**Claim No. BL-2021-000870**

**Neutral citation number: [2022] EWHC 1367 (Ch)**
**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**BUSINESS LIST (ChD)**

**DEPUTY MASTER MARSH**

**Rolls Building**
**Fetter Lane**
**London EC4A 1NL**

**B E T W E E N:**

**(1) JOHN N CROKE**
**(2) CROKE (SOUTH BUCKS) LIMITED**

**Claimants**

**And**

**(1) NATIONAL WESTMINSTER BANK PLC**
**(2) JAMES DAVIES**
**(3) JOSEPH PITT**

**Defendants**

**JUDGMENT**
handed down at a remote hearing on 9th June 2022

**John Croke** the 1st Claimant appeared in person and for the 2nd Claimant
**Paul Casey** (instructed by Addleshaw Goddard LLP) appeared for the Defendants

Hearing 9 and 10 May 2022

**DEPUTY MASTER MARSH**

1. This is my judgment on hearing three applications:

   (i) The claimants' application dated 11 November 2021 to substitute the Royal Bank of Scotland Plc (RBS) as the first defendant for National Westminster Bank PLC (NatWest) and, in addition, either for a declaration that the claim form was served in time, or for orders validating attempts to serve in time, or an order extending time for service retrospectively.

   (ii) The defendants' application dated 14 February 2022 seeking a declaration that the court has no jurisdiction to try the claim due to late service of the

claim and for or an order striking out the claim under CPR rules 3.4(2)(a), (b) and (c).

(iii) The claimants' unissued application seeking relief from sanctions in respect of late service of his witness statement dated 4 May 2022.

2. Although the claimants' application was issued first, the defendants' application directed to the inadequacies of the particulars of claim absorbed much of the hearing. Mr Croke represented himself and the second claimant and I asked Mr Casey, who appeared for the defendants, to address the court first. This took the morning of the first day which left Mr Croke with time to develop his submissions until shortly before the lunch break on the second day. I am grateful to him and Mr Casey for the helpful way in which they dealt with the issues. Mr Croke did not provide a skeleton argument before the hearing. However, his submissions were extremely thorough as well as being well organised and clear.

3. The claimants' application dated 11 November 2021 is supported by a witness statement made by Mr Croke that explains over 15 pages (i) why this claim ("the 2021 Claim") was issued in May 2021, (ii) why he had difficulty completing the particulars of claim within the four month period specified in the CPR and (iii) the steps he took to serve the particulars of claim.

4. The Defendants' application dated 14 February 2022 is supported by a witness statement made by Alexander Unger who is a Legal Director at Addleshaw Goddard LLP. He sets out the relevant background to the 2021 Claim and explains why the defendants consider it should be struck out.

5. The claimants did not respond to Mr Unger's statement and on 28 April 2022, with the hearing date fast approaching, the defendants applied for and were granted an order dated

3 May 2022 specifying that unless the claimants served a witness statement by 4pm on 4 May 2022 they would be debarred from relying upon any evidence in response to Mr Unger's statement. The claimants failed to comply with the deadline. Mr Croke filed a witness statement after 4.00 on 4 May 2022 and served the witness statement on the defendants the following day. However, the witness statement itself is very brief and its principal purpose is to exhibit a large volume of documents relating to earlier proceedings between the same parties. Mr Casey took no point about the witness statement being late other than observing it was another example of the claimants failing to comply with a court order. The statement was admitted without the need for the parties to make submissions about the grant of relief from sanctions.

**Background**

6. In June 2015 the first defendant ("the Bank") appointed the second and third defendants as LPA Receivers in respect of loans secured on two developments which have been referred to using the shorthand "Ickfield" and "The Caitlin". By June 2015 the claimants had been customers of the Bank for nearly nine years and their banking relationship had been under the management of the Bank's Global Restructuring Group for 6½ years. Mr Croke considers that he has been extremely badly treated by the Bank. Mr Croke says the relationship soured from the time a meeting took place on 16 January 2014 when his then relationship manager Mr Isaacs introduced him to his replacement manager Mr Guy Taylor. It will be necessary to refer to his and the second claimant's dealings with the Bank in some detail.

7. The claimants issued a claim against the Bank and the LPA Receivers on 26 November 2015 ("the 2015 Claim") seeking a wide range of relief including declarations that the claimants had not been in default under the loan agreements and that the appointment of the LPA Receivers was void. The 2015 Claim was struck out as a consequence of the claimants failing

to comply with an order dated 11 January 2017 requiring them to provide answers to a Part 18 Request by 31 January 2017.

**The 2021 Claim**

8. The 2021 Claim is made against the same defendants as the 2015 Claim[1]. The particulars of claim run to just over 34 pages and the claimants make six claims. Paragraphs 3 to 136 of the particulars of claim set out the background that is relied upon. The remaining paragraphs set out the six claims and the relief that is sought. The claims comprise:

    (i) Claim 1 (paragraphs 137 – 152 paragraphs 143 - 144 are blank) is a claim made in deceit against the Bank arising from a statement said to have been made at a meeting on 16 January 2014.

    (ii) Claims 2 and 3 (paragraph 153 – 166) are claims against the Bank and the LPA Receivers pursuant to alleged lawful and unlawful means conspiracies.

    (iii) Claim 4 (paragraph 167) alleges that the continuation of the appointment of the LPA Receivers was a further lawful or unlawful means conspiracy.

    (iv) Claim 5 (paragraph 168) alleges that the appointment of the LPA Receivers was for an improper purpose, undertaken in bad faith, irrational, unconscionable and/or was irrational and/or unconscionable.

