Neutral Citation Number: [2019] EWHC 3342 (Ch)

Case No: BL-2013-000004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building, Fetter Lane,
London EC4R 1NL

Date: 18/12/2019

Before:

CHIEF MASTER MARSH

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Between:

MYCK DJURBERG	**Claimant**
- and -	
(1) THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF RICHMOND	
(2) HER MAJESTY'S CROWN ESTATE COMMISSIONERS	**Defendants**

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The Claimant appeared in person
Francis Hoar (instructed by **South London Legal Partnership**) for the **First Defendant**

Hearing dates: 28 October 2019

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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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CHIEF MASTER MARSH

Chief Master Marsh:

1. This is my judgment on the hearing of four applications, two made by the claimant and two by the first defendant in this very old claim that was commenced in 2013.

2. The claimant has applied for permission to amend the particulars of claim and to consolidate this claim with a claim that is proceeding in the County Court at Central London. The latter application is no longer pursued.

3. The first defendant applied to strike out the claim and for relief from sanctions, to the extent that relief is needed, in respect of its failure to comply with an order dated 3 September 2019.

4. The second defendant has not played a part in the claim since July 2014 when an order was approved containing agreed terms of settlement.

5. The context in which these applications were made is complex and needs to be set out in some detail.

6. The claimant is the owner of a freehold title of land comprised in title TGL353054 known as Hampton Riviera Boatyard, Hampton Court Road, East Molesley KT8 9BP. The land is adjacent to the River Thames upstream from Hampton Court Bridge and opposite Tagg's Island. The landward side the claimant's property is separated from Bushey Park by Hampton Court Road. As its name suggests, the claimant runs a boat building and repair yard.

7. The stretch of riverbank adjacent to the claimant's land is known as Terrace Gardens and the part that lies between the claimant's land and the bridge to Tagg's Island is known as St Albans Gardens. The Crown owns the freehold of Terrace Gardens. It is occupied by the first defendant for the purposes of providing a public pleasure and/or leisure ground.

8. The claimant issued this claim on 13 January 2013. At the time he was represented by solicitors and counsel. However, he has acted in person since the latter part of 2014. More recently, he has had some assistance from Mark Evans QC on direct access basis. Mr Evans QC, who is resident in Northern Ireland, was unable to attend the recent hearing due to health issues.

9. The claim in its original form was based on a complaint that access to the claimant's boatyard had been impeded and interfered with because (a) 40 metres of the riverbank at Terrace Gardens was collapsing into the river causing the riverbed to be cluttered with detritus and (b) a number of trees had grown over the river. His claim was brought in nuisance and interference with a public right of navigation.

10. Defences were served by the defendants following which the claim was stayed to enable a mediation to take place. On 24 July 2014, Deputy Master Cousins approved a consent order that provided terms of settlement agreed between the claimant and the second defendant. The order is not strictly in the form of a Tomlin Order because it does not provide for the claim to be stayed on the terms agreed in the schedule. There is no doubt, however, that was the intention and the claim as between the claimant ant the second defendant was resolved at that stage. The terms that were agreed between

those parties are only indirectly relevant. It suffices to say that the first defendant was in occupation of the riverbank under a lease and nothing agreed between the claimant and the second defendant as freeholder could affect the first defendant's exclusive possession of the land.

11. The position as between the claimant and the first defendant is less straightforward and has proved to be controversial between them. On 23 September 2014 South London Legal Partnership, acting for the first defendant, wrote the court enclosing a consent order. At the hearing before me, the claimant asserted that the consent order filed with the court set out detailed terms of agreement that resolved at least some of his differences with the first defendant. He says that at a mediation terms of settlement had been agreed. This was not accepted by the first defendant. Following the hearing, it was possible to establish precisely what was filed with the court. The draft consent order was signed by Dewar Hogan on behalf of the claimant and South London Legal Partnership for the first defendant. The draft order was not in the Tomlin form and did not set out terms of settlement. It provided for the claim between the claimant and the first defendant to be adjourned pending the final determination of two planning applications that affected the claimant's land. The first related to a planning appeal before the Planning Court with reference number CO/292/2014 and the second concerned planning applications made to the first defendant (as the local planning authority) for consent to the installation of five mooring piles in the river and the fixing of boardwalks or pontoons to the piles.

