Neutral Citation Number: [2020] EWHC 3463 (QB)

Case No: QB-2019-002623

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2020

Before :

MASTER COOK

- -

Between :

MANSING MOORJANI	**Claimant**
- and -	
DESMOND KILCOYNE	**Defendant**

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- -

Mr Moorjani appeared in person
Suzanne Chalmers (instructed by **Browne Jacobson**) for the **Defendant**

Hearing dates: 16 October 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER DAVID COOK

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 21 December 2020 at 10:30 am

MASTER COOK:

Introduction

1. By application notice dated 5 November 2019 the Defendant applies to strike out the Claimant's claims on the basis that they are an abuse of the process of the court, in that they constitute an impermissible collateral attack upon judgments of HHJ May QC and the Court of Appeal, and/or there are no reasonable grounds for bringing the claim, alternatively for summary judgment on the grounds that they do not have real prospects of success.

2. I heard this application on 16 October 2020 when arrangements were made for the hearing to take place in person due to the fact that Mr Moorjani had hearing difficulties which meant that he could not easily participate in a remote hearing. Unfortunately there was insufficient time available to enable Ms Chalmers to complete her submissions in response and Mr Moorjani had made some points in the course of his submissions where he could not immediately point to the relevant documents. In the circumstances I asked Mr Moorjani to provide additional written submission and permitted Ms Chalmers to respond in writing. These written submissions were uploaded to the courts' electronic case management system, Ce-file. Unfortunately they were not provided to me directly or bought to my attention on submission, accordingly the preparation of this judgment has been delayed , for which I apologise.

3. The relevant facts are set out in the witness statement of Mr Radford made in support of the Defendant's application and are not in dispute. The Claimant has not filed any evidence in response.

4. The Defendant is a self—employed barrister, practising from Chambers at 42 Bedford Row. From October 2009, he was retained by the Claimant under the Bar Council Direct Access Scheme in connection with a number of matters, including two claims which are the subject matter of this action;

    i) a claim by Mr Moorjani against Durban Estates Limited ('Durban') (Claim Number 1WL00306) ('the Durban Claim'); and

    ii) a claim by Mr Moorjani against Mr Wahab & Others ('Wahab') (Claim Number 1CL00893) ('the Wahab Claim').

5. Both the Durban Claim and the Wahab Claim arose out of Mr Moorjani's leasehold ownership of Flat 67, Ivor Court, Gloucester Place, London NW1 SBN ('the Property'). Ivor Court is a block of mansion flats. in April 2005, the Property was damaged due to a water leak which emanated from a radiator in Flat 82, Ivor Court ('Flat 82'), the flat situated directly above the Property ('the 2005 leak'). Further damage to the Property followed a subsequent water leak which also emanated from Flat 82, this time from a cistern, in 2006 ('the 2006 leak').

The Durban claim

6. In the Durban Claim, the Claimant claimed damages against the former freehold owner of Ivor Court, Durban. He claimed damages on the grounds that:

i) Durban had failed to keep the common parts of Ivor Court in good repair;

ii) Durban had failed to action and diligently and expeditiously deal with an insurance claim arising out of the water leak damage to the Property (in breach of an implied covenant of the Lease and/or a fiduciary or quasi—fiduciary duty owed to the Defendant);

iii) Durban were in breach of a duty of care to avoid causing the Defendant economic harm arising out of its undertaking of responsibility to carry out repair and redecoration works following the 2005 leak.

7. In the action, the Claimanrt claimed damages for distress and inconvenience arising out of:

i) the condition of the common parts and

ii) the condition of the Property following the 2005 and 2006 leaks. His claim included a claim for loss of rent from December 2005 to July 2006 on the grounds that, but for Durban's breach, he would have let out the property. In addition, he claimed costs incurred in carrying out remedial works to the electrical system and skirting boards (£630) and the estimated cost of remedial works to 5 doors (£2,500) and the master bedroom (£1,950) which he alleged should have been carried out by Durban's contractors but were not.

8. On 10 April 2012, Durban made a Part 36 offer to settle the claim for £10,000 together with costs, to be assessed if not agreed. The Defendant advised the Claimant as to the merits of his claim in conference on 11 May 2012 and in writing on 21 May 2012. The Defendant advised that the offer placed the Claimant at considerable risk as to costs, and that he should consider the offer very seriously. As the Claimant accepts in paragraph 60 of his Particulars of Claim, he was advised by the Defendant to accept the offer. The Claimant rejected this advice and he did not accept the offer. He did not make any realistic counter proposals and the matter proceeded to trial, where he was represented by the Defendant.

