

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Friday, 1st May 2009

Before:

MR. JUSTICE AKENHEAD

B E T W E E N :

CHARTER UK LIMITED

Claimant

- and -

NATIONWIDE BUILDING SOCIETY

Defendant

GRAHAM CHAPMAN appeared on behalf of the Claimant, instructed by Freeth Cartwright.

MARK CHENNELLS appeared on behalf of the Defendant, instructed by Burges Salmon.

J U D G M E N T

MR. JUSTICE AKENHEAD:

1. This claim and dispute arise out of the desire of Nationwide Building Society ("Nationwide") to acquire new computer software for its Complaints Management System ("CMS"). In 2006 Nationwide approached a number of potential suppliers, including Charter UK Limited ("Charter"), with a view to purchasing such software. Charter's claim in these proceedings proceeds upon the primary contention that a contract was entered into following a period of discussions and exchanges at a meeting attended by representatives of both parties on 14 June 2007. Nationwide denies that any contract was entered into at that time, if at all.

2. In Charter's Particulars of Claim, Charter pleads that on that date (14 June 2007) agreement was reached as to price (£1 million for the licence fee), ongoing support and maintenance services (£250,000 a year), the provision of services for the installation and implementation of the software into Nationwide's system, the period of the agreement, (four years) and that Charter's master terms would be incorporated. Two alternative variants are pleaded to this. Charter plead that this agreement was confirmed and recorded in an email on the same day from Nationwide. It is then alleged by Charter that in April 2008 Nationwide repudiated the contract, having indicated that it was time for a "disengagement". Charter's claim is for £1 million for the lost licence fee, £314,000 for the value of professional services, less £144,000 said to have been paid pursuant to purchase orders and, in effect, for the loss of profit that would have been earned on the annual maintenance charge. The

ultimate claim in value will probably be, on current figures, between £1 million and £2 million. An alternative claim is put on a quantum meruit basis in restitution.

3. This is all substantially denied by Nationwide in its full Defence. In essence, Nationwide deny on a number of grounds that any binding contract was reached on 14th June, or at all. It denies that a condition subsequent in any agreement reached on 14 June 2007 has been satisfied and, whatever the outcome on those issues, Nationwide also denies, in any event, that it repudiated the contract. A Reply has been served.

4. During the latter half of 2007, two purchase orders were sent by Nationwide to Charter and it is accepted that there were substantial discussions between the parties in late 2007 and early 2008. There are two main areas of disagreement between the parties (on this occasion being the first CMC in the case). The first is whether a discrete part of the Particulars of Claim should be struck out. The second is whether or not there should be preliminary issues, a split trial between liability and quantum or a trial of all the issues. Since Charter had its parting of the ways in about April 2008, unsurprisingly perhaps, Nationwide has continued to seek to procure new software for its CMS from other suppliers. I make no findings, obviously, at this stage as to whether or not Nationwide had any contact with any relevant suppliers before the parting of the ways.

The Strike out Application

5. I will deal with the striking out application first. At Paragraphs 43 to 45 of its Particulars of Claim, Charter plead under a heading "Confidentiality and intellectual property" the following:

"43. The defendant is now developing a new CMS with a third party which is a competitor of the claimant. The claimant has sought disclosure of the arrangements entered into between the defendant and the third-party. The claimant's requests in this regard have been reasonable and limited to that which is proportionate and necessary. Nevertheless, the defendant has refused to cooperate in this regard which lack of cooperation serves only to increase the claimant's concerns that intellectual property and/or confidential information belonging to it and/or SVL [Charter's holding company] is being used by the defendant and/or the third-party supplier in the development of the new CMS. Further, the defendant has accepted in pre-action correspondence that it has benefited from know how provided to it by the claimant but maintains that this know-how was provided pursuant to the purchase orders referred to above will stop

44. Even if, contrary to the claimant's primary case, the parties did not conclude a contract on or including the Charter UK master terms brackets (which contain express provisions as regards the protection of intellectual property and confidential information in and attaching to the continuum software), then the claimant will contend that its and/or SVL's intellectual property and confidential information is nevertheless protected by the terms of a non-disclosure agreement agreed by the parties in August 2006 and/or the agreed terms of the software evaluation agreement and/or by the terms printed on the reverse of the purchase orders and/or, and in any event, by the general law. In any event, and whatever the defendant's case on the contractual claims set out above, the defendant will be prevented from making use of the claimant's and/or SVL's intellectual property and/or confidential information in developing a CMS with a third party or at all.

