Neutral Citation Number: [2021] EWHC 2350 (Ch)

Case No: BL-2009-000006

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

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Thursday, 1 July 2021

BEFORE:

DEPUTY MASTER LINWOOD

BETWEEN:

PATRICK FRANCIS

Claimant

- and -

F BERNDES LIMITED & Ors

Defendants

MR J BOGLE (instructed by AJ Angelo Solicitors) appeared on behalf of the Claimant
MS L IFE (instructed by Goodman Derrick LLP) appeared on behalf of the First Defendant

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JUDGMENT
(APPROVED)

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(Official Shorthand Writers to the Court)

1. THE DEPUTY MASTER: This is my ex tempore judgment following yesterday's hearing in this matter. By an application notice issued on 22 July 2020, the claimant (now appearing by his litigation friend) asks:

> "For the reasons set out in the third witness statement of Patrick Francis attached hereto, the following orders:
>
> (a) for permission to relist the adjourned hearing originally listed before Master Teverson on 18 February 2013 of his application to amend the claim form and particulars of claim herein in the terms of the draft provided to the court pursuant to the order of Henderson J dated 15 December 2011 expressly granting permission for the claimant to apply to amend the claim form and particulars of claim so as to add/amend a restitutionary claim; and
>
> (b) for permission to file and serve further evidence; and
>
> (c) for directions for the filing of evidence and for the further conduct of the proceedings."

2. That application notice was accompanied by the third statement of the claimant, also dated 22 July 2020. The claimant has also made a fourth statement, dated 30 September 2020.

3. The matter is contested by the first defendant and, whilst there are seven defendants listed, only the first defendant is active so I will refer to it as "the defendant".

4. The defendant objected to the application which they describe as wholly misconceived and an abuse of process for these reasons:

(1) The defendant says it is an attempt to revive by seeking to amend proceedings already dismissed by order of Master Teverson nearly ten years ago on 3 November 2010 and by order of Henderson J when he dismissed the claimant's appeal against Master Teverson's order but gave the claimant a window of opportunity to apply to amend and to persuade the court he had an arguable case based on restitution.

(2) The claimant has failed, the defendant says, to file and serve an application to amend with supporting evidence by 4 pm on 5 January 2012 and therefore the action remains dismissed.

(3) The claimant made an application a year later on 4 January 2013 for directions in the already dismissed action, which was correctly dismissed by Deputy Master Clark (as she then was) on 18 February 2013, Master Teverson having declined to adjourn that hearing. There then followed complete silence.

5. The claimant's case is that he did make the application on 5 January 2012 which, although filed and served, has never been heard. The claimant says the order of Henderson J was been complied with as his counsel, Mr Richard Wilson QC and his clerk, Mr David Green, told him it was complied with on that date, 5 January 2012. I am therefore asked by Mr Bogle to hear the application for permission to amend the pleadings to plead restitution in accordance with paragraphs 1 and 2 of the order of Henderson J.

6. This is an application of substantial importance to both the claimant and the defendant. I have before me a bundle of some 1550 pages and a substantial and detailed skeleton by Mr Bogle of 32 pages. I am told that the claimant's costs in, in effect, resurrecting this claim, currently total some £160,000. The background goes back some considerable time to approximately January 2004, seventeen-and-a-half years ago.

7. The claimant says that he invested, with a small contribution from one Desmond Hughes (now deceased), £250,000 on refurbishment of a property at 807 High Road, Tottenham, London, together with a flat and a workshop. The claimant says the defendant ejected both him and Mr Hughes from the property without any compensation, relying on an agreement which Master Teverson found to be unenforceable under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. The claimant says that the defendant said it would sell the property, valued at some £300,000 for just £50,000 to take into account the £250,000 the claimant had spent on it. This £250,000, the claimant says, represents his life savings which he says he has been unjustly deprived of by the unlawful conduct of the defendant and therefore the defendant has been unjustly enriched to the value of that sum, so the claimant now seeks restitution of his investment.

8. That claim for restitution, as I have mentioned, was what the claimant was permitted to apply for permission to amend to claim. The defendant says that the agreement was a forgery and so there was no binding contract.