    (v) Claims 6 (paragraph 169) alleges that the appointment of the LPA Receivers was a breach of an implied term that a party to a contract would not knowingly and intentionally act contrary to its own subjectively assessed commercial interests.

9. Mr Croke and the second defendant each seek damages of a sum in excess of £3 million and the claimants jointly seek damages in excess of £250,000 in respect of lost chattels. In an unnumbered paragraph, appearing to be a drafting afterthought, a claim for recission of the

[1] The first defendant is mis-named but no point is taken about that.

contracts of sale of Ickfield and The Caitlin is made. No particulars are provided of how the claims for damages have been calculated.

10. The essential procedural background to the 2021 Claim is that:

    (i) The claim form was issued on 27 May 2021. It had been preceded with a brief letter of claim sent on 21 May 2021 at a time when the claimants said they were concerned about the expiry of a limitation period. The claimants invited the defendants to undertake that they would not take any point about limitation which would allow the claimants to provide a more detailed letter of claim. The undertaking was not provided.

    (ii) No step in the claim was then taken until the claim form was sent to the defendants by special delivery on 23 September 2021. It was therefore deemed served on 25 September 2021 just before the 4 month deadline was due to expire on 27 September 2021.

    (iii) Pursuant to CPR rule 7.4(2) the deadline for service of particulars of claim was 27 September 2021.

    (iv) On 24 and 27 September 2021 the claimants asked the defendants to accept service of the particulars of claim by email. Agreement to accept service by email was not provided.

    (v) On 27 September 2021 the claimants sent the particulars of claim, without a signed statement of truth, to the defendants by emails timed at 16.36 and 16.39 respectively. At 22.17 the same day the claimants sent the defendants by email a further version of the particulars of claim with a signed statement of truth.

    (vi) On 28 September 2021 the defendants received at their respective offices by hand delivery copies of the particulars of claim with a signed statement of truth.

11. The defendants' case on service of the particulars of claim is straightforward. The last day for service was 27 September 2021. They had not agreed to accept service by email and, even if they had done so, the particulars of claim were sent after 4.30 on that date and would have been deemed served on 28 September 2021 by virtue of CPR rule 6.26. Service was effected by delivery of hard copies of the particulars of claim on that date which was one day out of time.

12. The question of whether service was out of time can be dealt with briefly without, for this purpose, considering Mr Croke's evidence about the difficulties he had in finalising the particulars of claim. In his submissions he contended that the deeming provisions in CPR rule 6.26 do not apply. However, the rule is clear and it applies to all documents other than a claim form. The claimants were only entitled to serve by email if, in accordance with paragraph 4.1 of Practice Direction 6A, the recipients had given consent. No consent had been given in this case. In any event, the particulars of claim were sent (without a statement of truth) after 4.30pm and therefore were deemed served on the 28 September 2021. Service took place when the hard copies of the document were delivered on that date. Service was therefore one day late.

13. Mr Croke invited the court to apply CPR rule 6.15 albeit that the application notice does not make it clear that he was seeking to rely upon its provisions. That rule does not assist the claimants as it only relates to service of a claim form. In any event, there was no "good reason" why the rule should be applied. The claimants' difficulties related to completing the particulars of claim, not service of it upon the defendants.

14. It follows that the claimants will be unable to proceed with the claim unless they obtain an order retrospectively extending time for service of the particulars of claim by one day. It is common ground that when the court is considering an application for a retrospective extension of time for service of particulars of claim it must apply the relief from sanctions framework under CPR rule 3.9 as it has been interpreted in *Denton*.[2]

15. If the only points for the court to determine were whether the claimants should be permitted to substitute RBS for NatWest due to an error made by the claimants and granting a retrospective extension of time of one day for service of the particulars of claim, it is unlikely the application would have engaged a great deal of court time. However, when the applications are seen in their full context, and alongside the defendants' application to strike out the claim, they take on a different complexion. Without an extension of time for service of the particulars of claim, the claimants, in effect, have no claim despite the claim form having been served within its period of validity. The claim is in a twilight zone and is only capable of being resuscitated by an order being made on the claimants' application.

16. The Defendants submit that the particulars of claim fail to comply with the minimum requirements of the CPR in respect of a statement of case and do not show reasonable grounds for bringing the claim. They also say that the 2021 Claim is an abuse of the court's process.

17. There is perhaps a dry point about whether the court is able to strike out a claim at a time when the claim, without life being breathed into it by the court, has no validity and cannot be pursued. Clearly it does not make sense to grant an extension of time for service solely for the purpose of enabling the court to strike it out. It is unnecessary, however, to determine the point I have highlighted because the court is required to apply the *Denton*

[2] See the notes in the White Book 2022 at para 7.4.3.

three stage test when considering the claimants' application. Mr Casey submits, and I agree, that the court, when considering all the circumstances of the case including the provisions of CPR rule 3.9(1)(a) and (b), is entitled to and should have regard to whether the particulars of claim provide reasonable grounds for bringing the claim, whether the statement of case is an abuse of the court's process and whether there has been a failure to comply with a rule, practice direction or court order. The tests contained in CPR rule 3.4(2) therefore fall to be considered as part of the claimant's application for an extension of time for service of the particulars of claim.

18. It follows that although the hearing proceeded as if it were principally an application to strike out the claim, in fact jurisdictionally it turns on whether, on the basis as I have determined the Bank is right about service of the particulars of claim, an extension of time for service should be granted applying the *Denton* test for relief from sanctions.