9. Following the trial, HHJ May QC (as she then was) gave Judgment on 31 July 2013. In summary, she held that:

i) The claim for loss of rent failed because, as a matter of law, Durban did not assume a duty of care to perform the repairs or avoid causing the Claimant economic loss. As a matter of fact, he had not established that he was unable to let the Property by reason of the damage caused by the 2005 leak.

ii) Durban owed a duty to act reasonably in liaising with insurers to identify and arrange the repairs. Durban should have raised the outstanding items of repair (the doors, the master bedroom and the electrics) with insurers; but the Claimant had failed to prove that insurers would have paid for these additional items.

iii) In breach of covenant, Durban had failed to apply insurance monies received by about April 2006 in reinstatement of the premises. In fact, the premises were not repaired until February 2007. However, the Claimant could not prove

any inconvenience as a result, because he was living elsewhere during that period, although the Property was habitable.

iv) Durban was also in breach of covenant in failing to maintain the common parts from 2005 until 2011. However, as the Claimant was not actually living at the Property during the period from 2005 to 2008, he was only entitled to damages for inconvenience / loss of amenity for the period from 2008 to 2011 which she assessed in the sum of £500 per year.

10. As a result, the Claimant was awarded damages of £1,500. Because he had failed to beat Durban's offer, he was ordered to pay 50% of the costs incurred by Durban prior to 11 May 2012 (the end of the relevant period for acceptance of Durban's Part 36 Offer).

11. The Claimant sought permission to appeal the decision on a number of grounds. A number of these grounds failed. Permission to appeal was granted in relation to two issues:

i) whether the Judge was wrong to refuse to award damages for inconvenience for a period when the Claimant was not living in the Property and/or whether the award was too low; and

ii) whether the Judge was wrong to dismiss the claim for the cost of completing the additional repairs. Throughout the appeal process, the Claimant was represented by alternative counsel, Mr Simon Williams.

12. On appeal, *Moorjani v Durban Estates* [2015] EWCA Civ 1262 , the Court of Appeal rejected the submission that the assessment of general damages for loss of amenity due to the condition of the common parts was too low. It held that the claim for the cost of completing repairs to the doors and the bedroom should have succeeded and awarded damages of £3,450. It held that the fact that the Claimant was not living in the flat was not fatal to his claim for damages for inconvenience, but it was relevant to the quantification of his loss and awarded £3,930 in respect of his impaired amenity. He was awarded total damages of £8,880 together with interest, but he had still failed to beat the Part 36 offer. As to the costs incurred prior to the end of the relevant period, no order for costs was substituted for the order that the Claimant should pay 50% of Durban's costs.

The Wahab Claim

13. In the Wahab Claim, the Claimant claimed damages against Mr Wahab and Others as the owners of Flat 82, alleging that they were liable to him in nuisance / negligence and/or under the doctrine in Rylands v Fletcher for damage caused by a series of leaks from their property, including the 2005 leak and the 2006 leak.

14. According to the Claimant, he accepted an offer to settle the claim for £16,000 made on 3 September 2013, but the offer did not determine interest or costs and so he applied to the Court. The Defendant did not represent the Claimant at the hearing. The Claimant states that the hearing was determined by District Judge Taylor, who made no order as to costs.

The Claimant's claims against the Defendant

15. The Claimant acts in person and has drafted his own particulars of claim. He told me, in the course of the hearing that he had been a law lecturer before his retirement, none the less, as Mr Radford observed in his witness statement, the particulars are drafted in a narrative style and it is not at all easy to separate the narrative from the alleged breaches of duty. In essence, it is the Claimant's case that, had his claim against Durban been presented properly, he would have recovered damages in excess of £10,000, either at first instance or in the Court of Appeal. As a result, he would not have had to pay Durban's costs from the end of the relevant period for acceptance of the Part 36 offer and he would have recovered his own costs.

16. In respect of the Durban claim it is possible to identify the following complaints against the Defendant from the particulars of claim:

    i) Presentation of the evidence as to habitability (paragraphs 6(i), 6(ii), paragraph 11, 34(ii), 46, 47, 65(h) and 65(r)),

    ii) The concession that no claim would be advanced for damages for inconvenience due to Durban's failure to present the insurance claim for the period prior to May 2006. (paragraphs 6(ii), 22 (second paragraph), 29, 30, 32(i), 37(ii), 39, 42, 43, 44, 45, 46 and 65(a) - (g),

    iii) Submissions as to the appropriate rate of general damages for inconvenience (paragraphs 34, 54, 55 and 56),

    iv) Alleged agreement with Durban's surveyor that the storage cupboard doors could be realigned, rather than replaced (paragraphs 17, 53 and 65(j)),

    v) Presentation of the claim for the cost of additional repairs to the Property (paragraphs 48, 49 and 50),

    vi) Presentation of the claim for damages for inconvenience arising out of the condition of the common parts (paragraphs 51, 52, 61 and 65(k) — (n)),

    vii) Following Judgment, submissions as to interest, costs and a failure to seek a review of the Judgment (paragraphs 57, 58 and 59).