9. As to the matters which led to the current claim, on 29 April 2010 the defendant applied for summary judgment and strike out of the claimant's claim against the claimant. On 3 November 2010 Master Teverson ordered:

(1) the claim be dismissed;

(2) the claimant pay the first defendant's costs of the claim including the application, such costs to be referred to a costs judge for detailed assessment if not agreed;

(3) the claimant to pay £25,000 inclusive of VAT on account of the first defendant's costs pending detailed assessment.

10. The claimant was granted permission to appeal by Briggs J (as he then was) on 4 May 2011. The appeal was heard by Henderson J when the claimant was represented by Mr Richard Wilson QC of 36 Bedford Row ("the Chambers"). I will set out certain of the recitals as well as the main parts of the order of Henderson J:

> "On hearing leading counsel for the claimant and leading counsel for the first defendant and upon the court judging that -
>
> (a) Master Teverson came to the correct conclusion on the issue whether the letter described in the judgment of this court as 'the 7 January letter' complied with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 ("the 1989 Act"); and
>
> (b) that the proposed alternative claim for rectification was misconceived and that any application for permission to amend this claim so as to raise it would have been dismissed; and
>
> (c) that the appeal should be allowed to the limited extent of permitting the claimant to make an application for permission to amend so as to raise the proposed alternative claim for restitution;
>
> It is ordered that:

> (1) the claimant has permission to make an application for permission to amend the claim form and particulars of claim if so advised to raise the proposed alternative claim for restitution;
>
> (2) if the claimant intends to apply for such permission, he must issue an application notice and file and serve it together with the proposed amended claim form and amended particulars of claim and any evidence upon which he intends to rely in support of the application by 4 pm on 5 January 2012."

11. Then five paragraphs make provisions as to service of evidence. Next paragraph 8 provides:

> "(8) Subject to paragraphs (1) to (7) of this order, the appeal is dismissed."

12. And paragraph (10):

> "The claimant is to make an interim payment of £15,000 inclusive of VAT on account of costs which he is liable to pay under paragraph (9) above by 4 pm on 12 January 2012."

13. The costs payable under that order and the order of Master Teverson of £25,000, namely a total of £40,000 have never been paid by the claimant to the defendant, together with further costs which I will come to.

14. In summary, therefore, the claimant was given permission to apply for permission to amend, not to amend which is of importance as at certain times those advising the claimant and the claimant himself have said that the claimant has permission to amend. But it was to permission to apply to raise an alternative claim in restitution, subject, of course, to the statute of limitations.

15. The defendant says simply that the claimant has failed to issue the application under paragraphs (1) and (2) of the order of Henderson J or at all.

16. When I read into this matter overnight and yesterday morning, three preliminary points occurred to me. I raised these with counsel at the outset of the hearing. I apologised and

said I could not have put them earlier as I had only just concluded my reading in. Those points are:

(1) The issue or issues that I am to determine

17. Clearly, they are not as set out in the application notice. Mr Bogle in his skeleton, at paragraph 169, says the court is asked to exercise its discretion and adjudicate on the following issues:

(1) whether relief from sanction is needed in respect of -

(i) “receipt” by the court of the claimant's 5 January 2012 application notice and amended claim ; and

(ii) the dismissal order dated 18 February 2013 of Deputy Master Clark, it having dealt with the 4 January 2013 application notice and not the 5 January 2012 application notice and in the absence of the claimant and, if so, grant it in the exercise of the court's case management powers under CPR 3.1 and 3.9.

(2) That any doubt as to receipt of the claimant's 5 January 2012 application notice by the court officer per CPR 23.5 be resolved in the claimant's favour, alternatively that the claimant be relieved from any sanction for failure to comply with paragraph 2 of the Henderson J order if the court deems it necessary;

(3) That the 5 January 2012 application is deemed served upon the defendant on that date pursuant to the rules;

(4) If the court deems it necessary, permission to apply in view of the claimant's absence from the hearing on 18 February 2013 to set aside or vary that order or for any relief from any sanction implied within it;

(5) Permission, if needed, for the claimant to adduce his late evidence;

(6) If the court deems it necessary, relief from any sanction for failing to pay the costs orders in time, bearing in mind they are seven and nine years old respectively;

(7) Permission for the claimant to make his 5 January application and if necessary permission to make this application, also;

(8) Permission to amend his pleading in accordance with the draft amended pleading filed and served on 5 January 2012 and, if so granted, directions in the form of the draft provided to the court or in such form as the court considers fit.