45. In the premises, the claimant must reserve the right to amend its case should it appear, for example following disclosure, that the defendant has acted in further breach of contract and and/or in breach of the duties of confidentiality that it owes to the claimant and/or has infringed the claimant's

and/or SVL's intellectual property rights and reserves the right to claim all such relief, including indemnities, to which it may be entitled by reason thereof."

6. There is no claim in the prayer to the Particulars of Claim specifically in respect of any of these three paragraphs. In its Defence, Nationwide pleads that Paragraphs 43 to 45 of the Particulars of Claim are irrelevant, disclose no cause of action and are liable to be struck out. Without prejudice to that, Nationwide accepts that it is developing a CMS with a third party but does not accept that the third party is a competitor of Charter. Nationwide pleads that Charter has no right as such to amend its case but it must apply to the Court to do so if it wishes. Nationwide applies to strike out Paragraphs 43 to 45 of the Particulars of Claim and certain related paragraphs in the Reply, which I have not set out. Reliance is placed on [CPR 3.4.2](#), which says,

"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) a statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

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

7. Nationwide also rely on the Court's inherent jurisdiction to strike out a claim so far as is necessary. In summary, Nationwide argue that Charter does not seek to make a claim but rather simply to reserve the right to amend its case to plead one possibly in the future. It argues that any claim must set out the relevant facts to sustain it and that Charter has no right as such to amend its case which is capable of reservation as such. It says that Charter is pleading what it does in effect to obtain disclosure in the action and argues that is accordingly an abuse of process. It argues that leaving these paragraphs in the pleading will obstruct the just disposal of the proceedings.

8. Charter argues that the Nationwide application to strike-out is misconceived because it is simply putting the defendant on notice of its concerns and of the claim that it intends to advance if its concerns are supported by disclosed documents. It is concerned that any application that it would wish to make to amend would have been met by the complaint that Charter had abandoned points taken in pre-action correspondence about these concerns. Charter's pleading makes it clear that it is not abandoning the points which it has raised, it says. It believes that it was following and complying with the overriding objective, it argues that Paragraphs 43 to 45 identified particular contractual obligations upon which Charter relies and it says that no objection can be taken at this stage until disclosure on the contractual issues has been provided. Nationwide has given assurances in open correspondence that it did not and does not have access to Charter's software and its solicitor has confirmed that the new supplier has no access to Charter's documentation or proprietary information.

The law

9. The overriding objective must at all stages be borne in mind by courts when considering applications such as that brought by Nationwide. [CPR Rule 16.2\(1\)](#) deals with the contents of the claim form,

"The claim form must: (a) contain a concise statement of the nature of the claim; (b) specify the remedy which the claimant seeks; (c) where the claimant is making a claim for money, contain a statement of value".

[CPR 16.4\(1\)](#) states that,

“The particulars of claim must include, amongst other things, a concise statement of the facts on which the claimant relies. It is axiomatic that amendments to pleadings, including particulars of claim, require the permission of the court in the absence of agreement between all parties (see [CPR 17.1](#)). The courts have considered the relevance and application and the statement of truth which is now under the CPR required to be signed by a relevant person at the end of pleadings”.

10. In **Clarke v Marlborough Fine Art (London) Limited & Anor**, reported in The Times on 4th December 2001, Mr. Justice Patten said this at Paragraph 21,

“In the most simple case the requirements of [CPR 22.1](#) will, if observed, exclude untruthful or fanciful claims. But the notes to [part 22](#) also indicate that the purpose of the new rule was to discourage the pleading of cases which, when settled, were unsupported by evidence and which were put forward in the hope that something might turn up on disclosure or at trial. In these cases judgment had to be exercised by the pleader even under the old rules of the Supreme Court. It was never proper for a case to be pleaded unless it had some evidence to support it”.

