Neutral Citation Number: [2013] EWHC 1242 (TCC)
Case No: 2BM9024

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

Royal Courts of Justice
Rolls Building,
7 Rolls Buildings,
London, EC4A 1NL

Date: 22nd May 2013

Before :

THE HON MR. JUSTICE EDWARDS-STUART

- -

Between :

VENULUM PROPERTY INVESTMENTS LTD **Cla**

- and -

The Developer Defendants:

(1) SPACE ARCHITECTURE LIMITED

(2) MRP DEVELOPMENTS SERVICES LIMITED

(3) MRP DEVELOPMENTS LIMITED

(4) REALACRE LIMITED

(5) MARK KEVIN WILLMOTT

Defe

(6) RICHARD STEWART ANDERSON

The Agent Defendants:

(7) ROBIN JOHN UNGEMUTH

(8) ABBEYROSS LIMITED

(9) RICHARD MILLER

(10) MILLERS ESTATE AGENTS (A FIRM)

- -

- -

Gordon Wignall Esq (instructed by **Shoosmiths LLP**) for the **Claimant**

Lord Marks QC (instructed by **Weightmans LLP**) for the **Defendants**

Hearing dates: 11th April 2013

- -

Judgment

Mr. Justice Edwards-Stuart:

Introduction

1.
This is an application for permission to extend time for service of the Particulars of Claim. The claim form was issued on 12 November 2012 but was not served at the time. It was served with effect from 12 March 2013, the very last day for service permitted by CPR 7.5(1).

2.
However, the Claimant did not serve the Particulars of Claim at the same time. Its solicitors thought, wrongly, that they had a further 14 days in which to do so. That was based on a mistaken reading of CPR 7.4(1) and (2). In fact, the long-stop deadline for service of Particulars of Claim is four months after the issue of the claim form: see CPR 7.4(2) and 7.5(1).

3.
The action is brought against ten defendants, two of whom (the "Miller defendants") oppose this application. They do so because a fresh action against the Miller defendants would now be statute barred. Accordingly, if this application is unsuccessful that will be the end of the claim against the Miller defendants. The other defendants have agreed to a short extension of time for service of the Particulars of Claim.

4.
The Claimant was represented by Mr. Gordon Wignall, instructed by Shoosmiths, the Miller defendants were represented by Lord Marks QC, instructed by Weightmans.

The facts

5.
The Claimant is a property development and investment company registered in the Cayman Islands. The claim arises out of a residential development, known as Enterprise Square in Northampton. Architects' plans, prepared by the First Defendant ("Space"), showed 171 parking spaces because it was a condition of the initial planning consent that there should be this number of parking spaces. The permission was for 152 residential units. Shortly after the initial planning permission had been obtained in February 2006 Space produced amended plans which "reconfigured the 171 spaces for the residential scheme".

6.
By this time the Claimant had already made an offer to purchase the land on which the development would be built, subject to planning permission. By September 2006 the proposal was that the Claimant would purchase the land from the Fourth Defendant ("Realacre"), a company in which the Third Defendant ("MRPD") was the majority shareholder. MRPD was in turn owned or controlled by the Fifth and Sixth Defendants, Mr. Willmott and Mr. Anderson. The Second Defendant ("MRPDS") was a company which carried on business as architects and was owned or controlled by MRPD. Space appears to have been associated with MRPDS and it was anticipated that the architects that it employed who had prepared the drawings for the scheme would at some stage be transferred to the Second Defendant.

7.
The Claimant intended not only to purchase the land but also to acquire the right to use the drawings that had been prepared by Space, which were to form the basis for an application for detailed

planning permission. It was a condition subsequent of the agreement to purchase the land that planning permission would be granted on the basis of the plans produced by Space.

8.
It appears to have been the intention of the parties that Space, or MRPDS, employing the architects that had formerly worked for Space, would be retained by the Claimant for the purpose of building the development. Space or Realacre subsequently granted the Claimant a non-executive licence to use the plans.