18. Ms Ife at paragraph 10 of her supplemental skeleton said:

> "It is respectfully submitted that the court must decide on the balance of probabilities [and I interject to say this is the issue] whether an application for permission to amend was issued, filed and served, together with any supporting evidence and the proposed amended claim form and amended particulars of claim. This is not a question of whether the claimant has raised an arguable case; it must be decided one way or the other. The defendant says all the contemporaneous evidence points to the application not having been issued, filed or served."

19. I asked Mr Bogle if I needed to hear all of his evidence on his applications, ie, all the issues, or whether it would be best for me to determine the issue submitted by Ms Ife, which I call Issue 1, as to whether the application had actually been issued. I said this notwithstanding the fact the application before me is nothing of the sort, as it is based on the application notice having been received by the court as it concerns the hearing of the adjournment.

20. Mr Bogle submitted that I should hear his whole case. Ms Ife submitted I should hear Issue 1, namely was an application for permission to amend issued, filed and served with evidence and the proposed amended claim form and proposed amended particulars of claim in accordance with the order of Henderson J by 4 pm on 5 January 2012?

21. I was persuaded by Mr Bogle to hear the entirety of the evidence in the application but at the end of the hearing yesterday, I said I would not determine the application for permission to amend to plead restitution due to Ms Ife being, she said, somewhat ambushed by the late provision of certain authorities. I emphasise I make no decision upon that, save that I felt that Ms Ife should have a certain amount of time to consider them. Mr Bogle submitted that I should determine Issue 1 and, if I was against him,

grant him a retrospective extension of time to make the application to amend ("Issue 2") as it flowed directly from Issue 1. This was another example of what I call application creep, as it appears nowhere in the application notice of 22 July 2020.

22. In any event, I will determine Issue 1 and, dependent upon my determination of that, Issue 2.

2. Conflicting witness statement evidence

23. There is a clear conflict, as I will come to, between what the claimant and his supporting witnesses say and what Mr Ince of Goodman Derrick, the defendant's solicitors, says. Ms Ife submits that on an interlocutory application the court does not have to accept what the claimant says as true if it is inherently improbable, self-contradictory or there is extraneous evidence to contradict it: see CPR 24.2(5). That, of course, concerns evidence on an application for summary judgment. I referred counsel to the decision of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) at [15] to [22]. I appreciate that concerned oral evidence at a trial, but I find it useful in terms of guidance and, with the greatest of respect to Leggatt J, if I may very briefly summarise, the fallibility of memory and the supremacy of contemporaneous documentary evidence.

24. I also referred counsel, because of my concern as to whether I could determine this direct clash of witness evidence, to the decision of HHJ Paul Matthews, sitting as a judge of the High Court, in *Ward Solicitors v Sharif Hendawi* [2018] EWHC 1907 (Ch) at [3]:

> "I was not asked to order cross-examination of any witness, and none was tendered for cross-examination. In the absence of cross-examination, the court is not entitled to reject any written evidence as being untrue, *unless* on the basis of all the evidence before the court it considers that that written evidence is simply incredible: see *eg Long v Farrer & Co* [2004] BPIR 1218, [57]-[61], applied in *Shierson v Vlieland-Boddy* [2005] 1 WLR 3966, CA, [56], *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488, [58]…"

25. I then referred counsel to *Long v Farrer & Co* at [57] to [61], in particular at [59] where Rimer J (as he then was) cited *Re Keypak Homecare Limited (No.2)* [1990] BCLC 440 a decision of Harman J at page 122G:

> "As it seems to me, the conflicts of evidence which arise in this case cannot be resolved in the absence of cross-examination. Mr Millett submitted that I could choose which affidavit I should prefer. In my judgment that is not a possible exercise. When a judge is confronted with paper evidence only which contradicts each other he is left with no option but to say that he cannot identify which of the conflicting stories is correct, and he cannot disbelieve a statement put upon oath without cross-examination, unless some contemporary document plainly contradicts the affidavit evidence."

