Neutral Citation: **[2021] EWHC 2622 (Comm)**

Case No: CC-2021-BHM-000037

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CIRCUIT COMMERCIAL COURT (QBD)

Birmingham Civil Justice Centre
Priory Courts, 33, Bull Street, Birmingham B4 6DS

Date: 29 September 2021

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

- -

Between :

Midland Living CIC	**Claimant**
- and -	
Prospect Housing Limited	**Defendant**

- -
- -

G Price Rowlands (instructed by **Lawrence Kurt Solicitors**) for the **Claimant**
Mark Grant (instructed by **Anthony Collins and Co**) for the **Defendant**

Hearing date: 10 September 2021

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Approved Judgment

HHJ WORSTER :

Introduction

1. This is the Defendant's application of 12 August 2021 for orders:

   (i) striking out the Claimant's statement of case;

   (ii) for summary judgment in respect of all or part of the claim; and for

   (iii) security for costs pursuant to CPR Part 25.13(2)(c).

2. The application is supported by witness statements from the Defendant's Interim Chief Executive officer Ms McDermott, and its solicitor Mr Burton, both of 12 August 2021. At the hearing, the Claimant relied upon the witness statements of Mr Deans of 26 August 2021, and Ms Saeed of 29 August 2021. Ms McDermott filed a short witness statement in reply on 6 September 2021. References to documents in this judgment are to the page numbers of those documents in the hearing bundle.

3. I heard argument on 10 September 2021 over the whole day, and reserved judgment in part because of a lack of court time, and in part to consider the matter further. I asked that the Defendant provide copies of the appendices to the Further Information it gave on 2 September 2021. The Further Information is included in the bundle at [39]-[86], but the appendices had been omitted to save space. In the event, they were referred to, and whilst Mr Grant was able to tell me what was in them, I took the view that I should see them. There was no objection.

4. On Monday 13 September 2021 the Claimant sought to supplement its evidence with a witness statement form a Mr Hughes. This was sent to the Court by email, without permission or any application. I directed that an application be issued and that the parties provide written submissions on whether or not I should grant permission to admit that witness statement. On Wednesday 15 September 2021, the Claimant's solicitors filed their written submissions, going well beyond the issue of Mr Hughes witness statement and asking for permission to admit hundreds of pages of further documents on different issues. Rather than give further directions, I deal with the matters arising in this judgment.

5. In addition to the Defendant's application, the Claimant had made an application of its own on 6 September 2021. That was an application to strike out the Defendant's Defence, for summary judgment on the basis of admissions made by the Defendant in the evidence of Ms McDermott, security for costs, permission to amend the Particulars of Claim, an account, and various other orders. The application could not be heard on 10 September 2021; it was listed to take a further 4 hours, and the Claimant had given the Defendant insufficient notice. I listed it on 10 September 2021 (in effect for directions). The Claimant prepared a further bundle relating to that application (references to the documents in that bundle begin with the letter C), although it is only the application to amend the Particulars of Claim that has any obvious relevance to the issues before me.

6. I had skeleton arguments from both parties. In addition Mr Price Rowlands, who had not long been instructed, produced a written summary (addendum) of his submissions

on the morning of the hearing. His first submission was that the Defendant's application should be heard with the Claimant's application. That would have led to the matter going off, wasting a day of court time, and delaying the hearing of the Defendant's application. I do not consider it necessary to hear the two applications together. The issues between the parties can be dealt with justly and fairly by hearing the Defendant's application first.

The Claimant's Statements of Case

7. The claim as presently pleaded is hopelessly muddled.

8. The Claim Form was issued in the County Court Money Claims Centre on 10 February 2021. The Brief details of claim settled by the Claimant's solicitors include the following.

> *The Claimant is a Community Interest Company providing supported housing for vulnerable people…. The Defendant is a Registered provider of Social Housing. There are contracts of Management, Lease and Rental Agreements between the Claimant and the Defendant. The Defendant has breached those agreements by failing to pay the Rent, Utilities, Services for Housing Management and Tenant Management due to the Claimant. In accordance to the Contract of Management dated 1st February 2019 and Licence Agreements for Individual properties on distinct dates between the Claimant and the Defendant. The Defendant must pay in accordance to these agreements the Claimant within 14 days of receiving the invoice from the Claimant for services rendered and rental payments. The Defendant has breached the agreements in that the Defendant failed to pay money due to the Claimant over a period of 8 months. The Claimant turns to the Court to recover the funds due including interest …*

The amount claimed is £1,253,725.89.

9. The Particulars of Claim are said "To Follow", but the Claim Form then continues in this way:

> *The Claimant Claims is for the sum of £1,263,725.89 being the balance outstanding for sourcing Tenant Referrals, Intensive Housing and Tenant Management, providing accommodation to the vulnerable individuals as stated above, along with Utilities, Maintenance, Day and Night Security, supporting staff and serving those vulnerable individuals provided in accordance to the Contract of management agreement dated 1st February 2019 and licence agreements for individual properties on distinct dates between the Claimant and the Defendant and for interest …*

10. Particulars of Claim were drafted by the Claimant's solicitors and served on the Defendant by letter of 1 March 2021. They include the following:

> *3. This claim arises out of a contractual dispute between the parties.*
>
> *4. By a contract of management in writing dated 1st February 2019 and Licence Agreement's on distinct dates between the Claimant and Defendant, it was an express and implied terms of the Contract that any money owed to the Claimant*

> *in relation to the Intensive Housing Management and Support Services including payment for Rent, Utilities, Services for Housing and Tenant Management would be paid within 14 days of receiving the invoices from the Claimant for services rendered including Rental and Utility payments. Further contracts between the Claimant and the Defendant include lease and rental agreements and licence agreements for individual properties on distinct dates that are to be included in this claim.*

11. Paragraph 4 refers to an invoice for the sum of £1,253,725.89 sent to the Defendant on 11 November 2020. Paragraph 5 alleges that:

> *In breach of the express and implied terms set out above the Defendant failed to pay the Claimant the sum due …. causing the Claimant financial difficulty in unprecedented times due to Covid 19 Global Pandemic.*

12. Paragraphs 6 and 13 refer again to the Claimant's financial difficulty consequent upon the Defendant's failure to pay, and to the fact that the Claimant has had to get a loan.