9.
On 7 September 2006 the Claimant exchanged contracts with Realacre for the sale of the land for the sum of £4.55 million. In a letter from Shoosmiths dated 28 February 2013 it was said that "The engagement of [the Second Defendant] as architects for the work to be carried out form one of the annexes to the [contract of sale]". This appeared to suggest that the Claimant intended to engage the services of MRPDS from then on. However, Mr. Wignall told me that MRPDS was never in fact engaged by the Claimant.

10.
Be that as it may, detailed planning permission was granted in November 2006 for the erection of 155 residential units and completion of the purchase of the property took place on 22 December 2006. It is alleged that in about February 2007 the Claimant became aware that the supporting posts/pillars in the underground car park shown on the original plans were not of the size indicated on the amended plans and would not support the building. It is said that this resulted in the loss of about 30% of the parking spaces, with the consequence that the development could not be built in accordance with the planning permission. As a result, the Claimant alleges that the value of the property with the existing planning permission was worth far less than the sum that it had paid.

11.
In this action the Claimant holds the defendants responsible for that loss. The Miller defendants are Mr. Miller, an estate agent who acted for the Claimant, and the Tenth Defendant, being the firm of estate agents for whom Mr. Miller worked. The Particulars of Claim do not set out the terms of the retainer of the Miller defendants, or when they were engaged. There is no allegation that they had worked for the Claimant before this project.

12.
The Seventh Defendant, a Mr. Ungemuth, was a surveyor who, since about 1990, had worked with the Claimant, to whom he had identified and proposed building projects. By contrast, it is not alleged in the Particulars of Claim that Mr. Miller was a qualified surveyor, but it is said that he "… has a practical understanding as to the question of whether or not schemes prepared by architects and submitted for development are capable of being constructed".

13.
In spite of the fact that the Claimant was fully aware in early 2007 that the development was not viable as a result of the problem with the design of the columns that were to support the building and that, as a result, it had sustained a substantial financial loss, it seems that it may not have instructed the solicitors until it approached Shoosmiths in September 2012. The evidence filed in support of the application did not contain a single word of explanation for this surprisingly long period of delay and no explanation was offered at the hearing.

14.

However, once instructed, Shoosmiths appear to have proceeded with reasonable expedition: they carried out money laundering checks, met their clients and took instructions, instructed counsel, and so on. They filed a claim form with the court on 31 October 2012, although it had to be amended with the result that the claim form was not in fact issued until 12 November 2012. On 28 February 2013 Shoosmiths sent each defendant a 14 page letter that was said to be in accordance with the Professional Negligence pre-action protocol and in which they set out the case against the various defendants.

The case against the Miller defendants

15.
According to the protocol letter, the principal allegation against Mr. Miller was that he owed a duty to the Claimant "to ensure that [the Claimant] was properly advised to ensure that the Scheme was feasible and could be constructed in accordance with their plans" and that, in breach of his duty, he "failed to ensure that [the Claimant] took steps to ascertain that the scheme could be constructed as envisaged by the plans" (at paragraph 58b). This was preceded by an allegation that the likelihood was that Mr. Miller thought that it did not matter whether or not the Scheme could be built since a further purchaser had been identified to whom the Claimant could sell on the Scheme.

16.
In the Particulars of Claim it is alleged against Mr. Miller that: (a) he would ensure that plans and drawings were feasible and capable of being built; or (b) he would advise the Claimant to obtain independent advice on those points. These duties were expressed as both "necessary and implied" terms of the engagement of Mr. Miller and as duties of care owed in tort. As I have already mentioned, Mr. Miller is an estate agent, and not a surveyor. So far the protocol letter and the Particulars of Claim are consistent.

17.
However, it is also alleged in the Particulars of Claim that Mr. Miller, acting in breach of good faith:

"precipitated the Claimant into making the Contract of Sale whereas if it had had more time the Claimant would have had the opportunity of discovering that the plans and drawings were not feasible and could not be used for a scheme which could in fact be constructed as illustrated".

It is then said that Mr. Miller (and Mr. Ungemuth) "… put their desire to earn commission above their duties to the Claimant". These are not just allegations of negligence, but are allegations of bad faith. In fact, the first of these allegations is arguably defective because there is no averment that, if the Claimant had had the opportunity alleged, that opportunity would have enabled it, as a matter of probability, to discover the problem with the plans. Mr. Wignall submitted that this was implicit in the allegation as pleaded, but I do not agree with him. However, that is really a pleading point.