26. Mr Bogle submitted that he adopted what I had said in that I cannot make that determination without oral evidence and therefore I cannot find against the claimant unless I find his evidence and that of his witnesses incredible. I must therefore, he submitted, accept the evidence on its face of the clerk and the claimant himself and his former girlfriend, Ms Cornett-Parkinson. I asked Mr Bogle if I could rely on witness evidence or did I need to hear oral evidence. Mr Bogle submitted that either would do.

3. How was the application notice to be electronically issued?

27. Prior to CE-file the issue of originating process and applications was very different. The whole of the claimant's case is based on this application notice being sent "by fax and/or email" (a formulation and catch-all expression I take issue with but will turn to later) to the court. In 2012 there was a pilot project within the Commercial and Chancery Courts and the position as to issue and service of electronic documentation was set out in Practice Direction 5C. I checked the 2011 White Book, being the applicable edition, as that for 2012 version would not appear until May 2012, after the deadline in the Henderson J order.

28. Practice Direction 5C at paragraph 6.1 refers to the starting of a claim and how the claimant may request the issue of a claim by obtaining the electronic claim form and obtaining a particular electronic reference key. At paragraph 6.6 it states:

> "A document key or electronic link will be printed on the sealed claim form and this will allow the party by whom it is served to obtain and file an acknowledgement of service through an electronic reference together with other documents, keys, or electronic links which will then allow the parties to obtain other forms required for the purpose of the workings. The electronic working [inaudible] is set out at paragraph 7."

Paragraph 7.2 says:

> "Where a party files a form or document through electronic working -
>
> (a) the form or document is not filed until it is acknowledged as received by the court, notwithstanding when it may have been sent."

29. That was the position back in January 2012. Neither Ms Ife nor Mr Bogle had considered what the court's position was as to issue then. This was not entirely satisfactory as the court system which obtained then is, in my view, of especial relevance, particularly when no detail has been provided and none is available due to the passage of time and the destruction of the court file as to exactly to what address and exactly how the application notice and its accompanying documents were allegedly electronically transferred.

30. Ms Ife submitted as to the three matters I had raised that first I should consider whether the claimant could bring himself within CPR 17.4 or not as permission to amend involved the court's discretion. As to the second, she submitted the evidence of the claimant was incredible and inconsistent with the documentation and therefore I could and should find for the defendant. She further submitted I could not resolve the matter against her today, ie, a finding that the application notice was issued and served in time, as there was no evidential basis for so doing. To go to the next steps, I needed to make a finding that it was done and it was for the claimant to prove it was issued and served.

31. As to my third point, she submitted that I did not have to determine the question as to electronic working of the court and what did the claimant do or not do, and whether it was in accordance with the then procedure as, if I found against the claimant on the evidence, there would be no need to. I agree. I now return to the background.

32. Mr Ince says that he never received the application form nor any other documentation at the time. However, on 23 March 2012 at 12.25 he received an email from Mr David Green, the clerk to Mr Richard Wilson QC, saying this:

> "Dear [addressee illegible]
>
> Further to the Amended Particulars of Claim served on 5 January this year, Mr Wilson QC has not received a response. I shall now contact your counsel's clerk at Maitland Chambers to fix a half day master's appointment.
> Yours sincerely."

33. Within two hours, Mr Ince replied as follows:

> "Dear Mr Green,
>
> Please identify how it is said that service was effected. So far as I am aware, nothing has been received.
> Regards
> Clive Ince."

34. Four days later, one Everton Wedderburn, also a clerk to Mr Richard Wilson QC, emailed Mr Ince as follows:

> "Dear Mr Ince,
>
> Please see attached: (1) amended draft claim form [then there is a gap] draft amended particulars of claim signed by Mr Patrick Francis dated 5 January 2012.
>
> Could you please acknowledge receipt of this email.
> Many thanks
> Kind regards
> Everton."

35. Attached to that email is what was transmitted, namely the claim form. At the top this someone has underlined the following in capitals, "AMENDED PURSUANT TO THE ORDER OF HENDERSON J DATED … DECEMBER 2011", and then in manuscript, "Amended" followed by the words "Claim Form". In the middle of the page the word "Restitution", underlined as an amendment has been inserted, and beneath that it says, "Value £950,000", that was the original, and again someone has written in in manuscript, "Alternatively, £250,000", underlined as the amendment.