12. I did not approve the draft order that was filed in September 2014 because it provided for an open-ended adjournment, and not a disposal, of the claim. My clerk wrote to South London Legal Partnership to say that the claim could be stayed for a limited period if there was a good reason to do so. Otherwise the claim would have to be dismissed. The claimant says he was unaware of the draft consent order being filed and the response from the court because he ceased to instruct Dewar Hogan shortly afterwards. Although the correspondence passed solely between first defendant's solicitors and the court, Mr Chesman, who was then a locum solicitor with South London Legal Partnership, has confirmed in his first witness statement made in support of the application to strike out the claim that he told Dewar Hogan about the court's response to the consent order. The claimant says Dewar Hogan did not tell him about the fate of the order but this seems to be very unlikely. In any event, the draft order was not approved and a revised version was not filed. Neither party then took any steps in the claim until 2018. It appears the parties acted upon the agreement they had reached as it was set out in the consent order despite the order not having been approved.

13. The claimant's planning history has been the source of much unhappiness on his part. This is illustrated by two events. First, the claimant instituted a complaint about inappropriate behaviour by a planning officer in May 2012. The complaint was rejected after a full investigation. More recently, in his draft amended particulars of claim, the claimant wishes to assert that the first defendant, acting as the local planning authority, has been activated by personal antipathy and malice.

14. It is not necessary to set out in this judgment full details of the planning history. The principal events that are pertinent to its modern era are:

(1) On 24 October 2012, four enforcement notices were issued requiring the removal of works undertaken by the claimant without permission.

(2) On 13 November 2013 two further enforcement notices were issued replacing two of the earlier ones.

(3) On 28 May 2014 a Planning Inspector made a decision granting retrospective consent for a number of works but upholding the requirement for the removal of posts and pontoons stationed in the river.

(4) On 15 December 2014 a Deputy High Court Judge dismissed the claimant application to quash the inspector's decision.

(5) On 26 March 2015, Sullivan LJ refused permission to appeal (CO/292/2014) on the basis that the application was totally without merit.

(6) On 27 January 2016 a further enforcement notice was issued requiring the removal of pontoons stationed in the river.

(7) On 4 October 2017 a planning inspector dismissed the claimant's appeal against the enforcement notice and upheld the notice.

(8) In July/August 2018 the first defendant exercised statutory powers to remove the posts and pontoons in default of the claimant taking this action.

15. In addition to this litigation having had a lengthy history and the lively planning history, the claimant has been involved in three claims that are relevant to the issues I have to determine.

16. On 1 September 2017 Mr Murray Rosen QC sitting as a Deputy High Court judge handed down a judgment in two conjoined claims that concerned house boats, HRB 3 and HRB 4, built by Mr Djurberg at Hampton Riviera, that the claimant had sold respectively for £1,250,000 and £850,000. In the first claim Mr Djurberg was the claimant and Mr and Mrs Small were the defendants. In the second claim, Ms Johnstone and Mr Sydney brought a claim against Mr Djurberg. The issues in the claims are of of no relevance. However, during the trial that lasted from 11 to 23 May 2017, the Deputy Judge formed clear views about Mr Djurberg. They are set out at paragraphs 50 to 53 of his judgment:

> "50. … Mr Djurberg struck me as an unusual man, with a complex relationship with the truth … his oral evidence was largely evasive – circling questions or going off at tangents – and at times nonsensical.
>
> 51. … Mr Djurberg seemed to have a constant strategy for obfuscation, for turning the simple into the complicated and for constructing arguments and possibilities which seemed to have little relation to reality …".
>
> 52. He gave an impression of dishonesty and at least ruthlessness in wriggling away from any certainties and exploiting any perceived uncertainties. His responses to questioning seemed to regard the process as a means for assertive negotiation rather than requiring an effort to recount any genuine recollection of events. He made dogmatic but unlikely allegations without providing any basis;

> he claimed mastery of facts and history clearly outside his knowledge, and disputed the obvious; his recollection was often poor but he made out that it was strong.
>
> 53. His inability to explain sensibly the nature and history of these transactions … provided many telling examples of extreme concoction. These examples do not prove that he was deliberately false in everything he said, but I would not trust Mr Djurberg to tell the truth, especially when his interests and emotions are at stake, and would not accept anything he said without independent corroboration."