11. In **Nomura International Plc v Granada Group Limited** [2007] EWHC 642 in the Commercial Court, Cooke J. said this at paragraph 38,

“In my judgment, when regard is had to these authorities the key question must always be whether or not at the time of issuing a writ the claimant was in a position properly to identify the essence of the tort or breach of contract complained of and if given the appropriate time to marshal what it knew to formulate particulars of claim. If the claimant was not in a position to do so, then the claimant could have no present intention of prosecuting proceedings, since it had no known basis for doing so. While therefore the absence of present intention to prosecute proceedings is not enough to constitute an abuse of process without the additional absence of known valid grounds for a claim, the latter carries with it, as a matter of necessity, the former. If a claimant cannot do that which is necessary to prosecute the claim, by setting out the basis of it, even in a rudimentary way, a claimant has no business to issue a claim form at all in the hope that something may turn up”.

12. In **Johnson v Gore Wood & Co** [2002] 2 AC1, Lord Bingham cited with approval an earlier reference of Lord Diplock, referring to the:

“...inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of procedural rules, would, nevertheless, be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute amongst right-thinking people”.

13. Reference has also been made to the case of **Atos Consulting Limited v Avis Europe Plc** [2005] EWHC 982 in the TCC before Jackson J., as he then was. There was an application to strike-out in that case on facts which were not particularly comparable with the current case other than it was an information technology case. Mr. Justice Jackson said this at Paragraph 18,

“The court will not strike out a statement of case merely because that statement of case would generate some untidiness in the pleadings. The court will not strike out a statement of case merely because one will end up with a bundle of pleadings, some parts of which are redundant. The court will only strike out a statement of case pursuant to the second limb of r. 3.4(2)(b) if the statement of case is such as to prevent the just disposal of the proceedings or, alternatively, such as to create substantial obstruction to the just disposal of the proceedings. It seems to me that if one has a somewhat untidy bundle of pleadings or statements of case, counsel and the judge will rapidly become familiar with

which parts of those pleadings are redundant and which parts are relevant. If one has the kind of pleadings bundle which I foresee in the present case there will be no true obstacle to the just disposal of the proceedings”.

At Paragraph 19 he went on to say:

“It would be wrong in principle for this court to strike out the particulars of claim on the grounds put forward ... Nevertheless, it is not appropriate for the court to step down into the arena and to tell either party how to plead its case. If there are infelicities in the pleadings or if some parts of the pleadings have to be disregarded because one party’s case is

re-pleaded and the reply is in a different but permissible manner, well, the court must live with that”.

14. In **MMI Research Limited v Celsion Limited** , in a judgment dated the 22nd August 2007, Warren J., in a patent infringement action, amongst other things, said this at Paragraph 14:

“The pleadings, of course, play an important part in the disclosure exercise because it is only through the pleadings that the issues in the case to which disclosure is directed can be identified. In an ordinary case a claimant may find that he is unable properly to particularise his case prior to disclosure being given, only being able to specify the nature of his case in broad terms. There is nothing wrong with that, although where the pleading is not well particularised, the claimant may be more open to accusations of ‘fishing’ than if he has a focused pleading”.

15. He went on at paragraph 18, having looked at some of the details which were said to be missing from the pleading in question, to say this:

“In an ideal world all of these details should be given and there can be no doubt, I think, that a claimant must make real efforts to comply with the practice direction, but it is a counsel of perfection and it cannot be, I think, that a pleading which fails to comply to the letter with the practice direction is to be struck out. It is, after all, only one aspect of the CPR applying to patent actions. Like all other actions, a patent action is subject to the overriding objective which may lead the court to the view that an action should be allowed to proceed with an imperfect pleading, for instance, to allow disclosure to be obtained in order to obtain more detail and thus to enable a more perfect pleading”.