36. On the next page of the claim form appears the heading “Statement of Truth” and under that appears these words:

> "I Patrick Francis believe the contents of this statement of case to be true. Dated this 5th day of January 2012.
>
> Signed, Mr RE Francis and Mrs Patrick Joyce Francis."

37. That is followed by a document. In between the tramlines it says, "Draft Amended Particulars of Claim", but at the top it says:

> "Amended to order of Henderson J dated … December 2011, granting permission to amend."

38. Crucially, as I have said earlier, no permission to amend had been granted by Henderson J.

39. In his third witness statement dated 22 July 2020 at paragraph 198 the claimant says:

> "Pursuant to the Henderson J order, the draft amended claim form and the draft amended particulars of claim were drafted by my then counsel assigned by me and served upon FPL [the first defendant's solicitors] as stated above on 5 January 2012.
>
> 199. I did not see the application notice for seeking permission to amend, but it was clearly filed and served since the court gave notice of the hearing of the amendment application to be listed on 18 February 2013 before Master Teverson.
>
> 200. My counsel was not able to attend on that date and I was sick and not able to myself. Accordingly, the hearing was adjourned to be relisted on another date."

40. I interject there to say that it is now accepted that, contrary to what the claimant says at paragraph 199, the application notice was not clearly filed and served as the hearing on 18 February 2013 was listed and heard due to the claimant issuing an application notice on 4 January 2013 in which he said he was "asking for the court's permission for directions for trial please. The other side have done nothing." That clearly was wrong in view of the above correspondence.

41. That January 2013 application by the claimant was listed to be heard before Master Teverson on 18 February 2013. The claimant certainly received notice of that hearing as in the evidence, there is a manuscript letter dated 11 January 2013 from him to the court asking for an adjournment of that hearing saying "my reason for this is ill-health and I have no legal representation". His request for an adjournment was unsuccessful as Deputy Master Clark (as she then was) on 18 February 2013 ordered:

> "Upon hearing the claimant's application by application notice dated 4 January 2013 and upon reading the evidence in the court file and upon hearing counsel for the first defendant and the claimant not attending, it is ordered that -
>
> (1) The application be dismissed.
> (2) The claimant do pay the first defendant's costs summarily assessed in the sum of £5,000 by 4 March 2013."

42. Those costs of £5,000 were in addition to the £40,000 that had previously been ordered by Master Teverson and Henderson J which remained and still remain unpaid.

43. I now turn back to events in 2012. On 5 April 2012, Mr Ince of Goodman Derrick wrote to the claimant in the following terms:

> "Dear Sir
>
> F Berndes Limited
>
> On Tuesday 17 March, we received from your counsel's chambers for the first time a copy of your draft amended claim form and draft amended particulars of claim. We understand that the documents had been served late to an oversight. We are attaching a copy of the court order dated 15 December 2011. We refer you to paragraph 2 of the order. Not only were the draft amended particulars served almost three months later than the date stipulated in the order, but no application notice in support of the evidence has been issued or served.
>
> Given your failure to issue an application notice and to serve evidence in support, we do not propose to respond to the amendments until you have complied with the court order and suggest you contact your counsel and discuss this letter with him as soon as possible. As regards the draft amended Particulars of Claim, our comments are as follows …"

44. Then there are three substantive paragraphs with regard to their rejection of the claim in restitution, saying that it disclosed no reasonable cause of action as it was the same claim again which was statute-barred and did not arise out of the same or substantially the same facts. Then it states:

> "As a matter of courtesy, we are sending a copy of this letter for the attention of your barrister, Mr Richard Wilson QC."