17. The claimant brought a separate claim against the first defendant in 2017 in the County Court at Central London concerning trees that had been planted in the land that is adjacent to the marina, the same land that is the subject matter of this claim. The claim is defended. At one point the claimant's case was struck out for failure to comply with an order but has now been reinstated and is proceeding to a trial.

18. On 2 October 2018 the claimant applied in the County Court at Central London for an injunction restrain the first defendant from selling items that had been seized when the enforcement notice was executed. The application came before HH Judge Monty QC on several occasions and in early January 2019 he handed down a judgment. One of the issues that arose on the application was whether the first defendant was prevented from selling the items seized due to an agreement between the parties. Although the judgment was given in connection with an interim application, the Judge at paragraph [34] determined in unequivocal terms that no such agreement had been concluded.

19. On 20 July 2018 the claimant made an application to reinstate this claim. His application came before a Deputy Master on 27 September 2018. No order was made on the application in part because there was doubt about whether the first defendant had been given notice of the hearing. The Deputy Master directed that the claimant could, if so advised, make an application for permission to amend the claim form and particulars of claim. That application was issued on 9 October 2018 and came before another Deputy Master on 1 November 2018 when it was adjourned, the court noting that the first defendant had been served late. The claimant was represented by Mark Evans QC at both these hearings.

20. The application came before me on 6 March 2019 with Mr Evans QC appearing for the claimant. The first defendant did not attend. Permission was given to amend the particulars of claim provided that some elements of the drafting were changed. It was plain on that occasion that the draft had been altered in part by the claimant himself and contained allegations that were unsustainable in their then form. The claim came back before me on 7 May 2019 for a CMC. On this occasion the claimant represented himself. Mr Hoar appeared for the first defendant. I was not satisfied that notice of the hearing on 6 March 2019 had been given to the first defendant and, since the order made on that occasion had not been drawn up, I made an order rescinding it. Mr Hoar indicated that the first claimant wished to apply to strike out the claim. I gave directions for the hearing of such an application which included the following order:

> "3. If the [First] Defendant wishes to apply to strike out the claim such application must be issued and served with any further evidence relied on by 4pm on 31 May 2019. It shall be listed for hearing on 3 September 2019 at the same time as the Claimant's application."

21. On 3 September 2019 there was again an issue about the service of documents. More significantly, however, it emerged that the first defendant had not complied with paragraph 3 of the order made on 7 May 2019. Instead of issuing an application notice, the first defendant filed three documents on 31 May 2019; (1) a lengthy witness statement by Mr George Chesman in support of an application to strike out the claim; (2) a draft order setting out the relief sought and (3) a skeleton argument explaining the basis of the application. No application notice was issued and the documents that were filed were not served on the claimant. The hearing was adjourned to enable the position to be regularised. The order specified that if the first defendant intended to apply for relief from sanctions that application had to be issued and served by 4pm on 17 September 2019. That led to the fourth application listed for hearing on 28 October 2019.

The amended claim

22. In its original form, the claim was relatively straightforward. The claimant asserted that:

    (1) He was entitled to unimpeded access from the main channel of the river by virtue of his common law rights as riparian owner and a public right of navigation.

    (2) The riverbed adjacent to his boatyard was cluttered with detritus due to the collapse of the riverbank at Terrace Gardens and the growth of trees from the riverbank.

    (3) He was unable to carry out works to remedy the problems.

    (4) The first defendant was liable to him in nuisance

23. The claimant sought as against the first defendant mandatory injunctions requiring it to (a) dredge the riverbed, (b) lop or prune the trees on the riverbank and (c) to repair the riverbank, or in the alternative, the grant of a declaration that he was entitled to carry out these works. In addition, he sought damages for the breaches of duty and/or nuisance.

24. Unhelpfully, the amended claim does not show the changes that have been made. The principal changes are:

    (1) Although the original claims for breaches of his common law rights and in nuisance are preserved, the claimant no longer seeks the mandatory injunctions or damages for loss arising from those claims. Put at its highest, the original claims are no more than background.