17. It is however more difficult to understand the nature of the allegations made against the Defendant in the particulars of claim arising out of the Wahab claim. In the course of the hearing the Claimant confirmed to me that the basis of his claim was that if the Durban claim had been properly presented by the Defendant, HHJ May QC would have determined that the Property was uninhabitable and that District Judge Taylor, who seemed to have knowledge of HHJ May's judgment, would have made a costs order in his favour rather than no order for costs (paragraphs 22 to 24).

The grounds for strike out and/or summary judgment

18. On behalf of the Defendant Ms Chalmers advanced three grounds for striking out the claim;

i) The allegations made should be struck out pursuant to CPR 3.4(2) because they seek to mount a collateral attack upon the decisions of HHJ May QC and/or the Court of Appeal. The Claimant should not be permitted to relitigate the issues raised in the earlier trial and/or mount a fresh appeal. His attempt to do so constitutes an abuse of the process of the Court in that he does not allege that further or new material should have been placed before the trial Judge. Instead, he alleges that the Defendant failed to persuade the judge to reach a different conclusion upon the evidence that she had read and heard.

ii) Alternatively, the Claimant's allegations do not have real prospects of success. Taken at their highest, they concern matters of judgment for the Defendant when presenting the Claimant's case at trial. The Claimant's complaint is that the Defendant should have argued the Claimant's case before HHJ May QC in a different way, with more emphasis upon certain points. There is no real prospect that the Court will find at trial that such matters constitute a breach of duty. Furthermore, the Claimant does not have any realistic prospect of establishing that the outcome would have been any more favourable to the Claimant. In truth, the Claimant's loss arises from his own decision not to accept a Part 36 offer, contrary to the Defendant's advice. Accordingly, these allegations should be dismissed at this stage.

iii) Lastly, the Particulars of Claim do not disclose reasonable grounds for bringing a number of the claims made. In particular, the allegations made by the Defendant in the Wahab claim are poorly particularised and vague.

19. Ms Chalmers submitted that the Claimant should not be given a further opportunity to particularise his allegations. All of the available material demonstrates that the allegations would amount to a collateral attack on previous Court decisions and/or would have no real prospect of success in any event.

The applicable legal principles

20. There was little dispute between the parties as to the applicable legal principles.

Abuse of process

21. CPR 3.4 provides that:

> "(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.
>
> (2) The court may strike out a statement of case if it appears to the court—
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; …"

22. A statement of case discloses no reasonable grounds for bringing a claim within the meaning of ground (a) if it is unreasonably vague, incoherent, obviously ill-founded or does not amount to a legally recognisable claim. As to ground (b), it is in the interests of justice, particularly the public interest in the finality of litigation, that the ability of a claimant to challenge legal decisions by way of appeal or subsequent action should be kept within reasonable bounds.

23. The case of *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 established that it is an abuse of process to initiate proceedings for the purpose of mounting a collateral attack upon a final decision made against the claimant in another Court, where the claimant had a full opportunity of contesting the decision in that Court.

24. In the case of *Taylor Walton v Laing* [2007] EWCA Civ 1146 the Court of Appeal drew a distinction between claims where the impugned conduct of the lawyer is independent of the factual conclusions of the Court and those claims where, in truth, the claimant seeks to relitigate a case on the basis of the same material as was before the trial judge. In the latter case, the claimant challenges the judgment of the Judge on the evidence before them and the claim should be struck out as an abuse of the court's process.

Summary judgment

25. Pursuant to CPR 24.2:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—
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> (a) it considers that—
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
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> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

26. The test for summary judgment is well known and has been restated on many occasions, see for example *JD Wetherspoon Plc v Van de Berg & Co Ltd* [2007] EWHC 1044 (Ch) and *EasyAir Ltd (trading as Openair) v. Opal Telecom Ltd* [2009] EWCA (Ch). The Court must consider whether the Claimant has a 'real' or 'realistic' prospect of success, that is one which is more than merely arguable. In reaching its conclusion the court must not conduct a mini trial but that does not mean that the court must take at face value everything a claimant says in his statements. The court must take into account not only the evidence actually placed before it but the evidence that might reasonably be expected to be available at trial. The court should be cautious of summarily disposing of a claim in an area of developing jurisprudence.

The standard of care

27. The standard of care required of the Defendant was that expected of a reasonably competent junior counsel of his seniority and purported experience: see Lord Carswell in *Moy v Pettman Smith* [2005] 1 WLR 581, at para 62.