45. On 13 April 2012, Mr Green of Chambers, as the clerk to Mr Wilson, wrote to the claimant and said:

> "Dear Mr Francis,
> Patrick Francis v Berndes Limited
> I write further to recent telephone conversations between yourself and chambers regarding the current issue on serving our amended particulars upon Mr Ince at Goodman Derrick Solicitors. We recently contacted Goodman Derrick to agree a new date for a hearing at the court. Mr Ince replied to us to say that he has never received the document that we believed had been sent on 5 January 2012. This technically means you are in default of the judge's directions given at the last hearing.
>
> Our understanding is that you came to chambers on the afternoon of 5 January 2012 whereupon you had a short discussion with Mr Wilson QC in the ground floor reception area. Mr Wilson recalls handing the document to a clerk to send through to Goodman Derrick and we understood that you were waiting in reception until a confirmation had been received. Unfortunately, whilst we have a record of a telephone call being made to Goodman Derrick, that would have informed them that the document was then going to be sent through, our records for email delivery is incomplete. We are currently trying to recover the information from a data server and this will take a few more days. The other possibility is that a clerk tried to send the document by fax through the photocopier. Unfortunately, the machine does not record items sent that far back.
>
> This information was given to Mr Wilson QC who then made contact with Mr Ince of Goodman Derrick to explain the situation. Mr Wilson QC understands that Mr Ince was actually on holiday the week commencing 2 January 2012 but Mr Ince confirmed that a file note stated Mr Wilson's clerk had made contact on 5 January with his secretary to confirm the document was going to be sent through. It was then agreed

> between Mr Wilson and Mr Ince that we would send through again the amended particulars of claim for them to consider.
>
> You will now be aware of the up to date position following this having received Goodman Derrick's letter of 5 April. Mr Wilson QC will address this further with Mr Ince to see how this can be resolved.
>
> Please accept our apologies for this situation. Whilst we believe we have complied with the judge's directions recorded on your behalf, we currently cannot provide evidence to support this.
>
> Yours sincerely."

46. Nothing more was heard until the claimant issue the application notice I have referred to which was heard and dismissed by Deputy Master Clark on 18 February 2013.

47. Then a deafening silence broke out, but this time for some seven-and-a-half years until the application before me today was issued on 22 July 2020. The claimant also in his third witness statement of the same date said:

> "5. A signed copy of these draft amended particulars of claim together with an amended claim form and application notice was first served upon the solicitors of FBL, Goodman Derrick, 5 January 2012. True copies are at pages XXX.
>
> 6. However, Goodman Derrick claimed they had not received the documents and so my legal representatives sent a further copy by email on 27 March 2012, receipt of which was acknowledged by Goodman Derrick in a letter dated 5 April 2012. This is evidenced by a letter from the clerk to my then counsel, Richard Wilson QC, to me. A true copy of that letter is at …"

Being the letter I have just read out.

48. This is another statement by the claimant that does not bear examination for these reasons:

(1) No such documents were served on Goodman Derrick on 5 January 2012.

(2) When the draft amended claim form and draft particulars of claim were sent on 27 March 2012, there was no application notice.

This, what could be called at best a lack of attention to detail, is present throughout the claimant's evidence. I also note that at no time was there any supporting evidence as required by the order of Henderson J. For the first time in this matter, Mr Bogle submitted that evidence was in box 10 of the missing application notice, as now appears in the last tranche of the claimant's evidence. I find that difficult to accept when the evidence was in support of the substantive application to appeal, namely to plead restitution. There is also no evidence of anyone other than the claimant and his witnesses having now seen it.

49. I would also emphasise that the claimant himself said he did not see the application notice, paragraph 199 again, but relies on the hearing date as evidencing that it was filed and served, which of course was, as I have explained, following the application he issued in January 2013, as to which there is no issue.

50. There has been wholesale misapprehension and misunderstanding on the part of the claimant as no such application was ever listed at any time. No copy of that supposed application notice has ever been produced. For this application, the claimant reconsidered the evidence in his third statement and in his fourth statement of 30 September 2020, he says:

> "On 5 January 2012 I went to the chambers of my then Direct Access counsel, Mr Richard Wilson QC at 36 Bedford Row, London and signed and had filed and served the application in these proceeds.
>
> 8. The documents were all drafted by Mr Wilson as my Direct Access counsel at my request.
>
> 9. There is a dispute between Mr Wilson and me as to whether at that time he was still acting for me on a conditional fee arrangement as I maintain or whether, as he maintains, he was acting for me pro bono publico.
>
> 10. As I now learn, he believed he could withdraw from my case at any time. I believed that he was still obliged to act for

me throughout the year. That is why he failed to act for me when I was expecting him to do so and why, although I did not realise it at the time, I was in effect left entirely on my own, effectively abandoned by the person I thought was my lawyer and Direct Access counsel.