13. Paragraph 7 is an allegation of loss, and the following paragraphs plead what are referred to as Particulars of Breach of Contract. Once again these are framed as breaches of the express and implied terms of the contract set out above. In summary they allege a failure to pay the Claimant for (9) its service remuneration; (10) rent for housing tenants; (11) utilities on the properties used for housing; and (12) services for housing and tenant management.

14. Paragraphs 15 to 17 are headed Particulars of Loss and Damage, but provide no breakdown of the sum claimed, Paragraph 17 alleges that as a result of the Defendants

> *… actual and repudiatory breach of contract of both the express and implied terms set out above the Claimant sufferer significant financial losses alongside suffering from associated damages.*

There are no particulars of the nature or the amount of those losses.

15. The Prayer claims the following

(1) Loss of £1,253,725.89 being held by the Defendant in Breach of Contract both implied and express terms

(2) Interest …

(3) Any Exemplary Damages

(4) Any Aggravated Damages

(5) Miscellaneous Expenses and any other applicable damages

(6) Further and/or other Reliefs

(7) Costs and Disbursements

(8) Interest on the loan that the Claimant borrowed due to the Defendant withholding funds due to the Claimant

The statement of truth is signed by the Claimant's solicitor.

The Defence

16. The Defence was filed on 30 March 2021. By paragraph 3 the Defendant admits entering into a Management Agreement with the Claimant dated 1 February 2019. The Defendant also admits taking leases of a number of properties from the Claimant, details of which are set out in a schedule. The various references to other agreements in the Particulars of Claim are said to be too vague to respond to.

17. The Defendant admits that clause 6.3 of the Management Agreement provided that the Defendant was to ensure that:

> *… all financial payments due to the [Claimant] by the Defendant are paid in a timely manner to the [Claimant] by way of 13 four weekly payments per annum paid in arrears, subject to the funds having been received from Birmingham City Council and/or other payers.*

The Defendant also admits that clause 11 provides that the Defendant was to:

> *… collect the rent due under the Occupancy Agreement and every 4 weeks will pay the amounts due to the Agent within 14 days of receiving the payments in accordance with the reasonable annually reviewed charges.*

But it is denied that there is some express or implied term which required the Defendant to pay any monies it owed the Claimant within 14 days of receiving an invoice from the Claimant. The Management Agreement is in the bundle at [137]. It was signed by Mr Deans on behalf of the Defendant and Saira Butt on behalf of the Claimant [148] and is said to commence on 1 August 2014 [135]. A brief reading demonstrates that the Defendant's case on this issue is correct. There is no term which provides for payment within 14 days of invoice. The 14 day period runs from receipt of payment from Birmingham City Council ("the Council"). Nor is there any basis for implying such a term, for it would be inconsistent with the express term providing for payment following receipt of funds.

18. Paragraph 4 of the Defence sets out the structure of the financial arrangements as between the parties. Ms McDermott gives evidence about this at paragraphs 15-25 of her witness statement [95]-[98], and Mr Grant took me to a number of the documents to make good her evidence in the course of his submissions. In simple terms the structure of the arrangements is as follows:

    (1) The Claimant owns a number of properties which it lets to the Defendant. The Leases of those properties provide for the payment of rent and a service charge.

    (2) The material terms of these Leases are the same. Mr Grant took me to an example at [155]-[173]. Clause 6 provides for rent of £95 per week payable monthly calculated on the basis of the number of rooms in the property, less the number of unoccupied rooms in the property. Clause 8 provides for the payment of a service charge at a weekly rate of £94.18. The services to be provided by the Claimant are set out in a schedule at Part B [158]. These include the payment of Council

Tax, and housing management functions. The total of the rent and service charge as provided by the Leases is £189.18 per week.

(3) The Defendant enters into Licence Agreements with vulnerable persons for the occupation of rooms in these properties. The licence fee is £237.53 pw [377]. Of that, £217.53 is met by the payment of housing benefit. The additional £20 is paid directly by the vulnerable person in occupation to the Defendant (sometimes referred to as the fixed fee). The Claimant is not a party to the Licence.

(4) The Council pay the housing benefit of £217.53 direct to the Defendant.

(5) The Defendant then pays the rent and service charge "due" under the Lease in respect of the occupancy of the vulnerable persons to the Claimant, and retains the balance.

(6) The Management Agreement is said to be "co-terminus" with the property leases; see clause 3.1 of the Management Agreement [136]. Clause 2.2 of the Management Agreement appoints the Claimant as the Defendant's managing agent to provide the housing management and support services for the vulnerable persons occupying the rooms in these properties; [135].