15. From these cases, and drawing the threads together in the context of the overriding objective, the following can be observed:

1. Claim forms and particulars of claim must identify the nature of the claim and the remedies sought.
2. Particulars of claim must contain the basic facts on which the claimant relies to support its claim or claims.
3. The remedies sought must relate to the claim or claims made and the basic facts pleaded by the claimant.
4. Generally at least there should be no half measures taken in the claim or in particulars of claim in terms of pleading matter which is immaterial to the relief or remedies sought.
5. It would be wrong, at least generally, in principle, to plead a matter which does not support or relate to any of the remedies sought.

6. It would be wrong in principle to plead a matter which is immaterial to the claim or claims made or relief sought for the purpose of securing disclosure of documentation relating to such immaterial matter.

7. Whilst infelicities in pleadings will not usually justify striking out, where no cause of action is pleaded then the court must give serious consideration to striking out that part of the pleading, particularly where its presence complicates and confuses the fair conduct of the proceedings..

8. Either through the CPR or through its inherent jurisdiction the court has wide powers to strike out parts of a pleading if it contains immaterial matter, particularly in circumstances when its continued presence will confuse the resolution of the underlying and properly pleaded claims.

9. A party absent agreement has no automatic right to amend its Particulars of Claim.

Discussion and decision on striking out

16. It is properly accepted by Charter, for instance, in its solicitor, Mr. Thompson's witness statement, that Paragraphs 43 to 45 of the Particulars of Claim do not in themselves plead a cause of action. There is continuing confusion both in the witness statements put before the court, the correspondence between the parties and in the arguments put before the court as to the extent to which disclosure, yet to be provided by the parties, needs or should relate to the subject matter of those paragraphs. I have formed the clear view that these paragraphs (43 to 45), and the related paragraphs in the Reply, should be struck out. There really is no pleaded cause of action or claim in relation to them and no remedy is sought in respect of them. At best at this stage, at least, they represent a speculative possibility that a claim might be demonstrated in the future to arise from what Nationwide may or may not have done in relation to its dealing with a third party's supply of software. No declaration is sought by Charter as to rights or any entitlement relating to confidentiality and/or copyright.

17. As to Charter's argument that these paragraphs put Nationwide on notice that the claim may be made in the future, that is not the function of pleadings. Correspondence can effectively do that if there is some concern that a failure to put another party on notice of a possible future claim may in some way prejudice the party which might bring such a claim in the future. In any event, the claim which Charter predicates might be made is one which is separable from the remainder of the issues. There is no issue relating to limitation in relation to any such potential claim.

18. I do not see that, even if Charter had not pleaded what they have at Paragraphs 43 to 45, they could be said in any legal or procedural way to have abandoned any assertion made in the pre-action period that they might have some entitlement to sue for breach of confidence or copyright. Charter's argument that its pleading gives Nationwide an opportunity to respond to the claimant's complaints to demonstrate that their complaints and concerns are without foundation is unjustified. Charter must either plead a case supported by material facts, and any relevant legal assertion, or decline to plead a material matter. It is not the function of pleadings to have what would otherwise be an exchange of correspondence and views about a matter which is not directly relevant to pleaded claims and defences. Nationwide should not have to plead to or address some assertions which do not support any pleaded cause of action. It is important for the parties, and the court, to have certainty as to what the pleaded issues are so that disclosure and witness evidence to be provided in the future can relate to the pleaded issues.

19. It is said that fairly recently, since the issue of this application, Charter's solicitors have now given an assurance that they will not seek disclosure of any documents arising simply out of paragraphs 43

to 45. If they gave that assurance in the letter of 29 April 2009 (which I will come to), I am not satisfied that they gave any such assurance before. Mr. Chapman, counsel for Charter, says that it has certainly got close to that in his client's solicitors' letter of 10 March 2009 to Nationwide's solicitors, in which they said this:

"Irrespective of any IPR claim, and we have properly raised this as a possibility and reserved our client's rights in the particulars of claim in this regard, the documents going to the relationship with the third party are also relevant to the contractual issues, not least because they will cast light on your client's changing position and their attempts to avoid their contractual obligations to our client. All the points pleaded are subject to standard disclosure in any event".