11. In any case, I was asked by Mr Wilson to attend the chambers on 5 January 2012 to sign the application notice, amended claim form and amended particulars of claim that Mr Wilson was drafting for me so that he and his clerks could file and serve them."

51. I interject there to say, of course, that flies in the face of the contemporaneous letter of 13 April 2012 where the reference to the document transmitted is to (and I quote again from the second paragraph) "the document we believe to have been sent on the 5th…Mr Wilson recalls handing the document to a clerk…", singular again, and finally, the last but third paragraph:

"Mr Wilson's clerk made contact on 5 January with the secretary to Goodman Derrick to confirm the document [singular again] was going to be sent through."

52. The claimant's statement continues:

"12. I attended the chambers in the early afternoon of 5 January 2012 with Collette Parkinson, my then girlfriend. After I arrived I met Mr Wilson's clerk, David Green, in the ground floor reception area of chambers. He handed the documents to me and asked me to sign them. Mr Wilson then appeared and greeted me and Collette. We chatted briefly and I signed the documents in front of Mr Wilson and his clerk and dated them 5 January 2012.

14. I signed three sets of documents, the application notice, including the evidence page, the amended claim form and the amended particulars of claim. As far as I can recall, the evidence page explained the background of the order of Henderson J and explained that I was complying with his order and why the amendments should be allowed.

15. Mr Wilson and Mr Green took the signed documents to the clerks room for serving on the defendant's solicitors and for filing with the court. I did not have to attend court in person and pay any fee because I am exempt from fees due to being on benefits then and now. All my savings were spent on the refurbishment of the Coolbury Club [that is the property I refer

> to] the benefit of which has been retained by the first defendant and is the reason I am seeking permission to add the restitution claim in accordance with the order of Henderson J.
>
> 16. I and Collette waited in the reception area and after a time David Green came back and told us the documents had been sent to the other side and the court. Collette and I left the chambers. I cannot remember the exact time but it was around 2 pm and certainly before 4 pm.
>
> 17. This can all be confirmed by David Green and by Collette. I also understand from Mr Wilson and the clerks both orally and by the letter to me dated 13 April 2012, the letter later handed to me by the clerks, that the necessary documents had been filed and served and thus the Henderson order complied with."

53. But again, in my judgment, this appears misleading. The necessary documents had not and never have been served on Goodman Derrick. The claimant then referred to the important paragraph 199 in his third statement and then said this at paragraph 20:

> "When I said in my third witness statement at paragraph 199 that 'I did not see the application notice for seeking permission to amend' I meant that I did not see it again after signing it on 5 January 2012, not that I never saw it at all. Of course, I saw it and read it on 5 January 2012 when I signed it and handed it to Mr Wilson and his clerk."

54. The claimant also relies on the first witness statement of Mr David Green dated 1 October 2020. Mr Green says this:

> "1. I am the former clerk to Mr Richard Wilson QC who acted for the claimant in these proceedings under a conditional fee arrangement and via Direct Access. Mr Wilson was then a member of the chambers of Francis Oldham QC and I was employed as a clerk in those chambers.
>
> …
>
> 4. In this statement I recount what happened in early 2012 …"

I interject there to say obviously eight-and-a-half years before the making of this statement:

> "… to the best of my recollection in relation to the filing and serving of the set of documents in these proceedings.

5. As Mr Wilson told me and I believe, those documents were drafted by Mr Wilson and I assume on the Direct Access instructions of Patrick.

6. Patrick was asked by Mr Wilson … to sign the various documents. I was told by Mr Wilson that the documents had to be signed by Patrick and filed and served on the same day, 5 January 2012.

7. That morning, Mr Wilson handed me the documents for signing and asked me to call him when Patrick arrived. Patrick duly attended chambers in the early afternoon of 5 January 2012. He had a female friend with him whose name I do not recall. After he arrived, I met him in the ground floor reception area. I handed the documents to Patrick, indicating that he had to sign them and then called Mr Wilson to come down and meet with Patrick. Mr Wilson came down and greeted Patrick and spoke to him and his female friend and Patrick handed an envelope to Mr Wilson. Mr Wilson then took Patrick to another part of chambers where I saw Patrick sign the documents in front of Mr Wilson. He dated them 5 January 2012.