19. Mr Price Rowlands drew my attention to clause 6.4 of the Management Agreement [137] which provides that the Defendant will be responsible for:

> *Providing to the [Claimant] weekly remittance forms from Birmingham City Council and/or other payers.*

His submission is that this term is the "fulcrum" of the Claimant's case, and that the Defendant is the Claimant's agent and liable to account to it for the monies it receives from the Council. However, as yet clause 6.4 is not pleaded, nor is there any pleaded case as to a liability to account. I note that whilst it seeks various accounts, the proposed form of Amended Particulars of Claim with the Claimants application of 6 September 2021 [C6-10] makes no reference to clause 6.4 or to any underlying basis for a liability to account either.

20. Having responded to the claim, the Defence then raises the defence of set off. There is no Counterclaim. The set off arises from historical overpayments of housing benefit by the Council to the Defendant, which the Council have clawed back from subsequent housing benefit payments. Overpayment is said to have occurred in the circumstances set out at paragraph 6(c) of the Defence, when the Claimant failed to notify the Council that occupants had vacated (so that benefit payments continued), when couples were occupying (so that benefit was overpaid by 100%), when there was no evidence that the relevant person was actually in residence, and in some instances when support services were not supplied. The sum repaid to the Council in this way is said to be £786,627.56; see paragraph 6(e) of the Defence [25]

21. The Defendant's case is that on a proper construction of clauses 6.3 and 11.1 of the Management Agreement the Defendant was only obliged to make payment to the Claimant in respect of housing benefit properly received from the Council and not liable to be repaid; see paragraph 6(f) of the Defence [25]. The Claimant takes no issue

with that, either in its evidence in response to the application, or in the submissions made before me. Indeed the tenor of its evidence is to accept that in the past there were overpayments and clawbacks, and that in principle the position is as the Defendant contends. It is the amount of the overpayment that the Claimant contests, asserting that the Defendant has failed to provide proper particulars of the sums the Council has recovered, and has obstructed its opportunity to challenge the Council's claims for the repayment of that money.

22. In addition, at paragraph 7 of the Defence the Defendant seeks to set off the sum of £106,746.50. This represents the Council Tax the Defendant has paid the Council in relation to the occupancy of the rooms at the various properties. The Leases provide that the Claimant is to pay this Council Tax, and that the service charge which the Defendant pays is calculated to include a sum in respect of that liability. Until last year, that is what happened. The Claimant would pay the Council Tax, but that would be funded from the service charge it received. In turn the housing benefit which was paid direct to the Defendant would include an element for Council Tax. The money went round the circle. However, at some point the Council required the Defendant to pay the Council Tax direct. The Defendant's case is that it has done so. The housing benefit it receives includes an element for Council Tax, but in addition to paying over the Council Tax to the Council, it has continued to pay the service charge at the same rate, including an element for Council Tax. Consequently it is paying twice, and the Claimant is receiving a sum for Council Tax which it no longer needs to pay on to the Council. The Defendant seeks repayment of this sum by way of restitution or as damages for breach of contract. I can see no defence to the principle of that case. Again it seems that it is the sums involved which may be an issue.

Striking out

23. The application notice seeks an order striking out the Claimant's statement of case on the basis that it discloses no reasonable grounds for bringing the claim pursuant to CPR Part 3.4(2)(a). In the witness statement in support Ms McDermott similarly refers to the failure to identify any basis on which the Claimant is entitled to the sum claimed, or any sum [93]. In his skeleton argument Mr Grant referred to PD 3A paragraph 1.4 which gives examples of where the court may conclude that particulars of claim fall within rule 3.4(2)(a). They include those which are incoherent and make no sense, and those which contain a coherent set of facts, but where those facts, even if true, do not disclose any legally recognisable claim against the defendant.

24. The power to strike out should be exercised with caution. In his submissions Mr Grant recognised that where there is a viable claim, the Court would consider whether the defects in the pleading may be cured by amendment, and give the Claimant the opportunity to amend. His submissions reflected two arguments. Firstly that the Claimant had already had the opportunity to remedy the defects in its case. Secondly that even if it pleaded a viable claim, the evidence was to the effect that it could never be more than the sums the Defendant was entitled to set off, and consequently it had no real prospect of success.

25. The way the claim is pleaded reveals a number of defects in the claim. In particular:

    (1) The claim appears to rely upon the terms of the Management Agreement. Yet the liability to pat Rent and Service Charge do not arise under the terms of the Management Agreement. The sums "due" referred to in the Management Agreement are due because they arise as a result of the liabilities to pay the rent and service charge under the Lease.

    (2) The "express and implied terms" presently relied upon provide no basis for liability.

    (3) It is not clear how the sum claimed is calculated.

    (4) The claims for exemplary and aggravated damages are wholly unparticularised and in any event bad in law.

The Request for Further Information

26. Having identified some of the problems with the Claimant's claim in the Defence, on 26 June 2021 the Defendant served a request for Further Information. This was an opportunity for the Claimant to reconsider its case, and provide some clarification. Unfortunately the opportunity was not taken. The replies were provided on 9 August 2021. I note the following in particular:

    (1) The Defendant was asked which express term required payment within 14 days of invoice. The Claimant quoted back clauses 11.1 and 6.3, neither of which make any such provision.

    (2) There was a request to identify the basis of the implied terms relied upon. The reply was to the effect that it was the express terms at clauses 11.1 and 6.3, and the "detailed implementation" of the Management Agreement.

    (3) Asked "*How and on what basis has the Claimant calculated the sum of £1,253,725.89? Please particularise a breakdown of the calculations"* the Claimant replied:

        > *The amount owed represents housing benefit paid to the Defendant in respect if supported accommodation dwellings managed by Midlands. See attached final demand invoice sent to Prospect.*

        No invoice was attached.

