error that can and should be corrected by reference to the Particulars of Claim.

67. The second case was Akenhead J's decision in Travis Perkins, already referred to above[1]*. He had to consider whether the brief details of claim on the claim form were apt or sufficient to cover a claim later advanced in the particulars of claim (see at [17]). In his summary of the principles at [22] he drew from Evans the principle that:*

"(d) In construing or understanding what was intended by the wording used, the court can and where necessary should have regard to the context or 'factual matrix' (as per Arden LJ in Evans) in which the claim has been prepared. It is legitimate to have regard to the Particulars of Claim, particularly if served promptly at or about the time of the issue and/or service of the claim. It is legitimate to have regard to correspondence and applications sent or served at or about the same time as the claim. Indeed it may be legitimate to look further back in time for exchanged communications between the parties, albeit that caution may need to be exercised to limit this exercise only to such communications which clearly demonstrate what was intended to be the subject-matter of the proceedings which followed."

This goes rather further than Evans in suggesting that regard can be had to the particulars of claim not only when served with the claim form, but also "particularly" when served "about" the time of service of the claim. I have some reservations about this as normally a document has a single meaning when first executed, or at least communicated, and cannot change its meaning in the light of later developments; and I have quite serious reservations about the use

[1] Travis Perkins Trading Co Ltd v Caerphilly County Borough Council 2014 EWHC 1498 (TCC)

> *Akenhead J made of the principle. In that case the claim form had been issued on 26 July 2013 (see at [8]); the date when the claim form was served does not appear to be given in the judgment, unless I have missed it, but must have been shortly afterwards as on 2 August 2013 the parties agreed a stay (see at [12]), which would not have been necessary had the proceedings not yet been served; and after various extensions of time had been agreed the particulars of claim were not served until early November 2013 (see at [13]). Nevertheless Akenhead J concluded at [27] that because the parties had agreed to the extension of time, the Court could have regard to the particulars of claim as an aid to interpretation of the claim form served some three months before. That seems doubtful to me, particularly so when the whole question was whether the particulars of claim went beyond the claims advanced in the claim form.*
>
> *68. But none of this matters for present purposes. What matters for present purposes is that Travis Perkins, like Evans, is a case about interpreting or construing the brief details on the claim form. In the present case, as I have already said, there is no ambiguity or difficulty of construction in the brief details of claim given in the Amended Claim Form. There is no need to resort to the RAPOC to understand them.*
>
> *69. These decisions do not in my judgment justify the conclusion that when comparing the new claims with those advanced in the Amended Claim Form, the Court could and should have had regard to the facts which had been alleged in the RAPOC (but which for reasons given above were no longer facts in issue as the RAPOC, and the claims as there articulated, had all been struck out). In my judgment what the Court should have been asked to do was much simpler, which was to compare the new claims sought to be substituted in the draft Re-amended Claim Form with the claims as articulated in the Amended Claim Form."*

28. I was also referred to the decision of Deputy Judge Mark Cawson KC in *Muduroglu v Stephenson Harwood* 2017 EWHC 3926 (TCC). There a claim form issued at the edge of limitation was amended without leave in accordance with the rules before service but outside the period of limitation. The deputy judge held that the court had no jurisdiction to permit the amendments unless they fell within the regime under s33(3) and (4) of the 1980 Limitation Act.

Discussion

29. In my view the position is as follows:
    a. There are no facts set out in the Claim Form.

    b. The Letter of Claim cannot be used to interpret or construe the Claim Form because it does not in any sense interpret or construe it; the present case is quite different from Evans.

    c. But in any event, the Letter of Claim was created after limitation had expired when the Claim Form was served. If in Muduroglu the court had no jurisdiction to permit amendments made to the Claim Form without leave after issue prior to service but after limitation had expired, the Claimant can hardly be in a better position by drafting a Letter of Claim and sending it with the Claim Form at the time of service of the Claim Form but after limitation has expired.

d. In any event there are problems in any circumstances in relying on a Letter of Claim as an aid to interpretation of a pleading, at least other than in an extreme case.

e. The Particulars of Claim cannot be relied upon to explain the Claim Form; in Evans the Particulars of Claim were served at the same time as the Claim Form. Here they were not even served at the same time the Claim Form is served; they were served after limitation had expired.

f. The Particulars of Claim plead new causes of action; it cannot be said that they plead the same causes of action as the Claim Form because the Claim Form pleads no effective cause of action.

g. Thus it would be necessary to obtain leave to amend the Claim Form because it could not otherwise be permissible to serve non-conforming Particulars of Claim.

h. However there is no jurisdiction to amend the Claim Form because limitation has expired and the amendments raise new causes of action which are not on substantially the same facts as those already contained in the Claim Form.

30. In those circumstances the claim cannot continue. I do not think it matters which of the various strike out routes is adopted. The claim must be struck out.