    (2) The claimant has grafted on to the complaint about the state of the riverbank in paragraph 17 (formerly paragraph 20) an assertion that after he had contacted the first defendant to complain about its condition, he was encouraged to do works of repair to the riverbed and riverbank at a cost of £179,258.54 after which he was told he did not have permission to do these works. At paragraph 18 he alleges that the change of attitude by the first

defendant was motivated by personal antipathy and malice of the planning officer about whom he made a complaint.

(3) At paragraph 20 he makes a new but unparticularised complaint that "the trees which had grown out over the River Thames…" constituted a nuisance.

(4) At paragraphs 22 to 28 the claimant relies on an agreement with the first defendant dated 24 September 2014 "where the Defendant agreed to endorse, support, and/or grant planning permission for the various works in line with license issued by the Crown Estate." He alleges that "entirely contrary to the spirit and intention of the agreed order the Defendant thereafter used any and all possible means to frustrate the intention and purpose …" of the consent orders. He says that (a) he spent £170,406.44 in restoration of the bank and installing 5 rubbing posts on Crown land (b) he spent £120,000 on planning applications that were opposed by the first defendant contrary to the agreement and (c) in breach of the agreement the first defendant issued enforcement notices. He asserts again that the first defendant's actions were motivated by personal antipathy and malice.

(5) In paragraph 26 he refers to the seizure by the police of his records by the police in the exercise of an unlawful search warrant that was subsequently quashed by the High Court; and "the process of appeals was eventually concluded in November 2017."

(6) At paragraphs 29 and 30 he complains about the steps taken by the first defendant to execute enforcement notices and the removal and sale at an undervalue of his property "having previously agreed with the Claimant that they could then be recovered by him."

25. The prayers for relief run in the sequence (1), (2), (3), (7). There are no prayers numbered (4), (5) or (6) and there is no indication that there is text that is accidentally missing. Prayer (3) is for interest and prayer (7) seeks further or other relief. Prayers (1) and (2) limit the relief to:

"(1) Damages equivalent to the sums thus wasted by the Defendant's breaches of the said agreement and further the cost of remedial works arising out of the same.

(2) Damages equivalent to the value of the property wrongfully removed and disposed of by the Defendant."

26. The amended particulars of claim bear Mr Evans QC's name at the end but given he has acted on a direct access basis it is impossible to know whether the version of the pleading that was served and filed is the document he settled.

Relief from sanctions

27. Paragraph 3 of the order dated 7 May 2019 did not contain an express sanction and no provision of the CPR imports a sanction to such an order. At the hearing on 3 September 2019, it emerged that the first defendant had not issued an application notice by the deadline although substantial steps had been taken towards compliance.

In the course of discussion between the court and Mr Hoar, who appeared for the first defendant, the possibility that the order might contain an implied sanction was raised.

28. Mr Hoar has addressed this question in his helpful skeleton argument. Having considered his submissions I am satisfied that the order did not contain an implied sanction and there is no requirement to consider the first defendant's application to extend time for issuing and serving the application with their evidence against the backdrop of the relief from sanctions regime as is required in some circumstances.[1] It seems to me that the order amounted to no more than routine case management. It would have been open to the court to have imposed an express sanction but in the absence of the order there is no basis for importing a sanction that does not arise by way of necessary implication or because it is obvious. Indeed, the court should not be over-inclined to import that sanctions regime unless it is clear that this is what was intended.

29. The notion of an implied sanction is not a new concept. It was considered in relation to appeals in *R (Hysaj) v Secreataty of State for the Home Department* [2014] EWCA Civ 1633 where there was a failure to file a notice of appeal in time (applying the earlier decision of *Sayers v Clarke Walker (Practice Note)* [2002] 1 WLR 3095). The same approach was applied to a respondent's notice in *Salford Estates (No2) Ltd v Altomart Ltd: Practice Note* [2015] 1 WLR 1825.

30. *Elliott v Stobart Group Ltd and others* [2015] EWCA Civ 449 is an example of the court implying a sanction where there was an enquiry into whether the defendant was entitled to recover loss pursuant to a cross-undertaking in damages given to the court. An order that the defendant "must" serve an expert report by a certain date was not complied with. Tomlinson LJ held that the order implied a sanction on the basis that, without further order, the expert evidence could not be relied on at the trial of the issue.