    (4) The issue at (3) is exacerbated by the fact that there appear to be 2 invoices dated 11 November 2020 both with the same invoice number but for different amounts. One for £1,092,777.79 [512] for the period from June to November 2020, which the Defendant had received. The other is for the sum claimed [611] which includes a further £160,948.10 for December 2020. The Defendant says it did not received this invoice until the service of the Claimant's evidence. Ms Saeed exhibits both invoices to her witness statement, and I return to her evidence on the point below.

(5) The Claimant continued to rely upon the terms of the Management Agreement as the basis of an obligation on the Defendant to pay for support services (requests 4 and 5) and rent (requests 6-8).

(6) There was no breakdown of the associated damages claim or the miscellaneous expenses claimed. A schedule setting out a detailed calculation of the latter was promised, but has not been provided.

(7) The basis for the claims for exemplary and aggravated damages was said to be the Defendant *causing mental distress and injury to feelings by the dismissive and contemptuous manner in which the Defendant conducted themselves throughout this matter…*

27. The Claimant responded to the Defendant's request for Further Information with a request of its own served on the same day as its replies [39]. Request 6 refers to the Defendant's case that it had repaid the sum of £786,627.56 to the Council, and seeks the following information [43]:

> *Please specify precisely the dates manner of and amounts of all sums included in the £786,627.56 alleged and give full details identifying (with name, room number, property, occupied period of overpayment and NI/benefits number) each and every benefit claimant referable to the alleged £786,627.56, and supply copies of all documentation relating to/arising from the said payment/payments including receipts from Birmingham City Council ("BCC") and all BCC's notification letters of cancellation/recovery of overpayment as is required of BCC in accordance with its statutory duties.*

28. The Defendant replied on 2 September 2021. In answer to Request 6 it asserted that the matter was properly pleaded, but said this:

> *… the Defendant is able to confirm that the information was provided by spreadsheets shared by the Claimant in an email dated 7 August 2020. The Defendant collated the information and prepared spreadsheets titled Attachment A-F. The relevant attachments were provided to the Claimant in emails dated 15 January 2021 and 25 February 2021. Copies of the attachments are provided as appendices to this response for ease of reference (Appendix 3). We also provide a spreadsheet titled "Copy of LL HB Reconciliation @ 24.8.21" which sets out the payments made by way of housing benefit and the overpayment recoveries made by the Council (Appendix 4).*

The Defendant's case was that these appendices demonstrated that it had paid the Council the sum alleged, and that the sum had since increased to £791,131.97. Ms McDermott's 1st witness statement also deals with the level of overpayment recovery by the Council, and exhibits some of the underlying material; see paragraph 49 onwards [104].

The Evidence on the Claimant's application

29. The service of the Claimant's application was the next opportunity for the Claimant to review its claim. At paragraph 10 and following of Ms Mc Dermott's witness statement, she sets out the grounds for strike out. She draws attention to the failure to identify any basis on which the Claimant is entitled to the sum claimed (or any sum). At paragraph 11 she refers to the attempt to clarify the issues of express and implied terms, the lack of explanation as to how the £1,253.725.89 is calculated, and the lack of any basis for claims for exemplary and aggravated damages. She follows that with an explanation of how the contractual arrangements between the parties really worked.

30. The evidence in response began to deal with some of these issues. Ms Saeed accepted that the Particulars of Claim had incorrectly recited the term of the Management Agreement in her witness statement in response at paragraph 12 [597]. She also provided some further information as to how the claim was calculated (to which I return below). But there is no coherent analysis of the contractual basis for the claim, and no real response to the points about the implied terms or the claims for aggravated and exemplary damages. Ms Saeed also refers to the two invoices of 11 November 2020, and provides the following explanation at paragraph 13 of her witness statement:

> *In Ms McDermont statement she states that the amount for the invoice provided is for £1,092,777.79 which is correct and a further invoice including the underpayments for the month of December were added making a total outstanding sum of £1,253,725.78 and served on [the Defendant] along with the non-payment lists based on occupancy stating the tenant's names, property address, check in dates, non payment period and amounts. For clarification I have attached both said invoices and non-payment lists of tenants.*

31. Ms Saeed's evidence about the calculation of the claim is of some importance. She exhibits a series of schedules which give details of the occupant, the address, period of occupancy and amount due. These correspond to the sums on the invoices of 11 November 2020.

Period	**Sum**	**Schedule (page)**
to June 2020	£203,221.92	[629]
July to August 2020	£400,253.66	[630]-[638]
September 2020	£189,733.66	[639]-[646]
October to November 2020	£389,568.55	[647]-[654]
December 2020	£160,948.10	no schedule

32. On the face of it, these schedules begin to grapple with how the claim is calculated. The Claimant operates the properties in question, so should have information about the actual occupancy rates. Indeed it is this information which is the starting point for the

process. Ms Saeed confirms that the Claimant has that evidence at paragraph 24 of her witness statement [599].

33. However, as Mr Grant demonstrated, the schedules Ms Saeed now produces raise further questions. They appear to be based on charges at weekly rates which bear no relation to the sums agreed in the Leases. For example, Mr Grant picked the third entry down for the June claim [629]. Dividing the sum claimed (£4,000.24) by the number of weeks (16) gave a weekly rate of £251.89. Taking the first entry for the July-August schedule [630] and undertaking the same process produced a weekly sum of £204.36.