28. In the case of *Arthur JS Hall v Simons* [1994] Ch 205, the House of Lords ruled that the public policy arguments in favour of exempting barristers from professional negligence claims were no longer appropriate. One of the reasons for their Lordships' decision was the fact that the Court had the power to give summary judgment where a claim was unlikely to succeed, see the judgment of Lord Steyn at p. 681;

> "There would be benefits to be gained from the ending of immunity. First, and most importantly, it will bring to an end an anomalous exception to the basic premise that there should be a remedy for a wrong. There is no reason to fear a flood of negligence suits against barristers. The mere doing of his duty to the court by the advocate to the detriment of his client could never be called negligent. Indeed if the advocate's conduct was bona fide dictated by his perception of his duty to the court there would be no possibility of the court holding him to be negligent. Moreover, when such claims are made courts will take into account the difficult decisions faced daily by barristers working in demanding situations to tight timetables. In this context the observations of Sir Thomas Bingham M.R. (now Lord Bingham of Cornhill) in *Ridehalgh v. Horsefield* [1994] Ch 205 are instructive. Dealing with the circumstances in which a wasted costs order against a barrister might be appropriate he observed, at p. 236:
>
> > "Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him."
>
> For broadly similar reasons it will not be easy to establish negligence against a barrister. The courts can be trusted to differentiate between errors of judgment and true negligence. In any event, a plaintiff who claims that poor advocacy resulted in an unfavourable outcome will face the very great obstacle of showing that a better standard of advocacy would have resulted in a more favourable outcome. Unmeritorious claims against

> barristers will be struck out. The new Civil Procedure Rules, 1999, have made it easier to dispose summarily of such claims: rules 3.4(2)(a) and 24.2."

Lord Hope held at pp.718 and 726:

> "The courts have been careful to point out that advocacy is a difficult art and that no advocate is to be regarded as having been negligent just because he has made an error of judgment during the conduct of the case in court.
>
> …
>
> While the advocate owes a duty to his client, he is also under a duty to assist the administration of justice. The measure of his duty to his client is that which applies in every case where a departure from ordinary professional practice is alleged. His duty in the conduct of his professional duties is to do that which an advocate of ordinary skill would have done if he had been acting with ordinary care. On the other hand his duty to the court and to the public requires that he must be free, in the conduct of his client's case at all times, to exercise his independent judgment as to what is required to serve the interests of justice. He is not bound by the wishes of his client in that respect, and the mere fact that he has declined to do what his client wishes will not expose him to any kind of liability. In the exercise of that judgment it is no longer enough for him to say that he has acted in good faith. … He must also exercise that judgment with the care which an advocate of ordinary skill would take in the circumstances. It cannot be stressed too strongly that a mere error of judgment on his part will not expose him to liability for negligence."

29. Ms Chalmers placed particular emphasis on Lord Steyn's observation that the courts were able to judge between errors of judgment which were inevitable in the art of advocacy and true negligence.

30. In *FirstCity Insurance Group v Orchard* [2003] PNLR 9 solicitors and Counsel for the claimant considered and decided not to plead or argue a potential point of construction which was subsequently raised by the Court of Appeal and proved decisive in the claimant's favour. Forbes J relying on *McFarlane v Wilson* [1997] 2 Lloyds LR 259 stated that:

> "… even where there are a range of possible points to be argued, once a well-informed and considered view has been taken as to what is the best point to argue, a barrister who runs with that point and decides not to clutter the case up with other arguments is generally not to be held to have been negligent"

The parties' arguments and analysis

31. I will consider each of the issues raised in the particulars of claim and identified by me at paragraph 16 above separately. Before doing so I would make one observation. It was apparent to me that the Claimant has spent a great deal of time analysing and reviewing the papers relating to this case, he has become immersed in the detail to such an extent that he could not, on occasion, see the wood for the trees. This was particularly evident from his written submissions which descended into granular detail. For the avoidance of doubt I have taken into account all of his oral and written submissions together with references to documents, however, if I fail to specifically address some of those arguments or documents in this judgment it does not mean they have not been taken into account.

The habitability issue

32. Ms Chalmers submitted that all of the relevant material, including documentary, oral witness and expert evidence was before HHJ May QC. The Claimant's complaint was that the Defendant should have placed greater emphasis upon one element of this material, a letter evidencing a decision of the local authority as to the Council tax. This document was in fact a Council Tax demand notice issued on 17 August 2005 and had been exhibited to the Claimant's witness statement and was specifically referred to in answer (i) to question 8 of the Claimant's Answers to the Defendant's part 18 request for further information dated 19 January 2012.

33. The Claimant continues to maintain that HHJ May QC was wrong to find that the flat was habitable in light of this document. He saw this as one of the main pillars of his case and maintained that the Defendant's failure to properly highlight the document's existence caused his case to fail. As he put it "*it was counsel's duty to lay out the foundation of the case and the main pillars before the court i.e. guide the court, so as to enable it to understand the case, rather than misguide it*".