18.
It is not alleged that Mr. Miller ought to have known that the design was not feasible [1] . However, it is alleged in the protocol letter that Mr. Miller conspired with other defendants to use unlawful means to bring about the sale of the property to the Claimant: the unlawful means on the Miller defendants' part was said to be "… a preparedness to act in breach of their duties".

19.
Pausing there, I have to say that this is a somewhat unusual allegation. A "preparedness" to act negligently in order to bring about a specific event seems to amount to an allegation of bad faith or

recklessness, although I have some difficulty in understanding the concept of premeditated negligence. But, whatever it means, this allegation is not repeated in those terms in the Particulars of Claim.

20.
So far as the architect defendants are concerned, the Claimant alleges that they were under a duty to ensure that the plans and drawings submitted for the purposes of obtaining planning permission would reflect a scheme that was feasible and capable of being built as indicated. This is an unsurprising allegation.

21.
It can be seen from this brief summary that the claim against the Miller defendants as set out in the protocol letter and as pleaded in the Particulars of Claim is not put in precisely the same way. The allegation common to both the letter and the Particulars of Claim is a failure to advise the Claimant to have the architect's plans and drawings checked and/or to ensure that the design was capable of being built. In addition, as I have already noted, it is alleged that the Miller defendants pushed the Claimant into making the contract with improper haste so that the Miller defendants could earn their commission.

22.
It is inappropriate for me to do anything more on an application such as this than express an initial and provisional view on the material available about the merits of the claim against the Miller defendants. But before I do so, I would make the general observation that where a claimant for no good reason leaves it until the last minute to issue proceedings he is under a high obligation to ensure that the claim that is finally presented is clear, coherent and properly particularised. That is particularly so if the claim involves allegations of bad faith.

23.
Whilst I would not go so far as to adopt the strictures of Lord Marks, it does strike me that the claim against the Miller defendants is neither coherent nor strong. Further, in places it is not the same as the claim advanced in the protocol letter and the allegations of bad faith are pleaded in the barest detail.

24.
More generally, a claim that an estate agent should appreciate that there might be defects in structural aspects of the design of the building is not one that sounds plausible, unless special circumstances are set out from which it could be inferred that the estate agent might be on notice of such defects. No such circumstances have been relied on here: all that is said here is that Mr. Miller had "… a practical understanding as to the question whether or not schemes prepared by architects and submitted for development are capable of being constructed". That, on its face, seems far too general an assertion to justify an allegation that an estate agent ought to have had misgivings about the structural details of the design such as to warrant advising his client to have them checked by an appropriately qualified third party. Of course, I accept that the evidence might present matters in a different light, but if the Claimant had proposed to lead evidence of facts to support such a case, those facts should have been pleaded.

25.
As I have already mentioned, the Claimant's allegations of bad faith against the Miller defendants have been pleaded in a very cursory fashion. Lord Marks described them as tenuous and he submits

that to permit a claimant to pursue such allegations out of time is an indulgence that should not be granted.

The law relating to extensions of time and relief from sanctions

26.
The Claimant's application notice for an extension of time for service of the Particulars of Claim says that the application is made "... in accordance with CPR 3.1(2) (a) and CPR 3.9". CPR 3.1(2)(a) provides that, except where the rules provide otherwise, the court may extend the time for compliance with any rule, even if the application for such extension is made after the time for compliance has expired. However, this does not confer a power on the court to extend the time for service of the claim form, because that is the subject of a separate rule: CPR 7.6(3).

27.
As I have already mentioned, the long-stop deadline for service of particulars of claim is four months after the issue of the claim form: see CPR 7.4(2) and 7.5(1). It is true, as Mr. Wignall submitted, that it is not immediately apparent from the wording of CPR 7.4(1)(b), which permits the Particulars of Claim to be served within 14 days after service of the claim form, that it is subject to the long-stop provided for by CPR 7.4(2). However, on a careful reading that is clearly what the rule says. Mr. Wignall relies on the fact that the editors of the White Book, at paragraph 7.4.3, refer to CPR 7.4 as "a trap for the unwary claimant". That may be so. But I agree with Lord Marks that solicitors acting for claimants who leave service of their claim forms until the dying weeks of the limitation period have to be wary.