20. That does not seem to me to get anywhere being an assurance that they would not seek disclosure relating to the subject matter of paragraphs 43 to 45. Rather, it is an indication that the documentation would be disclosable on its own in relation to other matters pleaded. That may or may not be right, but it is not an assurance that Charter will not seek disclosure by reference to Paragraphs 43 to 45.

21. The letter of 29 April 2009 (two days ago) to Nationwide's solicitors has said this:

"We have sought to meet this concern by confirming that our client does not intend to use these paragraphs in this way [that is a reference to paragraphs 43 to 45 of the particulars of claim]. Instead, our client's position is that disclosure in relation to the contractual and other pleaded issues will necessarily involve disclosure going to the relationship between your client and its third party supplier, but once disclosure has been completed then our client anticipates being in a position to plead out the case identified in paragraphs 43 to 45 of the particulars of claim".

Again, I do not read that as an assurance that disclosure will not be sought in relation to Paragraphs 43 to 45.

22. Indeed, the issue is raised again in Mr. Chapman's note for this hearing at Paragraph 13, in which it is made clear that disclosure will be sought, if it is not provided, in relation to documents relating to dealing with a third party. It seems to me that there is at the moment, if not in the future, a substantial amount of confusion between the parties and I think it is important that the pleadings reflect properly pleaded claims or claims for relief.

23. So far as the Particulars of Claim are concerned, by striking out, I am not saying, for the record, that a claim based on a breach of confidence or of any other intellectual property rights cannot be made in the future. It is not that sort of striking out, but it seems to me that there is nothing currently in the Particulars of Claim which even effectively suggests that there is a breach yet which is capable of being supported by a statement of truth. It may or may not turn out to be the case that a relevant pleading can be supported by a statement of truth. It is wrong in principle for parties to half plead a case in the hope or anticipation that that will create sufficient of an issue to give rise to disclosure obligations; it is important that clarity is reached as soon as possible on pleadings as to what the real issues are currently. If in the future there is an application to amend, it will be considered on its merits if it is properly supported by a statement of truth and the like.

24. It is said that to strike-out would be disproportionate. I do not consider that that is right. Time, effort and cost has already been wasted, it seems to me, on this issue to-date and there is a real risk that it will be wasted in the future if there is not clarity achieved on the pleadings. This is a different case to one in which a basic cause of action is pleaded, supported as far as it goes with a statement of

truth, with an indication given that further particulars will or may be provided on disclosure. Here there is no cause of action pleaded but there is a hint given that a cause of action may be capable of being pleaded in the future. That is not a proper use of the pleading process.

Preliminary Issues

25. I now turn to the second issue, which is whether there should be preliminary issues. The preliminary issues sought by Nationwide are these:

1. Whether a binding contract was concluded between the claimant and the defendant, as alleged in paragraphs 24 to 28 of the Particulars of claim.
2. Whether a binding contract was concluded as alleged in Paragraph 37 or, alternatively, 38 of the Particulars of Claim.
3. Whether in the absence of a binding contract the claimant is in principle entitled to be remunerated on a quantum meruit or quantum valebat basis.
4. Whether as pleaded in the defendant's alternative case in Paragraph 35 of the Defence there was an agreement conditional upon the defendant being satisfied as to the ability of the claimant's software to satisfy its requirements with no restriction upon the freedom of the defendant's action in this regard (including there being no obligation upon the defendant to make a fair and objective assessment of the claimant's software against the ITT requirements).
5. Whether there was an agreement to rescind any contract as pleaded in Paragraph 38 of the Defence.

It is made clear that references to a binding contract in those preliminary issues are intended to exclude the issue as to whether the alleged condition that Charter's software met Nationwide's requirements was satisfied in fact. This relates to an argument that any contract between the parties reached on 14th June 2007 was subject to a condition subsequently, namely that Charter's software had to meet Nationwide's requirements.