34. At paragraph 33 of her witness statement [600] Ms Saeed went on to refer to a further calculation of the claim undertaken by an accountant. This is exhibited at [623]. This also uses rates other than those provided for in the Leases. At [624] 5 of the properties use a daily rate of £34.14, which equates to a weekly rate of £238.98. At [625] another 7 properties use a daily rate of £31.07, which equates to a weekly rate of £217.

35. The Defendant's use of the rates set out in the Leases for rent and service charge was not challenged at the hearing on 10 September 2021. Nor does the Claimant's evidence respond to the calculation Ms McDermott undertakes of the sums payable by the Defendant in her witness statement served 4 weeks before the hearing. Ms McDermott's evidence expressly refers to the figures of £95 per week for rent and £94.18 per week for the service charge; see paragraph 20 [97]. However, following the hearing the Claimant has sought to rely upon an email dated 1 June 2018 from Saira Butt to Stefan Deans (then with the Defendant) which appears to record an increase in the rates. That may explain the email of 23 August 2021 and the breakdowns of rent Ms Saeed exhibits to her witness statement [626]-[628].

36. On 6 September 2021 the Claimant made its application (amongst other things) to amend the Particulars of Claim. I am conscious that the application has not yet been heard, but if there were a draft pleading which set out the Claimant's true case, that would assist its position on the strike out. In the course of argument I asked whether there was anything in the draft Amended Particulars of Claim which Mr Price Rowlands wished to rely upon. As I understand it, there was not.

    (1) The draft reflects the fact that clause 6.3 refers to the Defendant making payment within 14 days of receiving housing benefit payments from the council; see paragraph 6 of the draft at [C7].

    (2) It also appears to reflect the point about the second invoice; see paragraph 7 - although the draft seems to suggest that the invoice was served in December 2020.

    (3) References to express and implied terms have gone in the early paragraphs of the draft, but survive at paragraph 20 in the unamended allegation of *significant financial losses alongside suffering from associated damages.*

    (4) There is no attempt to deal with the basis of liability. Indeed I note that the new paragraph 4 [C7] is in these terms:

The Defendant role was to receive payment due to the Claimant from the Birmingham City Council as the registered housing provider and then forward the Claimant after deduction of their agreed commission for processing and forward 4 weekly housing benefit payments received to the Claimant within 14 days of receipt on behalf of tenants.

(5) Nor is there any particularisation of the claim for £1.25M.

(6) A schedule of loss is promised at a new paragraph 21, which given its position within the pleading I take to refer to the financial losses. The schedule is not attached.

(7) At paragraphs (22) to (24) the Claimant seeks various accounts of payments, albeit without any pleaded basis for such a claim, or any claim in the prayer.

(8) The claims for aggravated and exemplary damages are maintained.

Strike Out

37. The upshot is that the Claimant has yet to plead a sustainable basis for its claim, or to produce a satisfactory calculation of how the sum claimed is arrived at. That is over 6 months after the claim was issued, and despite a Defence, a Request for Further Information, an application to strike out, and an (as yet unheard) application to amend the Particulars of Claim.

38. A coherent statement of case is an essential starting point. It sets out the legal and factual basis of the claim so that the Defendant knows the case it has to meet. It is also the first and vital step in the process of identifying and defining the issues to be tried. It enables the just and proportionate management and trial of the clam. The Courts do not require perfection, but there needs to be something workmanlike and comprehensible.

39. Those responsible for preparing the Claimant's claim in this case have failed to understand and/or express the legal basis for it, or to provide the information about it which the Defendant is entitled to. That failure has led to the application to strike out. In reality the Defendant had little option but to bring the matter to a head. The Particulars of Claim as presently pleaded do not disclose reasonable grounds for bringing a claim and should be struck out. The more difficult question is whether the Claimant should be allowed a further opportunity to formulate a coherent claim; a process which involves starting again with a blank sheet of paper.

40. The Defendant has done its best to understand the real basis of the Claimant's claim, and work from there. The claim as Mr Grant explained it is a coherent one. In her witness statement Ms McDermott analyses the position as it would be if the Claimant had sued for the sums due under the terms of the Leases. On the Claimant's best case (100% occupancy of the relevant rooms) there may be a claim for £467,413.99; see paragraph 36 [101]. On 90% occupancy (which the Defendant would say is the more realistic figure given the Claimant's occupancy figures) the claim would be for £170,039.06; see paragraph 40 [102].

41. Ms McDermott's calculations include an important factual issue. The Claimant's claim to this point has been in relation to the rooms in all the 13 properties referred to in Schedule 1 of the Management Agreement [149]; some 257 in total. At paragraph 31 of her witness statement [99] Ms McDermott draws attention to the fact that the lease of one (210 Church Hill Road) terminated in February 2017, and that the Claimant is not a party to the Leases of two others (145-7 Hamstead Road and 21 Sandon Road). The leases of the latter two properties are exhibited. The Hamstead Road lease is between (1) Saira Butt and Faisal Saeed and (2) the Directors of the Defendant [326], and the Sandon Road lease is between (1) Bailey Hotel and Apartments Ltd (a company also under the control of Saira Butt and Faisal Saeed) and (2) the Defendant. That reduces the number of rooms the Claimant can charge for to 211. That has a significant effect on the Claimant's claim, but Ms Saeed does not deal with that point in her evidence in response.