28.
At paragraph 7.6.8 of the White Book, 2013 edition, the editors note that a court considering whether to exercise its general discretionary power to extend time for serving particulars of claim should adopt the relief from sanctions framework set out in CPR 3.9. That note is based, correctly, on the decision of the Court of Appeal in Price v Price [2003] 3 All ER 911.

29.
But there is now a potential difficulty with this because CPR 3.9 has been radically amended with effect from 1 April 2013. The nine factors that the court had to consider have now been removed. Instead, the court is to consider:

"... all the circumstances of the case, so as to enable it to deal justly with the application, including the need-

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders."

30.
However, the transitional provisions provide that this amendment is not to apply to applications for relief from sanctions made before 1 April 2013. Originally, both counsel were agreed that this new provision could be ignored for the purposes of the present application, since it was made before 1 April 2013. However, in a late change of mind Lord Marks submitted that, since this was not an application for relief from sanctions, but an application for an extension of time for service of particulars of claim under CPR 3.1(2)(a), the amendments to CPR 3.9 were relevant.

31.

Both counsel accepted that the change to the overriding objective in CPR 1.1 by the addition of the new sub-paragraph (f) which adds a further factor to be taken into account in the context of dealing with a case justly, namely that of "… enforcing compliance with rules, practice directions and orders", came into force on 1 April 2013 and is therefore applicable to the court's consideration of the present application.

32.
However, when I asked Lord Marks whether all or any of the nine factors that had been set out in CPR 3.9 were no longer to be taken into account by the court when considering an application to extend time for service of particulars of claim, he was not prepared to say that they could be ignored. However, his point was that the emphasis has shifted as a result of the amendments to the rules so that the court is now required to take a much stronger and less tolerant approach to failures to comply with matters such as time limits.

33.
I did not understand Mr. Wignall to disagree with this submission. The issue between the parties is the impact of the new approach on this particular application.

34.
In Stolzenburg v CICB Bank Mellon Trust [2004] EWCA Civ 827, the Court of Appeal was concerned with the approach to be adopted when considering CPR 3.9. It approved the summary of the principles given by Etherton J (as he then was) at paragraph 44 of the judgment under appeal. In that paragraph he said:

"The Court of Appeal has laid down guidance as to the approach of the Court when considering an application for relief from sanctions within CPR r.3.9. The Court, in such a case, must consider each of the nine items listed in r.3.9(1) which are relevant to the case, carrying out the necessary balancing exercise methodically, and explaining how the ultimate decision has been reached: Woodhouse v Consignia [2002] EWCA Civ 275 , [2002] 1 WLR 2558 . The Court must bear in mind that, where the effect of the sanction is to preclude a trial on the merits, the effect is to deprive the applicant of access to the Court, a concept which now has a particular resonance under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998 ("Article 6"): ibid at para. [42]. The Court, in carrying out the balancing exercise, is not, however, limited to the nine items specified in r.3.9. That rule expressly requires the Court to consider all the circumstances. In an appropriate case, for example, the Court can and should consider the merits, as part of the circumstances: Chapple v Emmett (unreptd) (CA) 8th December 1999. The exercise of the discretion of the Court under CPR r.3.9 must be carried out against the background, and in the light of, the overriding objective to deal with cases justly, as set out in CPR r.1.1: ibid.; Arrow Nominees Inc. v Blackledge [2002] 2 BCLC 167, esp. at paras.54-55 (Chadwick LJ) and 70 and 72 (Ward LJ)."

35.
Mr. Wignall's overall submission was that in this case there has been no history of default and the Claimant has not behaved in any manner which could be said to be contumelious. This, he submitted, is not a case of a failure to comply with an "unless" order and it was an error that was understandable, albeit one that should not have been made. It was not a mistake in which the Claimant itself was involved.

36.

Both counsel made submissions on the particular factors listed under CPR 3.9(1), and so I will take them in turn.