31. In *Mark v Universal Coatings & Services Ltd and another* [2019] 1 WLR 2376 Martin Spencer J considered the rationale for a sanction being implied in the cases mentioned above. In *Mark v Universal*, the claimant had failed to serve a medical report or a schedule of loss within the time stipulated in paragraphs 4.2 and 4.3 of Practice Direction 16. Those paragraphs stipulate that the documents "must" be served with the particulars of claim. In deciding that the provision of the CPR did not imply a sanction, the judge observed:

> "In his submissions, Mr Limb referred to the wording of paragraph 4 of the Practice Direction and the use of the word "must" indicating that it is a mandatory provision. Whilst this is true, I would observe that this is a characteristic of the drafting of the CPR and the word "must" is used liberally. However, to imply the need to apply for relief from sanctions in all cases where a rule or practice direction contains such wording would, as Mr Walker submitted, result in the courts being inundated with applications quite unnecessarily."

32. I respectfully agree with that analysis. In my judgment, it would be wrong for the court to search out reasons for imposing sanctions that do not obviously arise out of

[1] For example, an application to extend time for service pf particulars of claim when the time for service of the claim form has expired: *Price v Price* [2003] 3 All ER 911

the terms of the CPR or an order made by the court. As to orders made the court, it is always open to the court to impose a sanction and it should be clear on the face of the order so that the parties know of the consequences of a failure to comply with it.

33. Mr Hoar submitted that there are three categories of case so far as sanctions are concerned.

    (1) Cases where (a) there is an express sanction that is imposed as a consequence of failure to comply with a rule (such as the deadline for filing a costs budget (CPR 3.14) or serving a witness statement (CPR 32.10) or the effects of CPR 8.4(1) and 8.6(1)) or (b) orders that impose a time limit with an unless order.

    (2) Cases where a sanction must be implied. This occurs where although the rule or order does not impose a sanction, the effect of the rule or order is to require a party to have to apply to the court for permission or take some other step to avoid a negative consequence Examples are having to apply for permission to appeal out of time or to be permitted to participate in hearings where no respondent's notice has been served.

    (3) Cases where an order is expressed in mandatory terms such as "shall" or "must" but no consequences are directed in the rule or order for a failure to comply.

34. It seems to be that this is a helpful categorisation subject to two observations:

    (1) With reference to the second category, loosely 'implied sanctions', in some cases it will be obvious that the court intended there to be a sanction for a failure to comply with the order and it is also obvious that what that unexpressed sanction should be. This is matter of the court construing the earlier order. But as I have observed already, since it is open to the court to impose an express sanction in an order, it will be rare of the court to be able to reach the threshold for implication. After all, if it is so obvious that the court intended there to be a sanction, why was it not expressed. But I distinguish here a failure to draw up the order to as to reflect the intention of the court as it was expressed at the hearing, from seeking to construe the order to establish the court's unexpressed intention.

    (2) As with any categorisation, the boundaries between the categories may be indistinct.

35. I am satisfied that the order made on 7 May 2019 did not contain a sanction. I would add that even if my analysis of the CPR is wrong, I would have been willing to grant relief. The failure to serve the application and evidence by the deadline was serious because the idea behind the order was to put the claimant in a position in which he knew whether or not the application was to be made and if so on what terms. However, the explanation for the breach that is provided in the first defendant's evidence goes a long way to explain the breach and when all the circumstances of the case are considered, the fact that the claimant wishes to resurrect this is very weak case after a lengthy period of inaction militates strongly in favour in granting relief. The court is required to consider the merits of the amended claim when dealing with the application for permission to amend the particulars of claim. It follows that even

when the considerations set out in CPR 3.9(1)(a) and (b) are taken into account, it would be right for the court to deal with the first defendant's application.

The applications

36. The application made by the first defendant is closely linked with the claimant's application to amend the particulars of claim. As to the former, the first defendant relies on the three grounds for striking out the claim; (1) delay; (2) a want of particularity and (3) res judicata and abuse of the court's process. The applications need to be considered together because they involve overlapping considerations.

37. The principles to be applied to the application to amend are fully summarised at paragraphs 17.35 to 17.37 of Civil Procedure 2019. It is only necessary to highlight the following principles that are relevant to this application:

    (1) The approach that was set out in *Cobbold v Greenwich LBC* (unreported) 9 August 1999 no longer holds sway. The court will consider whether to grant permission to amend striking a balance between the parties applying the criteria set out in the overriding objective.