34. The Claimant cannot however escape from the fact that the material was in evidence before HHJ May QC. On this issue she had to consider all the relevant evidence. As Ms Chalmers pointed out the letter does not necessarily bear the evidential weight that the Claimant attributes to it. It was issued on 17 August 2005, before the autumn repair works were carried and it is not evident from the face of the Notice that any kind of survey was carried out. It is of no relevance that the Claimant has succeeded in persuading a court in a different case with different facts that a flat was uninhabitable on the basis of a similar notice.

35. If the Claimant were right that the Council Tax demand had the effect he was contending for and HHJ May QC fell into error as a result, then this would have constituted a good ground of appeal.

36. In my judgment this allegation amounts to a full frontal attack upon the finding of the Judge and the allegations at paragraphs 6(i), 6(ii), 11, 34(ii), 46, 47, 65(h) and 65(r) of the particulars of claim should be struck out either as an impermissible collateral attack on the Judge's decision or as having no reasonable prospect of success.

Damages for inconvenience

37. In his Particulars of Claim the Claimant contended that the Defendant was wrong to allege that the landlord's express obligation to carry out and complete the repairs

arose upon receipt of the insurance monies in April 2006. In his submissions to me and in his written submissions he now focusses upon an allegation that the Defendant was wrong to adopt a date of April 2006 as being the date when insurers made payment in respect of the works.

38. As explained by Mr Radford in his witness statement at trial the Defendant argued and HHJ May QC found that Durban wrongly failed to apply the insurance monies received in May 2006 to repair the damage caused by the flood. An additional claim had been pleaded in respect of the period prior to that date, namely breach of an implied obligation to liaise with insurers and effect the repairs. The success of this claim depended on establishing culpable delay on the part of Durban and its agents and that insurers would have paid the claim sooner if Durban had acted differently. The Defendant advised the Claimant not to pursue this aspect at trial and it was not pursued.

39. The Claimant submits that this was not a matter of judgment for the advocate, because the Defendant misinterpreted the written evidence namely the insurers letter of 10 April 2006. The Claimant pointed out that the reference in the letter is to the shop below his flat and that the amounts do not match the invoices rendered for the work done on his flat in the autumn of 2005. The Claimant submitted that he was unable to go behind what he described as a wrongly made concession in the Court of Appeal.

40. It is right that the Court of Appeal overturned HHJ May QC's conclusion that general damages should not be awarded for a period when the Claimant was not in occupation, albeit on grounds neither advocate advanced before the Court. The Court of Appeal awarded modest damages from April 2006 but declined to consider a period before that date because it had not been advanced in the Court below, see the judgment of Lord Justice Briggs at paragraph 41. It is important to note that the Court of Appeal expressed no view as to whether any such claim would have succeeded.

41. The Defendant has given his account as to why he advised the Claimant not to pursue this element of the claim at paragraph 46 of his defence.

> "46.1 Under clause 5 of the lease, Durban expressly covenanted to (i) keep the Building insured; and (ii) upon receipt of the insurance monies, to cause those monies to be laid out with all convenient speed in rebuilding, repairing or otherwise re-instating the Building or part thereof [which was] damaged.
>
> 46.2 In terms, the latter express obligation only arose upon receipt of the insurance monies.
>
> 46.3 As Mr Kilcoyne was at all material times well aware, Durban's obligation to keep the Building insured gave rise to an implied obligation to prosecute a claim under the insurance policy effected with all reasonable speed (*Vural v Security Archives* (1989) 60 P & CR 258).

46.4 This implied obligation or duty was not a strict obligation. In order to prove breach of the obligation by Durban, its servants or agents, Mr Moorjani was obliged to prove fault, that is, a failure to act reasonably, on their part.

45.5 in his written Opening Submissions (at paragraphs 7 to 8), Mr Kilcoyne presented Mr Moorjani's claim on the basis that there had been a breach of both the express and the implied obligation.

46.6 Prior to trial, Mr Kilcoyne took Mr Moorjani through the draft Skeleton Argument and discussed it with him. Mr Kilcoyne orally advised Mr Moorjani that, in his opinion, it would be advisable to restrict his claim for loss of amenity to the period from May 2006 to May 2007, by which time the insurance monies had been received and so Durban should have taken steps to complete the repairs properly. In this way, it would be sufficient to rely upon breach of the express obligation in the Lease and would not be necessary to establish to the requisite standard negligence / fault on the part of Gross Fine. Mr Kilcoyne's reasons were as follows:

(1) Overall, it was necessary to present Mr Moorjani's case at trial in a coherent and persuasive manner;

(2) The factual matrix was not straightforward, complicated by the 2006 leak;

(3) Much of the claim (including in particular the claim for loss of rent) turned upon the oral evidence of Mr Moorjani himself and his performance as a witness;

(4) Mr Moorjani was not party to the correspondence between Gross Fine and insurers / loss adjusters or between Gross Fine andAbletrades. The correspondence was not disclosed in the litigation.