42. Mr Grant took me through the calculations underlying the figures of £467,413.99 and £170,039.06 in his submissions. The first calculation is exhibited to Ms McDermott's witness statement [431] and is expressly referred to by her in the body of her witness statement at paragraph 35. As Mr Grant noted, the Defendant may have been generous to the Claimant by allowing for the payment of a service charge for all 257 rooms, but given that this is a strike out/summary judgment application, that was probably the right approach. Assuming 100% occupancy, the Claimant's maximum claim was made up of

Rent for 211 rooms (£95 x 96 weeks x 211 rooms)		£1,924,320
Service Charge for 257 rooms (£94.18 x 96 weeks x 257 rooms)		£2,323,608.96
Total		£4,247,928.96
Less the amount paid of		£3,780,515.97
	=	£467,413.99

Mr Grant pointed out that the sum paid was the Claimant's figure, and had recently been used by the Claimant when calculating its claim [623]. The workings for the £170,039.06 are set out in a spreadsheet at [432], using occupancy rates provided by Saira Butt of the Claimant in August 2020.

43. In the absence of any evidence from the Claimant in relation to the leases of Hamstead Road and Sandon Road, I asked Mr Price Rowlands what the Claimant's case was on the issue. He told me that his instructions were that the Claimant owned all the properties. If that is the case, it should be simple enough to prove. There was no explanation for why the matter was not dealt with by the Claimant in its evidence, particularly given the prominent treatment of the issue by the Defendant in its evidence.

The Set Off

44. The Defendant's case is that it is entitled to set off overpayments of benefit clawed back by the Council against the claim. As I have noted, the principle of that is not disputed. The issue is the amount involved. The Defendant's case is that even if the claim is put on a proper footing, it is comfortably less than the sum of the overpayments the Defendant is entitled to set off. Consequently there is no purpose in giving the Claimant a further opportunity to amend. No counterclaim is being pursued.

45. The Defendant's case is that overpayments of housing benefit were recovered by the Council in the period after May 2020, mostly between December 2020 and June 2021, in the total sum of £762,658.86. Ms McDermott exhibits a series of documents in support of this at [480]-[489]. That total sum is made up of a series of attachments to the emails exhibited. The sums relating to the benefit paid in relation to the Claimant's properties are summarised at paragraph 47 of Ms McDermott's witness statement as follows:

A	not relevant
B	£297,078.29 [376]
C	£205,160.94; email at [372]; attachment at [378]-[379]
D	£140,208.15 [376]
E	£98,011.09 [376]

The Defendant's evidence is that the Council recovered that overpayment.

46. Ms Saeed responds to this aspect of the Defendant's case at paragraphs 37 and following of her witness statement [601]. In summary she says as follows:

(i) The overpayments have been "*contrived in order to conceal mismanagement of funds*"; see paragraphs 37, 45, 49, 54 and 73.

(ii) The Defendant and the Council have collaborated to sabotage the interests of the Claimant; see paragraph 57.

(iii) The Defendant did not submit evidence of these overpayments to the Claimant, which were created without the Claimant's knowledge; paragraph 39.

(iv) The Defendant influenced the retrospective cancellation decisions creating the overpayments; paragraph 42.

(v) The Housing Benefit Regulations 2006 provide for a right to dispute overpayment decisions before recovery is made, but the Defendant has failed to provide the Claimant with the information needed for the Claimant to dispute the Council's position; see paragraphs 44, 48, 64, and 71.

(vi) The evidence the Defendant provides makes no reference to the address and details of the tenants and so cannot be checked; paragraphs 46, 47, and 60.

(vii) The overpayment schedules submitted by Ms McDermott total no more than £281,502.12; see paragraphs 63, and 68.

47. The evidence before me demonstrates that on 14 January 2021 the Defendant sent an email to the Council setting out the process by which the Claimant could appeal the housing benefit reclaims in attachments B, D and E [485]-[486]. The next day, as envisaged by that email, the Defendant emailed the Claimant with the schedules referred to in the reply to Request 6 of the Further Information of the Defence. The Claimant had a month to challenge the Council's figures, but it seems it did not. As I understand Ms Saeed's evidence, it is to the effect that without the addresses and other tenant details it was unable to do so. The reclaim in attachment C was sent to the Claimant later. The objection as to a lack of information would be the same.

48. At paragraphs 18-20 of her second witness statement [735] Ms McDermott makes the point that the Defendant relied on the evidence from the Council that housing benefit overpayments had been made and recovered. The full breakdown had not been put in evidence, but it had been provided in pre-action correspondence as attachments to emails of 15 January 2021 and 25 February 2021, and again in response to the Claimant's Part 18 request.

49. Mr Price Rowlands submits that the Defendant is in effect a managing agent, and has a duty to account. He relies upon clause 6.4 of the Management Agreement which provides the Defendant will be responsible for providing to the Claimant weekly remittance forms from the Council. These he submits are needed before the Claimant can calculate its claim. It is unclear why the benefit remittance forms were needed when the Claimant knew who was in which room and for how long. But clause 6.4 must have a purpose, and may be a reflection of how the arrangements worked. He also submits that the Claimant has had nothing which enables it to challenge the overpayment reclaim. That is not right, but I take the submission to refer to the fact that the Claimant's case is that the information provided was not sufficient.

50. The Claimant also relies on the evidence of Mr Deans, a former employee of the Defendant now working for the Claimant [588]. He is familiar with the arrangements between the parties, and the way in which housing benefit was paid and recovered. He gives a helpful summary of the roles of the parties in relation to housing benefit. Mr Deans finds it hard to understand what can have happened for this level of overpayment to have arisen, and that leads him to question whether the Defendant's data is correct. He may not have been asked to respond to Ms McDermott's witness statement and the way she has calculated the Claimant's potential claims, but there is no detail in his witness statement identifying where the Defendant may have gone wrong (if it has).