19. Although CPR 3.4(2) is not being applied directly, four observations about the general approach to its application are pertinent:

    (i) The burden is upon the defendants to show that the one or more of paragraphs (a), (b) and (c) applies. However, the burden of satisfying the court that an extension of time should be granted on the claimants' application lies on them.

    (ii) A statement of case will only be regarded as showing no reasonable grounds for bringing the claim if the claim is bound to fail and, even then, in a developing area of jurisprudence the court may decline to strike out the

claim on the basis that the viability of the claim should be tested against facts found at a trial.[3]

(iii) If the court considers that the claim does not show reasonable grounds and/or the statement of case fails to comply with the minimum requirements that are set out in the CPR, the court should consider whether the claimant ought to be given an opportunity to amend the claim.

(iv) The principles relating to abuse of process where a second claim is brought after the first claim has been struck out are helpfully summarised in *Harbour Castle Ltd v David Wilson Homes Ltd* [2019] EWCA Civ 505 [6 –9].

**Banking relations between the claimants and the Bank**

**A. Personal borrowing by the first claimant**

20. (i) By an agreement dated 2 October 2006 the Bank agreed to lend £1,054,000 to the first claimant for three purposes: (a) to re-finance borrowing from HSBC Bank plc; (b) to fund the development costs of Ickford; and (c) to assist with the purchase of an adjoining property. Clause 6.3 provided that the loan must be repaid with interest by no later than the Repayment Date, meaning the earlier of 31 December 2008 or the sale completion date of Ickford. Pursuant to clause 8.1 the loan was secured by a first legal charge over Ickford.
(ii) Two subsequent loan agreements re-financed and extended the term of the lending. The Repayment Date under the first agreement, dated 27 July 2012, was 30 December 2012. The Repayment Date under the second agreement, dated 30 January 2015, (the "2015 Ickford Loan") was 30 April 2015. Clause 8.1.1 provided that if contracts for the sale of Ickford had not been exchanged by 1 March 2015 the first claimant would be obliged by no later than 31

[3] *Hughes v Colin Richards & Co* [2004] EWCA Civ 266

March 2015 to place the property for sale in the next available auction at a reserve price approved by the Bank, with a reputable auction house approved by the Bank.

(iii) Contracts for the sale of Ickford were not exchanged by 1 March 2015 and the first claimant failed to place the property for sale by auction. Accordingly, on 1 April 2015, the Bank served a Notice of Default in relation to his breach of clause 8.1.1 of the 2015 Ickford Loan (the "Ickford Notice of Default").

(iv) The first claimant then failed to repay the 2015 Ickford Loan by 30 April 2015, the contractually specified due date. On 27 May 2015 the Bank served a demand for the repayment of the 2015 Ickford Loan in full (the "Ickford Demand"). The first claimant, again, failed to make re-payment.

(v) In June 2015 the Bank appointed the LPA Receivers to sell Ickford under section 109 of the Law of Property Act 1925. The property was sold on 27 September 2017.

**B. Borrowing by the second claimant**

21. (i) By an agreement dated 7 September 2006, the Bank agreed to lend £4,997,000 to the second claimant to assist with the purchase of The Caitlin and its development into residential apartments. The borrowing was secured by a first legal charge over The Caitlin.

(ii) The loan was re-stated and amended with effect from 22 December 2011 (the "2011 Caitlin Loan"). The main effects of the 2011 Caitlin Loan were:

(a) to increase the second claimant's available borrowing to £7,720,000; and

(b) to schedule a Final Repayment Date, this being the earlier of 1 March 2017 or the date falling 60 months after the first drawdown date.

(iii) The 2011 Caitlin Loan contained further express terms that are material:

(a) Clause 3.2 obliged the second claimant to pay accrued interest on the last day of each Interest Period.

(b) Clause 11.5 obliged the second claimant to ensure that any payment from a tenant of The Caitlin which included a sum which was in respect of Rental Income should be paid into the Rent Account (as these terms were defined in the Caitlin Loan).

(iv) Clause 10.3 of the Caitlin Loan provided that the second claimant must ensure that the amount of the loan would not exceed specified percentages of the Market Value of The Caitlin, with the percentage reducing over time.

(v) Subject to the detailed terms of clause 12.1 (a) to (q), the Bank was entitled following an Event of Default to declare on written notice to the Second Claimant that the loan, all interest accrued and all other sums payable by the second claimant, was immediately due and payable.

(vi) On 1 April 2015, the Bank served a Notice of Default on the second claimant in relation to three Events of Default under the 2011 Caitlin Loan (the "Caitlin Notice of Default"):

(a) In breach of clause 3.2, the second claimant had failed to make payments of interest which had fallen due for payment in July, September, October, and December 2014 (the "Caitlin Interest Default");

(b) In breach of clause 11.6, Rental Income had been deposited into an account with Halifax Bank in the name of the first claimant (the "Caitlin Rental Income Default");

(c) In breach of clause 10.3, the outstanding loan as a percentage of the Market Value of The Caitlin was 128%, based on the most recent professional valuation of The Caitlin (the "Caitlin LTV Default").

(vii) As the Bank had forewarned in section 8 of its letter dated 1 April 2015, on 27 May 2015, the Bank served a demand for the immediate repayment of all of the amounts owing

by the second claimant in connection with the 2011 Caitlin Loan in the sum of £7,818,414.38 (the "Caitlin Demand").

(viii) The second claimant failed to make payment in response to the Caitlin Demand. Accordingly, the Bank appointed the LPA Receivers to sell The Caitlin in June 2015. The property was sold on 13 February 2019.