26. I have to say, as I indicated during argument, that I was not ultimately impressed by this application, although it was put forward in good faith. It seems to me that the parties are going to have to consider in detail, even for the purposes of those preliminary issues, the history of the relationship between the parties; that is going to run from 2006, when the first contact was apparently made, up until mid-2008, by which time the parting of the ways had happened. There will therefore have to be a substantial amount of evidence relating to that whole period of time. For instance, it is common in many of this type of case (and it would happen here) that parties evidentially would seek to say that what the parties said and did after 14 June 2007 was consistent or inconsistent with what it or the other party was said or agreed at that meeting. Obviously, the court is not in a position to form any views as to what the final outcome of those issues will be, but it is at least possible, in theory, that even if it was found against the defendant that there was a binding contract in one of the three alternatives pleaded by the claimant stemming from the discussions that took place on 14 June 2007, then there would then remain, in any event, substantial issues on liability remaining to be dealt with. This would include whether there was in fact compliance with any conditions subsequent, assuming the condition subsequent is material, and, secondly, whether there was repudiation, even in circumstances where, apparently (and I make no findings about this), it is said that it was Nationwide which sought "to disengage" from whatever its relationship with Charter was or may have been.

27. So if there was an initial resolution of these preliminary issues, unless it was decided absolutely in favour of Nationwide, i.e. there was no binding contract in any one of the three alternatives pleaded relating to the June 2007 discussions, there would be still matters of liability to be dealt with and there would be no quick or expeditious resolution to those issues. I raised with Mr. Chennells, counsel for Nationwide, that for the resolution of issue 3, as it is formulated at the moment, it is undoubtedly the position that there would have to be a detailed consideration of every service provided by the claimant during the period in question to determine whether there was an entitlement to a restitutionary remedy. Mr. Chennells accepted that there was some force in that observation but that the issue could be amended to relate to an issue more in principle as to whether the entitlement to a restitutionary remedy was in some way excluded; however, that just underlines the difficulty with dealing with a preliminary issue like that, because even if, if it was decided that in principle a quantum meruit entitlement existed, or could exist, in theory, there would then have to be a further hearing dealing with whether or not, on the facts, a quantum meruit entitlement had been established even if the quantum was then left to be resolved.

28. Although arguably, depending on the outcome, there might be savings in costs, this court should be fairly slow to order preliminary issues unless and until it is clear that there will likely be a substantial costs saving. The claimant wishes its primary case to proceed. It does not want to be diverted from pursuing its claim by having to address preliminary issues which, depending on how they are decided, will not ultimately resolve liability, and in my view, particularly in a case here where the defendant, whilst I will not say it has limitless pockets, is not an organisation without resource and some resources. In those circumstances, it seems to me the preliminary issues put forward by Nationwide should not be dealt with as preliminary issues. I do not see that there will be any savings in cost and it is only if the issues are resolved on one permutation out of a number that time and cost will be saved; on the other permutations, time and cost will be wasted.

29. The next issue, therefore, is whether there should be a full trial of everything, as opposed to a trial of liability and a deferment of quantum issues. This is a case where there is a lot to be said for splitting liability from quantum. First of all, the quantum case is only being pleaded in a fairly vestigial form at the moment. There is an indication that credit will be given for costs which would have been incurred by Charter but no indication is given as to what that will be. It is not clear whether the claim will be close to one million or to two million pounds, but it is quite clear on the face of the Particulars of Claim that substantially more information remains to be provided.

30. Secondly, this case, given that there are a number of permutations of outcome on the issues of liability, is one in which one can have moderate confidence that, once the issues of liability are decided, sensible parties should be able to resolve their financial differences. If, and I take this only as an hypothesis, all that the claimant is entitled to is a quantum meruit and no contractual claim, then it is clear that the claim for the quantum meruit is no more than about several hundred thousand pounds, as I read the pleading at the moment. If, however, taking the alternative hypothesis, there is a binding contract, which was repudiated, if that is the case, then it is likely to be the case that there will be a substantial or much greater claim. But be that as it may, sensible parties should be able to resolve their differences.

31. So far as timing is concerned, this court can fix a timetable which will give a trial on the issues of liability and also fix in the diary the quantum hearing a few months thereafter, so that there should not be any delay. So, for those reasons, I am of the view that there should be a split trial on liability and quantum. I should say that the split trial of liability and quantum represented both parties' fallback and alternative positions.