    (2) The court will have regard to the form of the amendment, the degree to which the claim or defence is pleaded with clarity.

    (3) The amended claim must have some prospect of success and must not be based on invention or mere speculation.

38. The principles that apply to a late or very late amendment are summarised in the judgment of Carr J in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38]. In that case the application was made very late, in the sense that amending the claim would inevitably have led to the trial being vacated. However, lateness is not a fixed notion and an application may be regarded as being late even though the trial of the claim is not imminent. The claimant's application was made five years after the claim was issued and after a long period in which no steps were taken in the claim. The claimant says that the delay is explicable by the agreement made in 2014 to adjourn the claim (albeit the order was not approved) and by the planning history. It certainly right to say that the claim has not progressed far towards a trial and I do not consider the court could fairly characterise the application to amend as being made very late.

39. It seems to me that the most important issue for the court to consider is whether the amended claim has some prospect of success. The claim is certainly very stale and the issue of lateness is best considered in relation to the defendant's application to strike out the claim based the claimant's delay in progressing it.

40. A review of the merits of the amended claim is most simply conducted by working backwards from the relief that the claimant is now seeking.

41. The first prayer seeks damages for the first defendant's breaches of "the said agreement" and the cost of remedial works arising "out of the same". The agreement that is referred to must be the agreement that the claimant says was made in 2014 and included in a consent order that is that is mentioned in paragraph 23 of the amended

particulars of claim. The 2014 agreement is referred to again in paragraphs 27 and 28 and they immediately precede the separate agreement mentioned at paragraphs 29 and 30 of the amended particulars of claim concerning recovery of the claimant's property.

42. For the reasons that have already been explained, it is clear that the 2014 agreement pleaded in paragraph 23 of the amended particulars of claim was not the subject of a consent order signed by the solicitors acting for the claimant and the first defendant. There is no factual basis for the claimant to assert that an agreement with the terms he relies on was made between the parties. It is, of course, possible there were negotiations on a without prejudice and confidential basis at and following the mediation but it is clear that the parties agreed, in the sense of there being a binding contractual arrangement, no more than that the claim would be adjourned until certain planning matters were resolved. The first defendant did not sign a consent order in which it agreed it would endorse, support and grant the claimant's planning applications. Indeed, it is obvious that the first defendant could not do so in light of its role as the local planning authority. Furthermore, it must be open to question whether the consent order that was submitted to the court amounted to a binding contract. Unlike a Tomlin order under which the parties enter into a binding agreement that is not part of the court's order, although it may be in a schedule to it, in this case the order and the agreement it contained depended upon the court's approval. The parties asked the court to approve an open-ended adjournment of the claim (not a stay) pending the resolution of planning issues and the court declined to approve the order. It seems likely to me that, properly analysed, the agreement was conditional upon the court approving the order and in the absence of approval the 'agreement' fell away.

43. The second prayer seeks damages in relation to the claimant's goods that he says were wrongfully removed by the first defendant. The removal is said to have been wrongful because of an agreement between the claimant and the first defendant under which the first defendant would return them to him. The existence or otherwise of such an agreement was considered by HH Judge Monty QC in his judgment in the recent proceedings in the County Court at Central London (claim E02CL869). After having considered the relevant exchanges of emails, he determined that no agreement had been entered into by the first defendant. It might be said in favour of the claimant that the determination was made in the course of a judgment dealing with an interim application and without hearing evidence. However, the determination is expressed in unequivocal terms and clearly the judge felt the position was not in doubt based upon the written material that was before him.

44. On the basis that the two prayers for relief represent the claim the claimant now wishes to pursue, the application for permission to amend should be dismissed on the basis that the claim the claimant now wishes to pursue has no prospect of success.

45. There are however further issues that are pleaded and, although they do not lead to claims for relief, it is right to deal with them having regard to the claimant's position as an unrepresented party.