**The 2015 Claim**

22. The first claim ("the 2015 Claim") was issued on 26 November 2015 against RBS and the LPA Receivers. The claimants were unrepresented litigants. It was, in effect, brought against the same parties as the 2021 Claim. Although the early stages of the 2015 Claim were not considered at the hearing other than in passing, I understand that Mr Croke applied for injunctive relief in relation to the appointment of the LPA Receivers in June 2015 in respect of both Ickford and The Caitlin. His particulars of claim were not served until 24 November 2016.

23. The particulars of claim run to 50 pages and contain 11 claims. They are described as Claims A to K and I will identify them in the same way. Claim A relates to both Ickfield and The Caitlin, Claims B to H relate to The Caitlin alone and Claims I to K relate only to Ickfield.

(i) Claim A alleged that the appointment of the LPA Receivers was in breach of an implied term in the loan agreements that the Bank would not act in an arbitrary, irrational or unconscionable manner. The claimants sought declarations that the Bank was in breach of its duty, the appointment of the LPA Receivers was unlawful and the two properties should be returned to the claimants' control. It included a claim for damages.

(ii) Claims B and C alleged that the Bank was in breach of a promise or in breach of a collateral warranty to similar effect and/or liable for a misrepresentation. These allegations related to what is termed "the Penthouse Agreement".

(iii)Claim D relates to Unauthorised Overdraft Interest.

(iv) Claim E relates to interest for the Years 2009, 2010 and 2011.

(v) Claim F alleged that the appointment of Receivers by the Bank was unlawful.

(vi) Claim G alleged a breach of duty by the LPA Receivers in their management of The Caitlin since their appointment by the Bank on 1 June 2015.

(vii) Claim H alleged the relationship between Mr Croke and the Bank was an unfair relationship as that term is used in the Consumer Credit Act 1974.

(viii) Claim I alleged that Mr Croke entered into the Ickford 2015 loan under duress by the Bank or that he was subject to undue influence by the Bank or the loan represented an unconscionable bargain.

(ix) Claim J alleged that the 2012 loan agreement had been varied by the parties' behaviour whereby the Bank was estopped from enforcing the agreement without the court determining what a replacement repayment date would be.

(x) Claim K alleged there had been a breach of duty owed by the LPA Receivers to Mr Croke as mortgagor in relation to Ickford.

24. Mr Croke made detailed submissions about the defendants' conduct of the 2015 Claim and submitted that it amounted to an abuse of the court's process which should be reflected in the approach the court adopts to the claimants' application in the 2021 Claim. He took the court through the chronology of events in great detail and relied upon documents exhibited to his witness statement dated 4 May 2022. In essence his case on abuse of process is that:

(i) The manner in which the defendants used the Part 18 procedure was contrary to the spirit of the CPR and the requirement for the parties to cooperate with the court. He submitted that the defendants used Part 18 in a way that was never envisaged by the makers of the CPR.

(ii) The ‘unless’ sanction should not have been requested by the defendants’ solicitors or imposed by the court. A lesser sanction was appropriate.

(iii) The defendants’ solicitors should have assisted to correct an obvious mistake when his application for permission to appeal was struck out.

25. Mr Croke was critical of the conduct of the Bank’s solicitors. Although the making of a Part 18 request had been forecast in correspondence, the request (comprising 33 requests) was not served until 17 October 2016. That was less than two clear days before the Costs and Case Management Conference listed for hearing on 20 October 2016. It is clear that the timing of an answer to the Request was discussed at the CCMC because the date for service of answers was a compromise date between the date proposed by the defendants (26 November 2016) and that proposed by the claimants (16 January 2017). The date for compliance set by the court was 20 December 2016.

26. The defendants’ solicitors did not agree to an extension of time and an application for an extension was made by the claimants. At the hearing of that application on 11 January 2017 time for a response to the request was extended to 31 January 2017 without a sanction being attached. By then the claimants had had over three months to prepare their response. It was only after a failure to comply with the extended deadline an order was made, without a hearing, imposing an unless order requiring a response by 10 February 2017. Although a lengthy document was served by the deadline it did not substantially comply with the order and a further order was made declaring that the claim was struck out. Due to the order being made without a hearing it permitted the claimants to apply to set it aside. They made an application to do so and for relief from sanctions which came before Deputy Master Pickering on 10 April 2017. He undertook a full review of the request, the orders made and the response and determined that the order should stand.

27. I can see nothing in the process that is indicative of the Bank’s conduct having been abusive conduct. The period between the making of the request and the court making an order was short. It

is evident, however, that consideration was given by the court to the period to be provided for a response. Two months should have been ample. Furthermore, time was subsequently extended without a sanction being imposed to a date that was later than the date initially proposed by the claimants. Although it is right that use of a strike out sanction needs to be carefully considered, and should not be imposed routinely, it was far from an unusual or exceptional approach to case management. The court's determination that a sanction should be imposed and that the claimants had failed to comply with the order to a substantial degree was reviewed and the same conclusion was reached. If the use of the Part 18 procedure was abusive it would have been open to the court to say so and to rule accordingly.

28. It was open to the claimants to apply for permission to appeal and an application was made. The application was struck out on the basis of a failure to comply with an order made by Zacaroli J on 14 December 2017 stating that unless a transcript of the judgment given by Deputy Master Pickering was filed by 3 January 2018 the appeal would be struck out. The application for permission to appeal was treated as struck out when, in fact, a transcript of the judgment had been filed by the claimants, albeit on the main case file and not the appeal file. Mr Croke was critical of the defendants' solicitors in failing to help correct the minor procedural error because they were served with a copy of the transcript. I consider there is nothing in the criticism. The process of seeking permission to appeal is usually unilateral and the putative respondent to the appeal would not know what steps the appellant had taken to file a transcript. Mr Croke said that the order striking out the appeal was not served upon him. Even if that is right, it lay in his hands to prosecute the appeal and had the filing error been pointed out it seems unlikely the striking out order would have stood. At the hearing Mr Croke said he made a decision not to apply to set aside the order striking out his appeal because Ickfield had just been sold and he knew that a "huge claim" was coming. He took a decision not to seek to apply to set aside the order striking out the appeal and must live with the consequences of that decision.