37.
Factor (a) - the interests of the administration of justice. On this aspect I consider that the wholly unexplained delay of more than five years since the Claimant became aware of the problem is relevant. In general, it is not satisfactory or in the interests of justice to have claims brought in the closing weeks or months of a long limitation period. Delay is bad for justice. I agree with Lord Marks that the court should adopt a stricter approach where a claimant has, seemingly through its own choosing, left the start of proceedings until the last minute. On behalf of the Claimant, Mr. Wignall submitted that there should be a public adjudication of the Claimant's rights, including those against the Miller defendants. It is not in the interests of justice to deprive the Claimant of its right of access to the court. He submitted that there had been a concise and detailed letter of claim and the Miller defendants knew the case that they were facing. Lord Marks responded by submitting that the Claimant should not be allowed to "steal a march" on the other party by failing to comply with the rules in a very important respect and then serve a poorly particularised claim upon the Miller defendants.

38.
Factor (b) - whether the application for relief has been made promptly. This is not in issue. It clearly was.

39.
Factor (c) - whether the failure to comply was intentional. Again, this is not an issue. It was plainly unintentional.

40.
Factor (d) - whether there is a good explanation for the failure. Lord Marks submitted that there was no good explanation for the failure. He says that all the Claimant has said is that it was intended that the Particulars of Claim should be served within 14 days of service of the claim form. He submits, rightly, that this is not an explanation for the failure. However, the explanation is in fact clear enough: the Claimant's solicitors simply misread the relevant rule.

41.
Factor (e) - the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol. Lord Marks submits, first, that the Claimant complied with the wrong pre-action protocol: it should have complied with the Pre-Action Protocol for Construction and Engineering Disputes, whereas it purported to comply with the Professional Negligence Pre-Action Protocol. Further, he submitted that the protocol letter contained allegations that were vague in the extreme. I do not attach much weight to the fact that the Claimant may have followed the wrong protocol (anyway, I am not convinced that it did). However, the second point made by Lord Marks has rather more force. This was that the failure to produce a proper pre-action protocol letter with sufficient time in which to respond to it deprived the Miller defendants of their chance to make out their case proportionately and inexpensively in correspondence prior to being involved in litigation. Mr. Wignall's response to this point was to say that it could be met by staying the proceedings so that the pre-action protocol procedure could be completed. Lord Marks's retort to this was to say that for the court to permit further delay is hardly an appropriate remedy for a failure to serve proceedings in time.

42.

Factor (f) - whether the failure to comply was caused by the party or his legal representative. Here there is no question but that it was the Claimant's solicitors who were at fault. However, Lord Marks submitted that as a result of this the Claimant has a clear case against its solicitors and can recover from them any loss it could prove as a result of the loss of the opportunity to pursue a claim against the Miller defendants. In fact, he went further and submitted that the Claimant might even be in a better position in an action against its solicitors than in the present action against the Miller defendants. Mr. Wignall submitted that the position was rather more complicated. He said that there would be an inherent difficulty for the Claimant in proving its claim against its solicitors since it would have no right to disclosure of documents in the possession of other parties to the current action. This, of course, would depend on whether or not the Miller defendants were brought back into the action by way of contribution proceedings. He submitted also that there would be inherent difficulties in quantifying the claim on a loss of a chance basis.

43.
Factor (g) - the effect on the trial date. This is not relevant.

44.
Factors (h) and (i) - the effect which the failure to comply had on each party, and the effect which the granting of relief would have on each party. The first point made by the Miller defendants is that they now have an accrued limitation defence of which they would be deprived if permission to extend time was given. That extension of time should not be given without good reason. Lord Marks also made the point that the Claimant is a company registered in the Cayman Islands, so there is no guarantee that it would meet any order for costs made against it. This point was made to forestall Mr. Wignall's argument that any prejudice to the Miller defendants could be compensated for by an appropriate order for costs. On the other side of the coin, the consequence of refusing relief is that the Claimant would lose the right to pursue the Miller defendants for all time. Lord Marks's answer to this was that the Claimant's case against the Miller defendants is speculative and so, if the Claimant is prevented from pursuing it, it will not have lost anything of any value.