(5) For example, although there was evidence that insurers paid a sum of money to Gross Fine (as agents of Durban) on 10 April 2006, there was no available evidence as to the particulars of the insurance claim which had been made by Gross Fine and/or as to the response by insurers / loss adjusters.

(6) As a result, for the period prior to April / May 2006, it was unclear how Mr Moorjani could prove his case that Gross Fine had failed to act reasonably in relation to the insurance claim.

> (7) There was a risk that the weak claim for the period prior to April / May 2006 might taint the remainder of Mr Moorjani's claim for loss of amenity and/or his claim generally.
>
> 46.7 Mr Moorjani accepted Mr Kilcoyne's advice and agreed to restrict his claim to the period from April / May 2006 (after the insurance monies had been received).
>
> 46.8 The Claimant's Skeleton Argument was finalised and approved by Mr Moorjani and Mr Kilcoyne's Opening Submissions were advanced on this basis."

42. This account has not been contradicted by the Claimant.

43. The evidence shows the Durban claim was a complex one, involving many legal and factual issues. The main claim was for loss of rent, not damages for loss of amenity. There was no previous decided case where damages had been awarded for loss of amenity to a tenant who was not in occupation. Furthermore, it would have been necessary for the Claimant to prove liability and causation in relation to the conceded claim. The conceded claim related to a short period between the autumn of 2005 at the earliest and April 2006.

44. Miss Chalmers submitted that the Defendant exercised his judgment and considered that it was not worth pursing, given the evidential difficulties and bearing in mind the many other issues which arose for determination at trial. Furthermore she submitted that even if, in theory, the Defendant could have invited the Court to infer an earlier date for payment, somewhere between completion of the works and April 2006, there was no evidence to support an insurance payment at that time at all, in which case the Claimant would have been obliged to fall back upon the assertion that the landlord failed to progress the insurance claim with reasonable expedition in which case the Claimant may not have recovered damages in respect of the whole of the second period.

45. It is clear to me from the Claimant's written submissions that he continues to disagree with the finding of HHJ May QC that the insurance covenant did not impose upon the landlord an obligation to repair. It is not open to the Claimant to go behind this finding which was not appealed. In any event the Claimant's criticisms of the Defendant have a heavy element of hindsight.

46. In my judgment the available evidence shows the concession made by the Defendant in the course of a trial and fully explained to the Defendant at the time was the sort of decision which Forbes J described in *McFarlane v Wilson* as being made after a well-informed and considered view has been taken. It is the sort of decision that that a court can and should determine summarily as amounting to no more than an *error of judgment rather than negligence*, to use the words of Lord Steyn in *Arthur JS Hall v Simons.* At worst the concession made by the Defendant could be said to amount an error of judgment at best it was rightly made. In the circumstances I am satisfied that the allegations at paragraphs 6(ii), 22 (second paragraph), 29, 30, 32(i), 37(ii), 39, 42, 43, 44, 45, 46 and 65(a) - (g) of the particulars of claim stand no reasonable prospect of success.

The appropriate rate of general damages for inconvenience

47. HHJ May QC determined that damages for inconvenience should not be awarded for any period whilst the Claimant was not living in the property. She also determined the general rate to be applied.

48. First, it must be noted that both of these decisions were the subject of the appeal to the Court of Appeal. The Court of Appeal declined to interfere with the judge's assessment of the rate.

49. In his submissions to me the Claimant referred to paragraphs 44 and 45 of his particulars of claim where he alleged the Defendant was wrong to allege that the landlord's obligation to carry out and complete repairs arose on receipt of the insurance monies in April 2006. The Claimant maintained the Defendant had misunderstood the effect of a letter from the insurers dated 10 April 2006 with the result that he was stuck with this date in the Court of Appeal. He pointed out that there was a reference in the letter to the shop below his flat and that the amounts paid do not match the amounts paid.