29. I am satisfied that no element of the defendants' conduct in the 2015 Claim can be said to have been abusive and that the process adopted by the court was a fair one. The 2015 Claim was struck out due to the claimants' failure to comply with a court order.

**The requirements of a statement of case**

30. The defendants are highly critical of the particulars of claim and submit that the manner in which the six pleaded claims are put forward in the 2021 Claim does not meet the standard that is required under the CPR and Common Law.

31. CPR rule 16.4 requires that particulars of claim must include a "concise statement of the facts on which the claimant relies". The need for concision and the requirements about what particulars of claim must contain have been summarised in many cases, perhaps most succinctly in the judgment of Leggatt J (as he then was) in *Tchenguiz & Ors v Grant Thornton UK LLP & Ors* [2015] EWHC 405 (Comm) at [1]:

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

32. In *Portland Stone Firms Limited & Ors v Barclays Bank PLC & Ors* [2018] EWHC 2341 (QB) at [30] Stuart-Smith J made a similar point whilst additionally emphasising the requirements set out in Paragraph 8.2 of Practice Direction 16 for cases in which allegations of fraud, misrepresentation and knowledge are made:

> "It should not need repeating that Particulars of Claim must include a concise statement of the facts on which the Claimant relies: CPR 16.4(1)(a). The "facts on which the Claimant relies" should be no less and no more than the facts which the Claimant must prove in order

to succeed in her or his claim. Practice Direction 16PD8.2 mandates that the Claimant must specifically set out any allegation of fraud, details of any misrepresentation, and notice or knowledge of a fact where he wishes to rely upon them in support of his claim …. Experience also shows that prolix pleadings normally tend to obfuscate rather than to serve their proper purpose of identifying the material facts and issues that the parties have to address and the Court has to decide." (Emphasis in the original).

33. In the same decision the minimum requirements for pleading fraud were discussed at [29]:

" … if a case alleging fraud or deceit (or other intention) rests upon the drawing of inferences about a Defendant's state of mind from other facts, those other facts must be clearly pleaded and must be such as could support the finding for which the Claimant contends. This is clear from numerous authorities: see Three Rivers District Council v The Governor and Company of Barclays of England (No 3) [2003] 2 AC 1 at [55] per Lord Hope and [186] per Lord Millett. I endorse and adopt the statement of Flaux J in JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm) at [20] that:

> "The Claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty." At the interlocutory stage … the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge"

34. One other principle relating to pleading fraud needs to be highlighted. The court adopts a "generous approach" to pleadings involving allegations of fraud because fraudsters will often cloud their work in secrecy: see the discussion at [27] in *Portland Stone*.

35. The defendants submit that the particulars of claim are far from being a concise statement of the facts on which the Claimants rely. They say they are (i) both prolix and inadequate, (ii) they combine narrative, evidence, comment, and submission in a way which makes it difficult to identify the material facts and the alleged bases of the claims and (iii) they also lack material which is essential for the defendants to understand the case they have to meet.

36. Mr Croke accepted that the particulars of claim are inadequate. He said, with a degree of candour which is rare, that all the claims, other than the claim in deceit had been drafted on 27 September 2021 while he was on a train from his home to London and then in a public house where he was intending to use the WiFi facility for the purpose of sending the particulars of claim to the defendants by email. He asked the court give him an opportunity to amend the particulars of claim. He said he wished to use solicitors and counsel to enable him to do so. However, when asked about the arrangements he had made, he said he had not retained solicitors, that he could not afford to do so and would be dependent upon solicitors and counsel being willing to act on a conditional fee basis.

37. I will first consider the defects to the particulars of claim, secondly consider whether Mr Croke should have an opportunity to cure those defects and thirdly consider whether the claimants should be granted an extension of time for service of particulars of claim applying the Denton criteria.

**The 2021 Particulars of Claim**

38. The particulars of claim commence with a very lengthy introduction of over 25 pages and 134 paragraphs. The six claims are then made in the following nine pages with nearly six pages being

devoted to the claim in deceit. The provision of an introductory background section is not objectionable as such provided it contains facts which are relevant to the causes of action that follow. Indeed, it may be helpful for some context to be provided. The problem with these particulars of claim, however, is that the introductory section is far too lengthy and almost impossible to relate to the claims that follow. To do so involves the reader making an attempt to interpret what is said and why it may have been said without the clear signposts that are required when pleading a cause of action.

39. The essence of Mr Croke's complaint remains that LPA Receivers were appointed by the Bank after Default Notices were served on him and it is instructive to see how the introductory section to the particulars of claim deals with the events of default that were relied upon by the Bank.

40. So far as the Ickford lending is concerned, Mr Croke does not assert that the bank was wrong to rely upon a breach of his obligation to place Ickford on the market for sale under clause 8.1.1 of the Ickford Loan and he does not dispute that the loan was repayable in full by 30 April 2015.

41. The Bank relied upon three events of default in relation to The Caitlin:

(i) The interest default: the claimants do not (a) deny that the second claimant was in breach of clause 3.2 of the Caitlin Loan or (b) the breach was an Event of Default.