45.
Another point made by Lord Marks on this aspect was that it is hard to see how the Claimant's claim could succeed against the Miller defendants and yet fail against, say, the architects. I consider that there is considerable force in this submission. If the Claimant has a stronger case against some of the other defendants, then it is deprived of little or nothing if it cannot sue the Miller defendants.

46.
Finally, Lord Marks referred to what he called the sword of Damocles effect: if the claim is allowed to proceed against the Miller defendants it will mean that a professional man will have to endure having a claim hanging over his head for much longer than would have been the case if the Claimant had pursued its claim promptly and had complied with the rules. There is some force in this point, as Mr. Wignall fairly accepted.

47.
Overall, as I indicated in argument, I consider that the CPR 3.9(1) factors are fairly evenly balanced. It is quite hard to see, on the basis of the Particulars of Claim, how the Claimant could succeed against the Miller defendants and lose against all the other defendants. Most of the other defendants appear to be covered by suitable insurance so if the Claimant obtains a judgment against any one of them it should recover the money. Against that, the Claimant will be deprived of the opportunity of pursuing a claim against a party that it wishes to sue.

48.
The two other factors that seem to me to be of relevance to this application are, first, whether or not this is a weak claim (that is, as against the Miller defendants) as Lord Marks submitted and, second, the effect of the new "post-Jackson" regime approach to the enforcement of, and compliance with, orders and time limits.

49.
In relation to the approach under the new regime I was referred to the decision of the Court of Appeal in Fred Perry v Brands Plaza Trading [2012] EWCA Civ 224. In giving the judgment of the court, Lewison LJ cited with approval paragraph 6.5 of the Jackson report, which said:

"... courts at all levels have become too tolerant of delays and non-compliance with orders. In so doing they have lost sight of the damage which the culture of delay and non-compliance is inflicting on the civil justice system. The balance therefore needs to be redressed."

Unsurprisingly, Jackson LJ made the same point in paragraph 3 of his judgment.

50.
Lord Marks relied on Hashtroodi v Hancock [2004] 1WLR 3206 and, in particular, on the observations of Dyson LJ at paragraphs 18-20 and 34-35. At paragraph 34 Dyson LJ said:

"It has often been said that a solicitor who leaves the issue of a claim form almost until the expiry of the limitation period, and then leaves service of the claim form until the expiry of the period of service is imminent courts disaster. "

At paragraph 35 he said:

"It follows that this is a case where there is no reason for the failure to serve other than the incompetence of the claimant's legal representatives. Although this is not an absolute bar, it is a powerful reason for refusing to grant an extension of time."

The Court of Appeal endorsed the approach taken in Hashtroodi in Collier v Williams [2006] 1WLR 1945.

51.
Lord Marks relied also on Hoddinott v Persimmon Homes [2008] one WLR 806. In that case Dyson LJ referred to the general principle that:

"... where there is no good reason to the failure to serve the claim form within the four months period, the court still retains a discretion to grant an extension of time, but is unlikely to do so" (at paragraph 14).

Dyson LJ went on to say, at paragraph 52:

"Where there is doubt as to whether a claim has become time-barred since the date on which the claim form was issued, it is not appropriate to seek to resolve the issue on an application to extend the time for service or an application to set aside an extension of time for service. In such a case, the approach of the court should be to regard the fact that an extension of time might "disturb a defendant who is by now entitled to assume that is rights can no longer be disputed" as a matter of "considerable importance" when deciding whether or not to grant an extension of time for service: see Hashtroodi's case, para 18."

52.

All these cases are, of course, decisions on the failure to serve a claim form in time. They do not concern the situation where the claim form has been served in time but the particulars of claim have not. As the Court of Appeal pointed out in Totty v Snowden [2002] 1 WLR 1384, a different regime applies to the service of a claim form than that which applies to the service of particulars of claim. [2] Nevertheless the approach adopted in those cases of considering the reason for the failure as a paramount consideration seems to me to be reinforced by the new sub-paragraph (f) to the overriding objective, which requires the court to have regard to "enforcing compliance with rules, practice directions and orders" when dealing with cases justly. Under the present rule I am satisfied that the absence of a good reason for the non-compliance with the relevant time limit is an important factor.