50. The major difficulty with this argument is that there was no evidence in support for an earlier date for payment. At trial it was common ground that the insurers had made payment in respect of invoices presented after the works had been completed by the Landlord in October and November of 2005. The complaint made was that the work done was incomplete and defective and that the landlord had failed to complete the works or pursue the insurers to complete the works. It is also the case that the Claimant's skeleton argument in the court of appeal made this very point;

> "26 In fact the so-called works of reinstatement of the Flat were completed by the end of September 2005 and the payment made in April 2006 (£3,934.09 [186] could not have related to the invoices for that work to the Flat [180-181] which totalled £2,989.19. In all probability that payment was for work to a different part of the Building. Furthermore, the payment was for "presented invoices" [186] and clearly therefore related to work which had already been completed as opposed to being an advance payment for work to be done from May 2006 onwards.
>
> 27. Moreover, the fact that the work was done in September 2005 makes it clear that D had assumed responsibility for performing its reinstatement obligations well before April 2006. This is entirely consistent with the way insurance claims are handled by insurers and managing agents of blocks like the Building. The contractors, ATP, were engaged and paid by Gross Fine, the managing agents, by November 2005. The funds were thereafter reclaimed from the insurers. ATP's September 2005 work was of poor quality and incomplete and had to be redone. By October 2005 D had therefore attempted but failed to reinstate the Flat. C would say, therefore, that by its conduct, D is estopped from relying on the strict terms of

> clause 5(7) of the Lease as to the time at which the obligation to reinstate arose. The principal period for the assessment of damages is October 2005 to April 2007, by which time much of the work had been done, at C's behest. C was still not able to return to the Flat until January 2008 by which time the fire doors to the front, kitchen and inner passage and the doors to the outer passage and small toilet had been put in to make the Flat habitable as a one-bedroom fiat [214, 215 & 217]."

51. HHJ May QC had held that the landlord was not under any obligation to carry out remedial works to the Claimant's flat prior to receiving the insurance moneys and no appeal was permitted against this finding. As Ms Chalmers rightly points out in theory the Defendant could have advocated an earlier date for payment but as there was no evidence to support that date the Court may have concluded there was no evidence to support any insurance payment with the result that the Claimant would be forced to fall back on his assertion that the landlord failed to progress the insurance claim with reasonable expedition and he may not have recovered damages in respect of the whole of the second period.

52. I accept Ms Chalmers submissions that having regard to the contents of Claimant's speaking note at pp 19a, b and d he disagrees with the findings of the trial judge and continues to maintain that she was wrong as a mater of law to conclude that the insurance covenant did not impose upon the landlord an obligation to repair.

53. Paragraphs 34, 54, 55 and 56 of the particulars of claim should be struck out as an impermissible collateral attack of the judge's decision or as having no reasonable prospect of success.

Agreement that that the storage cupboard doors could be realigned, rather than replaced

54. This complaint appears to relate to the way in which the Defendant cross examined Durban's surveyor. The difficulty here was that experts each viewed the property on different occasions, as stated in their joint statement. Mr Blackman gave evidence that all of the doors had been realigned and closed properly in May 2012.

55. In the circumstances I cannot see how the Defendant could be expected to challenge this opinion further. Even if the allegation could be substantiated it is in my judgment clearly a matter of detail arising in the conduct of a trial and as such falls well within the ambit of counsel's reasonable discretion.

56. Paragraphs 17, 53 and 65(j) of the particulars of claim have no reasonable prospect of success.

Presentation of the claim for the cost of additional repairs to the Property

57. The Claimant's assertion that HHJ May QC's decision on this issue was based on an incorrect understanding of the case of *Vural Ltd v Security Archives Ltd* (1989) 60 P&CR 258 is simply wrong. At paragraphs 20 and 21 of her judgment she stated:

> "20. However, there has been no evidence before me from which I could conclude that a claim made under the insurance would have been paid. It was not that no claim was made as result of some failure on the part of Gross Fine, plainly claims were made and the views of tenants were sought. I was taken to a sequence of letters starting with the letter from loss adjusters on the 10th April 2006 asking Gross Fine to check with the tenant (in this case Mr. Moorjani) as to what else remained to be done. Gross Fine duly sent this letter on to Mr. Moorjani who responded by a long letter on the 14th April identifying, amongst other things, non-fitting doors and defects to decorations within the master bedroom. There, however, the trail goes cold. There is reference in a later letter to there having been a subsequent meeting at the flat attended by assessors, Gross Fine and Mr. Moorjani. Presumably the matters which Mr Moorjani now complains of were discussed at that meeting. There is no evidence as to what happened after that, nothing to show (a) that insurers would have paid or (b) that the fact they did not was due to some default on the part of Gross Fine.
>
> 21. In these circumstances I have concluded that I simply cannot find the necessary evidential threads joined up so as to render Durban Estates liable to pay for the three items of damage as damages for breach of duty on the part of Gross Fine. It is for the claimant to prove his claim and I find that he has not done so. Had I been satisfied, on the evidence, that the repairs remained outstanding as a result of some breach on the part of Gross Fine, then I would have valued the three items as follows: the doors, £1,650 on the basis that replacement in the end was necessary. I would not have allocated anything for the storage cupboard doors as these were not identified at the time as a problem. So far as the master bedroom is concerned, there are no receipts for this work. The only evidence which I saw was an estimate in the sum of £1,800 so that is the value I would have put on that. So far as the electrical items are concerned, there is no more than an assertion in the pleadings that the cost was £250. There are no receipts and no estimate. In my view that is insufficient evidence upon which I could have made a finding as to value."