(ii) The rental income default: the claimants accept that rental income was paid into Mr Croke's personal account rather than the Rental Account as the loan terms required. It is merely said that the Bank was aware of this practice since 2013. No case is made that the Bank was wrong to assert there had been a breach of clause 11.6 of the 2011 Caitlin loan and an Event of Default.

(iii) The Caitlin Loan to Value (LTV) Default: Here there is more dispute. The claimants allege that the Bank relied upon a valuation ("the JLL 2013 Valuation") that was two years out of

date and negligent. It was lower than earlier valuations and a later valuation by Savills. The claimants say that the Bank knew the JLL 2013 Valuation was "false" and could not be relied upon to calculate LTV two years after the valuation date.

42. Importantly, the claimants do not say in the 2021 Claim either that the Bank lacked the contractual right to enforce the loans when it served notices of Events of Default or that the Bank lacked the power to appoint the LPA Receivers.

**Claim 1**

43. Mr Casey relies on the useful summary of the ingredients of a claim in deceit that is set out in the judgment of Jackson LJ at [77] in *Eco 3 Capital Ltd v Ludsin Overseas Ltd* [2013] EWCA Civ 413:

"What the cases show is that the tort of deceit contains four ingredients, namely:

(i) The defendant makes a false representation to the claimant.

(ii) The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false.

(iii) The defendant intends that the claimant should act in reliance on it.

(iv) The claimant does act in reliance on the representation and in consequence suffers loss.

Ingredient (i) describes what the defendant does. Ingredients (ii) and (iii) describe the defendant's state of mind. Ingredient (iv) describes what the claimant does."

44. Mr Casey also submits that the court must establish the meaning of the statement that was made, or alleged to have been made, in order to determine whether the representation that is alleged was made at all. It is not sufficient merely to plead the words that were used without pleading what the representation is said to have been. This point is made in the judgment of Hamblen J (as he then was) in *Cassa di Risparmio delle Reppublica di San Marino v Barclays Bank Ltd* [2011] EWHC 484 (Comm) at [215]. The exercise involves:

"(1) construing the statement [said to constitute the representation] in the context in which it was made; and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee."

45. The particulars of claim in its introduction includes a section under the heading: "The Meeting and Representations made at Tower Hill on 16 January 2014". At paragraph 40 and 41 the claimants say:

"40. Mr Taylor made it clear in this meeting that the Bank was not going to allow the Company to cure any alleged Interest and/or SWAP costs that had built up or occurred. He did this by making his categoric statement that **"We are beyond that".**

41. The message from Mr Taylor was startlingly clear to Mr Croke, **the Bank was not going to permit the Company to cure** any past alleged or actual Interest and/or SWAP costs. The future course of events would be dictated by the Bank and Mr Taylor would revert in due course as to what that was going to be." [Emphasis in the original]

46. Paragraphs 138 to 152 contain Claim 1 without referring back to the Introduction. The heading "The Representation by Mr Taylor and the Bank was knowingly untruthful" is followed at paragraph 138 by the claimants saying again the representation they rely upon was "we are beyond that". They say that the representation could only be understood by Mr Croke one way namely that the Bank would not be permitting the Company to cure any interest or SWAP shortfall.

47. Particulars of dishonesty are set out in paragraph 145 with nine particulars provided. They include that the Bank knew it had agreed with the FCA that no foreclosure action would be undertaken until the FCA had concluded its review into Interest Rate Hedging Products.

48. Reliance is dealt with at paragraphs 146 to 152.

49. The core difficulty for the claimants is that the words they rely upon are but a snippet from a conversation and impossible to understand with them being considered in their full context. The words clearly beg for "that" to be explained. It is impossible to know what it is said the Bank was beyond with the words being taken out of context. It seems to me that Mr Casey is right when he submits:

> (i) The failure to plead the statements within which the words that are relied upon were made means there has been a failure to plead the representation.
>
> (ii) Dishonesty is bound up with precisely what the representation(s) was said to be.
>
> (iii) The words that are relied upon do not point only in the direction of the Bank making a representation it knew to be false intending the claimants to rely upon it. The words are equally consistent with meaning that the Bank would not permit the claimants to build up any further arrears as opposed to refusing to permit the claimants to cure breaches of the loans.
>
> (iv)The case on reliance is very weak. In paragraphs 45 to 46 the claimants refer to an email to the first claimant which referred to the Bank's agreement with the FCA not to foreclose on customers such as the claimants other than in exceptional circumstances. The claimants plead that Mr Croke recalls having read the email. The fact that Mr Taylor drew this agreement to Mr Croke's attention is suggestive of his honesty and it must be rare for a person to rely upon a representation in the knowledge that it was made dishonestly.

**Claims 2 and 3**

50. Mr Casey relies upon the well-known summary of the elements of an unlawful means conspiracy in *Kuwait Oil Tanks Cp SAK v Al-Bader (No3)* [2000] 2 All ER (Comm) 271 at [108]:

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he
>
> has suffered loss or damage as a result of unlawful action taken pursuant to a combination

or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

51. A lawful means conspiracy must have the same constituents save that the acts carried out pursuant to the conspiracy do not need to be unlawful and the parties must have a predominant intention to injure the claimant.[4]

52. Mr Casey highlights three fundamental problems with the way Claims 2 and 3 are pleaded:

(i) The claimants do not allege that there was any agreement or combination (or shared object) between the Bank and the LPA Receivers. I would add that it is not obvious why either conspirator should have combined with the other in the manner that is required to constitute the tort.

(ii) The claimants do not allege any acts taken by any of the defendants pursuant to the combination between them with the predominant purpose of injuring the claimants.