53.
At paragraphs 36-38 of his judgment in Totty Kay LJ said this:

"[36] ... The effect of rule 7.4(2) is that the claimant who chooses not to serve the claim form until the period of the service has all but elapsed loses such part of that absolute right as takes the total period beyond the prescribed limit, and is left to rely on the exercise of the court's discretion if he wishes to extend that period. That discretion would involve considering the overriding objective, which includes ensuring that the case is dealt with expeditiously. The consideration will, therefore, start from the position that the claimant will not have complied with the requirements of rule 7.4 and this will be a factor to be taken into account.

[37] If the claimants are right in their interpretation, I consider that there is a perfectly sensible reason why a distinction could be drawn between service of the claim form and service of the particulars of claim. Until the claim form is served, the defendant may be wholly unaware of the proceedings. He may, therefore, because of his ignorance be deprived of the opportunity to take any steps to advance the case. The same would not be true if the claim form had been served but the particulars of claim were outstanding. In such circumstances it would be open to a defendant either to seek an order for immediate delivery of the particulars of claim or, if it was justified, to seek to strike out the claim. Thus a strict regime in relation to the claim form and a discretionary regime subject to the overriding objective is a perfectly sensible approach to the differing problems raised by the two types of failure to comply with the rules as to service.

[38] For these reasons I have come to the conclusion that there is no justification for concluding, in the absence of express words to that effect, that the particulars of claim come within the provisions of rule 7.6 by implication. Thus I am satisfied that the court does have a discretion to extend time in circumstances such as those in this case."

54.
I accept the submission of Mr. Wignall that this case is the one that governs this application although, for reasons that I have given, I regard the addition of sub-paragraph (f) to the overriding objective as requiring the court to take a more robust approach when exercising a discretion to extend time for the service of a claim form or particulars of claim.

Conclusions

55.
I regard the submissions made in relation to the factors listed under CPR 3.9(1) as being fairly finely balanced in this case. Against the Claimant is the fact that there was no good reason for failure to serve the Particulars of Claim in time: it was an oversight by the Claimant's solicitors. However,

against that the Miller defendants were aware of the claim and the consequences of a refusal to grant the application will be to shut out the Claimant's claim against the Miller defendants for good.

56.
If all other things were equal, I would have difficulty in these circumstances in seeing how it would be either just or proportionate to visit a few days delay in the service of the Particulars of Claim, particularly in circumstances where the application for the extension of time is made promptly - as it was here, by the sanction of preventing the Claimant from pursuing its claim against the Miller defendants for all time.

57.
But in my view other things are not equal in this case. Three factors are in my judgment of particular importance:

i)
The Claimant delayed for over five years before instructing solicitors: it knew in April 2007 that the building as designed could not be built so as to achieve planning permission. Absolutely no explanation has been given for this period of delay.

ii)
On the material before the court, the Claimant's claim against the Miller defendants is not a strong one and there is reason to believe that if the Claimant has a good case against the Miller defendants, it probably has an equally good, or better, case against some of the other defendants. Thus the consequence of not allowing the Claimant to pursue the claim for the same loss against the Miller defendants may well not result in any demonstrable prejudice - at least, not on the limited material before the court on this application.

iii)
The fact that the Claimant was seeking to advance a claim for bad faith that is pleaded in particularly vague terms is a course that does not merit indulgence.

58.
In my judgment, when the circumstances are considered as a whole, particularly in the light of the stricter approach that must now be taken by the courts towards those who fail to comply with rules following the new changes to the CPR, this is a case where the court should refuse permission to extend time. The Claimant has taken quite long enough to bring these proceedings and enough is now enough. I therefore refuse this application.

59.
I will if necessary hear counsel on any questions of costs that cannot be agreed, or any other matters arising out of this judgment.

---

[1] It is agreed that the third reference to "Miller" in paragraph 60a of the protocol letter should be a reference to Mr. Willmott, who is alleged to have had this constructive knowledge.

[2] Totty v Snowden was not referred to in any of the three judgments in Hashtroodi , Collier or Hoddinott .