51. Ms Saeed makes repeated references in her witness statement to a regulatory judgment [615] which records that the Defendant is not compliant with the Governance and Financial Viability Standard 2020. The content of that judgment is insufficiently detailed to be of any assistance in this case.

Council Tax

52. The final element of the Defendant's application for summary judgment relates to the payment of Council Tax. The Schedule to the Management Agreement records that the service charge includes a sum for Council Tax. I also note that the breakdowns attached

to the Claimant's email of 23 August 2021 [626]-[628] includes a sum of £5.19 per week as an element of the service charge. As I set out above, the Council have determined that the Defendant is liable for the payment of Council Tax. Ms McDermott exhibits a letter dated 18 December 2020 from Sarah Ferdinand on behalf of the Claimant at [465] setting out the Claimant's position. The Defendant does not dispute that as between the Council and the Defendant, the Defendant must pay the Council Tax. Indeed, that is what it has done. The point is that it is paying it twice (as Ms McDermott spells out at paragraph 58 of her witness statement). Once to the Council and again to the Claimant. Hence she says that to the extent that the claim includes the Council Tax element of the service charge (which it appears it still does) it would have no real prospect of success; see paragraph 59. The Defendant's evidence is to the effect that it has paid £106,746.50 in Council Tax; [403]-406].

53. On 13 September 2021 the Court received an email attaching a witness statement from a Mr Hughes. Mr Hughes is an employee of the Claimant, and is referred to in the email from Ms Buckingham of 18 December 2020. There was no permission for further evidence on this point, and no application. Moreover the email to the Court was not copied to the Defendant's solicitors. I directed that an application be made. The Defendant was content for it to be dealt with on paper and I directed that the parties provide written submissions. The Claimant's solicitors filed written submission on 15 September 2021. They went far beyond the admission of Mr Hughes witness statement. But insofar as that witness statement is concerned, it takes the matter no further (as the Defendant's solicitor notes in his written submissions in response). The Claimant fails to understand that it cannot claim the Council Tax element of the service charge when it is no longer paying Council Tax to the Council.

Summary Judgment

54. The approach on applications for summary judgment by defendants was summarised by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [200] EWHC 339 (Ch) @ [15]. The summary has subsequently been approved by the Court of Appeal and adopted by the editors of the White Book, who reproduce it in the note to the rule. The relevant principles in this case are as follows:

> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel at [8];*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*

> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5);*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd;*

55. As I have already found, the Claimant has failed to formulate its claim in a coherent way or to provide the necessary particulars of the calculation of that claim to enable the Defendant and the Court to understand it. Something similar is to be said about the way it has gone about responding to this application. Rather than analysing the points the Defendant makes, and responding to them with evidence (in a proper form), it has adduced witness evidence which is high on assertion and low on detail, and a skeleton argument from its solicitor which is of no assistance. Mr Price Rowlands made such submissions as he could, and I adjourned so that he could take instructions. The core of his submission was that there needed to be an account taken, and that the Defendant should disclose the documents which lay behind the overpayment claim before the Court accepted its case. But even with his assistance I was left without very much to set against the Defendant's position that there was no point in giving the Claimant another opportunity to plead its case because the claim would always be overtopped by the set off.

56. The Defendant's evidence in support of its application was credible. Consequently there is an evidential burden on the Claimant to show some real prospect of defending or some other reason for a trial. The Claimant's case is a mess. There has been a failure to understand the legal basis of the claim, and no proper thought has been given to the evidence it needs to respond to the Defendant's application or how to present it. The fact that it is still appearing piecemeal and without any formality in the week following the hearing of this application demonstrates that. The Defendant's solicitor's written submissions note the wholesale failures to comply with the Court's directions and the Civil Procedure Rules.

57. The position now is that I have the following:

    (1) Mr Price Rowlands submission (on instructions provided during the hearing) that the Claimant owns the properties at Hampstead Road and Sandon Road (and so is entitled to charge rent and service charge). I assume that it has been charging for these properties over the years, but that does not necessarily mean that it was entitled to. If it can, then the number of rooms the Claimant can charge for goes up from the 211 the Defendant accepts to 252. That is the correct number

according to Ms Saeed; see paragraph 19 of her witness statement [598]. The Leases support the Defendant's case.

(2) An email from 2018, sent to the Court by the Claimant by email 3 working days after the hearing, which suggests that the figures of £95 per week for rent and £94.18 for service charge were varied. There is no witness statement exhibiting the email, and no explanation for why this document was not produced for the hearing.

(3) Written submissions from the Claimant seeking permission to adduce further evidence to support its claim, with no relevant application. The contention at paragraph 3 is that the claim for £1,253,725.*89 is based on tenant's contractual rent as stated on each Licence Agreement.*

(4) The submission that the Defendant is under a duty to account for the housing benefit it has received from the Council in relation to the occupancy of these properties, and an as yet unformulated claim based on agency.

(5) A "dispute" of sorts about the level of overpaid housing benefit, which seems to come down to little more than a put to proof as to whether or not the Council were entitled to claw back the monies they did. The legal basis for the Claimant's insistence that it should be able to have the material it says it requires to object is as yet unexpressed, but in any event the evidence I have suggests that it was provided with the information the Defendant had in circumstances where it (the Claimant) had the raw information about occupancy.

58. What all that comes to in simple terms, is that if the Claimant is right about the room numbers and the variation of the rent and service charges, then it's claim may have more than a fanciful prospect of exceeding the overpayment set off.