(iii) The claimants do not allege that the LPA Receivers had any intention to injure the claimants. Only the Bank is said to have had the intention to injure.

**Claim 4**

53. Claim 4 alleges that the continuation of the appointment of the LPA Receivers was a further unlawful means or lawful means conspiracy. The claim is pleaded in one sentence and is wholly inadequate. None of the necessary elements of the torts is set out.

**Claim 5**

54. Claim 5 is set out in even briefer terms than Claim 4. The heading asserts that: "The appointment of the Receivers was for an improper purpose, undertaken in Bad Faith, irrational, unconscionable

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and/or was irrational and unconscionable." Paragraph 168 says that the material facts are already set out but do not indicate where they are set out.

55. Plainly Claim 5 is not pleaded adequately and would not survive an application to strike it out. It is unnecessary to seek to analyse a case which has not been set out with any particularity. However, it can be said it is very unlikely that a viable claim of this type could be made.

56. So far as the allegation of bad faith is concerned, the decision of the Privy Council in *Cukurova Finance International Ltd and another v Alfa Telecom Turkey Ltd* (Nos 3 to 5) [2016] AC 923 makes it clear that a mortgagee is not required to have purity of purpose – see [78]. Without an allegation that the Bank appointed the LPA Receivers for a reason that was disconnected for a wish to obtain repayment of the loans, the duty of good faith, such as it is, will not assist the claimants: see *UBS AG v Rose Capital Ventures and others* [2018] EWHC 3137 (Ch) at [38].

57. The reference to irrationality would appear to be an attempt to rely upon a *Braganza* type duty that the Bank would not appoint the LPA Receivers arbitrarily. In *Rose Capital* at [49] the following principles were extracted from the authorities:

> "(1) It is not every contractual power or discretion that will be subject to a Braganza limitation. The language of the contract will be an important factor.
>
> (2) The types of contractual decisions that are amenable to the implication of a Braganza term are decisions which affect the rights of both parties to the contract where the decision-maker has a clear conflict of interest. In one sense all decisions made under a contract affect both parties, but it is clear that Baroness Hale had in mind the type of decision where one party is given a role in the on-going performance of the contract; such as where an assessment has to be made. This can

be contrasted with a unilateral right given to one party to act in a particular way, such as right to terminate a contract without cause.

(3) The nature of the contractual relationship, including the balance of power between the parties is a factor to be taken into account: per Braganza per Baroness Hale. Thus, it is more likely for a Braganza term to be implied in, say, a contract of employment than in other less 'relational' contracts such as mortgages.

(4) The scope of the term to be implied will vary according to the circumstances and the terms of the contract."

58. Mr Casey submits and I agree that the decision to appoint an LPA Receiver is far removed from the circumstances in which a Braganza duty will normally arise:

(i) The power or right to appoint LPA receivers does not arise from a bilateral contract with the borrower but from the statute.

(ii) The right is a unilateral right of the mortgagee and does not involve a role in the on-going performance of a contract or the making of an assessment.

(iii) A mortgagee is under no duty to refrain from exercising its rights to appoint a receiver merely because to exercise them will cause the borrower loss: see *In re Potters Oils Ltd* [1986] 1 WLR 201 at 206B.

(iv) The protection which the law affords to the borrower is that the mortgagee must exercise its right to appoint receivers in good faith. As the court held in *Rose Capital* at [55], the very fact that mortgage-lending has built up its own protections in the form of the duty of good faith militates against the importation of implied contract duties requiring rational or non-arbitrary decision making.

**Claim 6**

59. Claim 6 comes under the heading: "The appointment of the LPA Receivers was a breach of an Implied term that a party to a contract would not knowingly and intentionally act contrary to its own subjectively assessed Commercial Interests." Paragraph 169 which follows does little or nothing to plead a cause of action in a manner that comes close to complying with the requirements of the CPR. There is no reference to any of the facts pleaded earlier in the particulars of claim and it is impossible for the defendants to discern (a) the source and scope of the alleged duty (b) whose subjective assessments are to be attributed to the Bank for the purposes of the duty (c) what were the Bank's subjectively assessed commercial interests and (d) how the duty was breached.

**Relief**

60. Although this might not be fatal if it were the only defect, the claims for damages and the claim for recission are completely unparticularised.

61. I conclude that the particulars of claim are materially defective. The claimants have not pleaded claims that show reasonable grounds and none of the six claims complies with the requirements of the CPR and the common law rules for pleading claims relying upon allegations of dishonesty.

62. I turn therefore to consider whether the claimants should be given an opportunity to re-plead the particulars of claim.

63. The court, if it decided to give the claimants an opportunity to draft a fresh case could adopt one of two approaches. On the hearing of a conventional application to strike out particulars of claim it would be usual to strike out the particulars of claim but not the claim form, thus leaving the claim in existence albeit in a perilous state. In this case, the approach I would adopt is to adjourn the hearing for a suitable period without making a final determination whether to grant the relief sought by the claimants.

64. However, I consider there are a number of facts that are present that militate strongly against the claimants being given an opportunity to present a fresh version of the particulars of claim. In summary they are:

(i) Mr Croke stated in correspondence that he intended to produce revised particulars of claim. A stay of the claim was agreed between the parties on 11 November 2021 until 31 January 2022 and Mr Croke states in his witness statement that he intended to provide a draft amended claim by the end of the stay. He again referred to an amended statement of case in his emails to the Banks' solicitors sent on 24 and 25 November 2021. However, on 31 January 2022 he said he had decided not to provide a draft amended case in light of the Bank's decision to apply to strike out the claim notwithstanding the defendants having indicated in October 2021 that they were considering making such an application. Mr Croke's decision is difficult to understand in light of his acknowledgement of the defects in the particulars of claim.