58. HH Judge May QC's decision was based upon her conclusion that that she could not draw an inference as to what the insurers would have done if presented with a particular claim. In the circumstances it is not open to the Claimant to allege that the Defendant should have been able to persuade her to reach a different conclusion.

59. Further and in any event the Court of Appeal allowed these claims with the exception of the £550 skirting cost. It is clear that in awarding the sums she did HHJ May QC took into account all the evidence including that of the Claimant who was cross examined as to the basis of his claims.

60. Paragraphs 48, 49 and 50 of the particulars of claim should be struck out as an impermissible collateral attack of the judge's decision or as having no reasonable prospect of success.

Presentation of the claim for damages for inconvenience arising out of the condition of the common parts

61. It is clear from paragraphs 25 to 33 of her judgment that HHJ May QC reached a view as to the permissible period for disrepair of the common parts on the basis of all the evidence given at trial. The judge approached this task in a global way. In essence the Claimant's complaint is that had the Defendant cross examined Mr Blackman in a different way the judge would have arrived at a different result. The Claimant accepted, in answer to a question from me, that he was not saying that relevant evidence had been omitted.

62. It is clear from the authorities that I have referred to above that in the course of a trial advocates are obliged to take rapid decisions and focus their cross examination, having regard to the evidence as it emerges and interventions from the trial judge. The fact that with the benefit of hindsight another approach would have been better or an error of judgment was made cannot be properly regarded as negligence.

63. Paragraphs 51, 52, 61 and 65(k) — (n) of the particulars of claim should be struck out as an impermissible collateral attack of the judge's decision or as having no reasonable prospect of success.

Post judgment, submissions

64. The Claimant's first complaint was that the Defendant should have asked HHJ May QC to review her decision post judgment. The Claimant failed to identify any procedural basis for such a review notwithstanding his allegation at paragraph 57 of the particulars of claim that the Defendant was not aware of the "relevant CPRs" . The proper approach in a civil claim is to appeal the judgment pursuant to CPR 52 which was the approach that was in fact followed.

65. The Claimant's second set of complaints concerned alleged failures on the part of the Defendant in relation to the appropriate interest on costs. Here again the Claimant's case is wholly misconceived. As the Claimant had failed to beat the Part 36 offer the judge was considering Durban's claim for enhanced interest on damages and costs pursuant to CPR 36.17 and was not limited to 3%.

66. Paragraphs 57, 58 and 59 of the particulars of claim have no reasonable prospect of success.

The Wahab claim

67. The Claimant's argument here rests upon his case on habitability. It is essentially as follows; as HHJ May QC decided in the Durban case that the flat was habitable from May 2005 until March 2007, on the basis of the Defendant's negligent advocacy, the Claimant was prevented from asserting different dates in the Wahab case before District Judge Taylor.

68. I find the pleading of this issue very difficult to follow. There appears to be a criticism of the Claimant's drafting of the particulars of claim in the Wahab case, see paragraph 20 of the particulars of claim where it is said that no claim for general damages was

made. This is simply incorrect as general damages were included at paragraph 10 of the Wahab particulars of claim.

69. It is also common ground that the Claimant settled the Wahab claim. Whilst full details of the settlement and its circumstances have not been set out by the Claimant it is apparent that having accepted an offer of settlement which was silent as to costs he applied to the court for his costs. The Claimant asserts that District Judge Taylor was aware of HHJ May QC's decision on habitability in the Durban case and that this was the reason he did not recover costs in the Wahab case.

70. I agree with the submissions of Ms Chalmers, this claim is vaguely set out and not properly particularised. It is difficult to begin to understand how any decision of HHJ May QC in separate proceedings between different parties could begin to be relevant to the decision of District Judge Taylor in a different case. In any event the Claimant did not appeal the decision of the District Judge Taylor which he could have done if the judge had taken account of irrelevant material.

71. In the circumstances paragraphs 22 to 24 of the particulars of claim have no reasonable prospect of success and should be struck out.

Conclusion

72. This claim concerns matters which have been litigated at a fully contested trial and in the Court of Appeal. For the reasons set out in this judgment the majority of the criticisms made by the Claimant of the Defendant's conduct of the trial are made with the benefit of hindsight and at a granular level. Having reviewed the material before me in detail, I have no hesitation in coming to the view that this is an unmeritorious claim against a barrister arising out of his advocacy in court. In the circumstances I conclude that the allegations which have not been struck out have no reasonable prospects of success and should be summarily dismissed.