59. The Claimant's conduct of the case in general, and this application in particular, has been woeful. There has been ample time to deal with the matter properly. I could ignore the material which the Claimant now seeks to rely upon and leave the Claimant to appeal and apply to adduce further evidence. The Claimant would only have itself to blame. But I have concluded that would not be the appropriate course to take. It appears (now) that there may be evidence available at trial which was not properly before me, but which I ought to take into account. In coming to that view I recognise that I am (in effect) allowing the Claimant to rely on material put in late without the necessary formalities, in circumstances where the Defendant has not had the usual opportunity to respond to it at the hearing of its application. There are some serious shortcomings in the presentation of the Claimant's case, but I am concerned that there may just be something in it. For that reason I intend to adjourn the application for summary judgment, giving the Defendant permission to restore it. The Claimant will have to plead its case properly, and the Defendant can then consider whether it wishes to proceed with the application.

60. As I have already said, the Defendant had no option but to bring this matter to a head. Its application was well considered and clearly presented. It would be quite wrong for the Defendant to be prejudiced by the Claimant's failure to deal with it properly. That prejudice can be compensated for in costs, and by a direction that if the Claimant were

to succeed, the interest calculation is to be adjusted to reflect the delay that conduct has caused.

Security for Costs

61. The application is made pursuant to CPR Part 25.13(2)(c) on the basis that the Claimant is a company and that there is reason to believe that it will be unable to pay the Defendant's costs if ordered to do so. This element of the application is supported by the witness statement of Mr Burton the Claimant's solicitor [517]. There is no evidence in response.

62. Mr Burton refers to the Claimant's last set of filed accounts for the period to 31 December 2019, showing net assets of £27,639. He raised the issue of the Claimant's ability to meet an order for costs with it's solicitors in April 2021, and has raised the matter in correspondence since, but there has been no response. He notes the references to the Claimant's financial difficulty in the Particulars of Claim, and that it has taken out a loan. The Claimant's costs to date are £37,240, and the projected figure to trial is in the region of £250,000.

63. At paragraph 2 of her witness statement, Ms Saeed says that others will deal with the application for security for costs [596]. The Claimant was plainly aware of the application, but has failed to respond to it.

64. The Defendant establishes the basis for an order. The issue then is whether the court is satisfied having regard to all the circumstances of the case that it is just to make an order. I note that (i) there is no counterclaim, although there is a defence of set off; (ii) that the Claimant might argue that its financial position is the result of the Defendant's failure to pay; (iii) that Mr Price Rowlands submits that the Claimant has a bona fide claim and that the Claimant clearly does not have the means to pay the Claimant's costs; see paragraph 39 of his written addendum.

65. There is, however, no evidence that the Claimant is unable to raise money to satisfy an order for security. The Claimant has not said in evidence that an order would stifle the claim, and has produced no evidence that it would. That is not something that can simply be assumed in its favour; see the passages from the judgment of Eady J in *Al-Koronky v Time Life Entertainment Group Ltd* [2005] 1688 (QB) referred to in the notes in the White Book at 25.13.1 and 25.13.13.

66. Mr Grant submitted that this may be a case for a phased order. He submits that I should make an order to deal with the costs to the CCMC, and revisit the matter at that stage having undertaken the costs budgeting exercise. That is a reasonable and proportionate approach to take having regard to all the circumstances of the case.

67. I leave out of account the costs of this application and the costs of amending the Defence which will be dealt with separately. The further costs of taking this matter to a CCMC are unlikely to be less than the £20,000 or so provided for in the budget Mr Burton exhibits [578], and I make an order for security in that sum. The application may be renewed at the CCMC.

Disposal

68. I make the following orders:

    1. The Particulars of Claim are struck out pursuant to CPR Part 3.4(2)(a).

    2. The Claimant is to provide a draft of its amended Particulars of Claim to the Defendant by 4pm on 20 October 2021. If the Claimant fails to comply with this order by the time provided the claim is to be struck out.

    3. If the Defendant agrees to the grant of permission to amend the Particulars of Claim in the form of the draft provided pursuant to paragraph 2 above, the Court will consider granting permission on paper. If the Defendant opposes the grant of permission, the matter will be listed for a further hearing before HHJ Worster.

    4. The Claimant is to pay the Defendant's costs of and caused by the amendment of the Particulars of Claim. The Defendant may apply for those costs to be summarily assessed once incurred.

    5. The Claimant shall not be entitled to claim interest on any sum it recovers in respect of the period from the issue of proceedings to the grant of permission for the amendment of the Particulars of Claim.

    6. The Defendant's application for summary judgment is adjourned with permission to restore.

    7. The Claimant is to give security for the Defendant's costs of these proceedings up to the hearing of the Costs and Case Management by paying the sum of £20,000 into the Court Funds Office by 20 October 2021. Save that the Claimant is to comply with the requirements of paragraphs 2 and 8 of this order, all further proceedings are to be stayed until the security is given as required.

    8. The Claimant is to pay the Defendants costs of the application of 12 August 2021 on the indemnity basis, summarily assessed in the sum of £44,992.44 (being costs of £37,536.20 plus VAT of £7,456.24) by 4pm on 20 October 2021.

70. The amended Particulars of Claim must set out the legal basis of the Claimants claims and plead them in such a way that they can be understood. The pleading must provide proper particulars of the way in which the claim is calculated. It is unlikely that the Court will allow the Claimant any further latitude in the matter.

71. The Claimant is to consider whether it intends to proceed with any part of its application of 6 September 2021.