(ii) Mr Croke has already had an ample opportunity to re-draft the particulars of claim. The defendants' application was issued on 14 February 2022, nearly 3 months before the hearing. Mr Unger's witness statement set out the defects clearly.

(iii) There is little in what Mr Croke said at the hearing and in the manner in which he has behaved to date that would give the court confidence that he will be able to produce either at all, or within a reasonable time limit, a viable properly pleaded claim. Mr Croke's wish to instruct solicitors and counsel appears unlikely to prove fruitful. It is difficult to envisage that a conditional fee agreement would be entered into in respect of a claim that has been held to lack any substance.

(iv) There is a substantial overlap between the 2015 Claim and the 2021 Claim. The overlap is closest between Claims 5 and 6 in the 2021 Claim and Claim A in the 2015 Claim.

(v) Mr Croke was made aware in the 2015 Claim of the importance of providing a fully particularised claim but failed to do so within the extended deadlines set by the court.

(vi) It is very difficult to see how the claimants might be able to fashion a claim against the defendants given that they do not dispute the Bank's entitlement to demand repayment or now dispute the Bank's entitlement to appoint the LPA Receivers. In the case of the Ickfield loan, it expired under its contractual terms before the LPA Receivers were appointed.

**Denton three stage test**

65. The first stage is to assess the serious or significance of the breach. Mr Croke suggested that the breach should be characterised as being insignificant because of his efforts to serve the particulars of claim and the fact that the particulars of claim were served just one day out of time. However, when looked at in the full context it would not be right to make light of the breach. The factors I have in mind are:

(i) The claim was issued at a time when the claimants considered a limitation period was fast approaching. A claim had been notified alleging serious breaches of duty.

(ii) The claim form was only served at the end of its period of validity.

(iii) The defendants were entitled to know within the four month period specified in the CPR whether a claim had been made against them and to be able to understand that claim.

(iv) Unless an extension of time is granted, the claim will cease to have any validity and will be struck out. As I have said it currently has a twilight existence.

66. The reasons why the default occurred are explained, or at least partially explained in Mr Croke's witness statement dated 11 November 2021. He says he did not wish to issue the claim in May 2021 but felt constrained to do so because there was, he felt, a potential issue about limitation and the defendants had not agreed to waive their entitlement to rely upon limitation. He does not explain however what if anything he was doing between the date when his application for

permission to appeal against the order striking out the 2015 Claim was struck out in early 2018 and May 2021.

67. Mr Croke's witness statement explains that almost immediately after he issued the claim in May 2021 he was served with notice of eviction from his home under a suspended order for possession. It is clear that the steps he describes to try to prevent the order being enforced and putting his home in a suitable condition for sale were a major pre-occupation. Nevertheless, he accepts that from mid-July onwards he was able to spend some time on drafting the particulars of claim. The witness statement does not explain why he was unable to produce a draft setting out his claim in a concise way in accordance with the CPR well before the 4 month period was due to expire.

68. For completeness I should add that Mr Croke had difficulty with his printer in the week before the deadline expired and he misunderstood the CPR's deemed service provisions. He thought he had until midnight on the final day to serve the particulars of claim. He says making an application for an extension of time for service of particulars of claim before the deadline did not occur to him because he thought he could complete the task within the deadline.

69. The court is then required to consider all the circumstances including the factors that are specified in CPR rule 3.9(1)(a) and (b). I have in mind in particular:

(i) The claimants have a history of failing to comply with court orders in the 2015 Claim (acknowledging that his appeal was struck out for an incorrect reason). They were given ample time to provide a compliant answer to the Request made under CPR rule 18. The 2015 Claim was conducted by Mr Croke in a manner that was far from efficient.

(ii) The claimants' approach to dealing with the defendants' application in this claim has also been unsatisfactory. No indication was given whether they intended to respond to Mr Unger's statement and this led to an unless order being made on 3 May 2022 which the claimants failed to comply with.

(ii) Again, it is relevant to note that no explanation has been given for the lengthy period between the claimants' application for permission to appeal being struck out in early 2018 and the 2021 Claim being issued.

(iii) The claim form was issued very close to the expiry of the 4 month deadline and his explanation for the difficulty he had in serving the particulars of claim is incomplete. It should have been possible for him to produce particulars of claim that complied with the CPR in time.

(iv) Instead, he has served particulars of claim which are seriously deficient and the court can have no confidence that he is capable of producing a statement of case that complies with the requirements of the CPR and Common law. He has had plenty of opportunity to do so.

(v) The 2021 Claim is at least in part a collateral attack on the order striking out the 2015 Claim.

(vi) As Mr Croke has acknowledged, there are limitation periods which are in play. The claim form was issued precisely six years after the Bank made demands under the Ickfield and The Caitlin Loans.

70. It is not appropriate in these circumstances to grant relief from sanctions in respect of a statement of case that is seriously deficient against the backdrop of the 2015 Claim. The claimants have had a fair opportunity to bring the claims they wished to make. A considerable amount of court resources has been devoted to both claims and substantial costs incurred by the defendants. Finality in litigation is an important principle and the balance comes down firmly in favour of the claimants' application being dismissed.

71. I will make a declaration that the court has no jurisdiction in this claim in light of the failure to serve the particulars of claim within the period of validity of the claim form. It is not appropriate

or necessary to make an order striking out the claim. I will consider what further orders should be made on the handing down of this judgment or on a later date.