46. The claimant has grafted onto his original claim based in nuisance and interference with his public right of navigation, an assertion that after the claimant contacted the first defendant, it encouraged the claimant to remedy the obstruction to the riverbed and poor condition of the riverbank. He says he then carried out works at a cost of

£179,254.54 but subsequently the first defendant told him he had no entitlement to do any works of the type he had undertaken. The case is pleaded in the most general terms. No particulars are given of:

(1) Who the claimant contacted and when this happened.

(2) What was said, whether orally or in writing, that amounted to encouragement to do the works himself.

(3) Who subsequently told the claimant that he did not have permission to do the work, when this occurred and whether the interaction was oral or in writing.

47. The claimant asserts that the first defendant acted towards him motivated by personal antipathy and malice and that this explains the change from encouragement to prohibition. The claimant relies in particular on the antipathy and malice displayed by a planning office against who he pursued a complaint. The allegation of malice is of course a serious one, particularly against an officer of a public authority. However, the allegation appears to be made solely for the purposes of explaining why the first defendant behaved as the claimant alleges it did, rather than as part of a cause of action.

48. The claim in nuisance and for breach of the claimant's right of public navigation remain pleaded at paragraphs 19 to 21 and the claimant pleads loss at paragraph 21(a) by referring back to paragraph 15 of the particulars of claim in their original form. He pleads loss amounting to £139,536.42 although it is not easy to discern how that sum was calculated.

49. The original claims are based on two matters. (1) An obstruction to the riverbed that resulted from the collapse of a section of the riverbank. The obstruction is said to have occurred in October 2011 when the claimant filled his dry dock. (2) Trees on the riverbank having self-seeded on the deposits of silt and debris and grown out over the river.

50. As with other aspects of the pleading, the claim is poorly particularised. No particulars are provided of:

(1) Actual knowledge of the first defendant of the condition of the riverbank.

(2) The condition of the riverbank.

(3) The extent to which trees had grown out over the river.

51. The allegation of personal antipathy and malice is repeated in paragraph 28 of the amended particulars of claim in connection with the 2014 agreement but, as with the earlier reference to antipathy and malice, it does not appear to form part of a cause of action and is in any event not particularised.

52. It seems to me it is right to treat the claim as including the original causes of action despite that absence of a prayer for relief. It is therefore necessary to turn to the first defendant's application to strike out the claim.

53. The first defendant relies on the delay in pursuing the claim. The principles that are relevant are set out at paragraph 3.4.3.6 of Civil Procedure 2019. Delay alone will not suffice as a basis for striking out a claim even if the delay is inordinate and inexcusable. There must in addition be some other relevant factor. Here the delay has been very lengthy. Nothing was done by the claimant to pursue the claim from September 2014 to the issue of his application seeking to reinstate the claim in July 2018. It seems to me that the claimant cannot rely on the agreement embodied in the consent order lodged with the court in September 2014 because the court did agree to the claim being adjourned. I do not accept that the claimant was unaware of the position. Equally, and in any event, the extensive planning disputes do not excuse the failure to proceed with the claim. It cannot be right that an application for permission to appeal that is characterised as being wholly without merit can be relied on by the claimant. And the remaining planning issues arise out of enforcement action taken by the first defendant for breaches of planning.

54. Mr Hoar submits that the court should have regard to the fact that it is now impossible for there to be a fair trial of the original issues pursued by the claimant. He points to the fact that the condition of the riverbed about which the claimant complains occurred in 2011 and has since been rectified by the claimant. It will be impossible, he says, for an expert witness employed by the first defendant to express any view on the subject. Similarly, the first defendant is not in a position to deal effectively with the allegations about the riverbank. Mr Hoar submits that a fair trial is no longer possible.

55. It seems to me that there is force in these submissions and it is right to have regard to the failure of the claimant to provide particulars of core elements of his claim 6 years after the claim was first issued. I consider that the delay in progressing the claim is the result of, or largely the result of the claimant's failure to take timely steps to pursue it and it will now be impossible for a fair trial to be conducted.

56. There are other elements of the application to strike out the claim that strictly do not need to be dealt with. I mention, however, the plea in the amended claim that seeks to rely on an agreement by the first defendant to release his possessions. Such an allegation is a collateral attack on the determination of HH Judge Monty QC and it is in any event subject to cause of action estoppel.

Conclusion

57. I will dismiss the application seeking permission to amend the particulars of claim and strike out the claim.