8. To the best of my recollection, the documents consisted of:
(a) an application notice dated 5 January 2012;
(b) an amended claim form redated 5 January 2012; and
(c) an amended particulars of claim redated 5 January 2012.

9. As far as I can recall, the reference panel on the second page of the application notice contained type written text and was signed by Patrick.

10. Mr Wilson and I then took the three signed documents to the clerks room for sending to Goodman Derrick, solicitors for the first defendant and the court.

11. We handed the documents to another clerk named Rowan Calthorpe asking him to send the documents through to Goodman Derrick and to the court by email and/or by fax.

12. I telephoned Goodman Derrick to confirm the documents had been sent to them by email and/or fax. I could not speak to Mr Ince, he was away, but I spoke to his secretary and she acknowledged that they were content to accept receipt by email and/or fax.

13. Rowan then returned and reported to me that he had sent then three sets of documents to Goodman Derrick and to the court. I then reported back to both Mr Wilson and to Patrick

that the documents had been sent. Patrick then left chambers. This all took place before 4 pm that day.

14. Mr Wilson told me and I believe he had also telephoned Goodman Derrick to inform them the documents would be coming through and that they said they were content to accept them by email and/or fax."

55. Also in evidence before me is the first witness statement of the claimant's then girl friend, Ms Collette Parkinson, made on 22 October 2020. She says this:

"1. I am a carer professional in the NHS and I have known the claimant for many years. We went out together about for about eight or nine years until October 2016. Although we are no longer going out together, Patrick and I are still friends and would often confide in each other.

…

6. Patrick and I duly arrived at the chambers in the early afternoon of 5 January 2012. After we arrived, Patrick was met by one of the barrister's clerks in the ground floor reception area of chambers. I saw the clerk handing documents to Patrick saying he had to sign them.

7. Shortly thereafter, Mr Wilson came down and greeted Patrick in the reception area. He took Patrick and the clerk to another part of the chambers to sign the documents. Patrick later told me and I believe he signed the documents in front of Mr Wilson and dated them 5 January 2012.

8. When they came back out, Mr Wilson said to Patrick he need not worry as his clerk would send the documents to the other side and to the court.

9. I then saw Mr Wilson and the clerk go to another room which they told me was the clerks room. I saw them hand the documents to another clerk, a young white man.

10. Mr Wilson's clerk then returned and said to Patrick that he had given the documents to a clerk to send to the other side and the court straightaway. This was well before 4 pm on that date.

11. Patrick and I waited in the reception area and eventually the first clerk came out of the clerks room and over to us and said the documents had been sent. Patrick thanked him and then Patrick and I left chambers. As I say, this all took place before 4 pm that day. We left before 4 pm."

56. Mr Ince's position in his witness statements has not changed, namely that he submits the claimant has never complied with the order of Henderson J. He says in his fourth witness statement dated 25 September 2020:

> "I sought to draw these issues to the attention of the claimant's solicitors requesting them to withdraw this misconceived application so as to avoid yet further unnecessary costs being incurred. The defendant is hugely out of pocket already, as Mr Francis has not paid a penny towards the costs orders which have been made against him totalling £45,000. It is to be noted that in his own evidence he does not deal with this."

57. I interject there to say now the claimant has dealt with it and explained he is impecunious. Mr Ince continued:

> "14. I am instructed the company has not taken active steps to enforce the award of costs against Mr Francis. If they had done so, then it would appear this would have resulted in the claimant's bankruptcy. Once again the actions of the claimant are causing the company to incur substantial legal costs with, it would seem little or no prospect of these costs being covered from Mr Francis."

58. Then, as I have said, Mr Bogle submitted that the reason for the non-payment is the claimant is impecunious, at least in part due to the actions of the defendant.

59. At paragraph 15, Mr Ince summarises the position as follows:

> "With all respect to the claimant and his advisers, this is a very stale claim which has been dismissed on three occasions by the court. One in December 2011 when Henderson J gave the claimant what really could be described as a final opportunity to persuade the court his case might possibly be framed on the basis of a different cause of action and restitution, the claimant failed to take that final opportunity. It appears he did not issue an application either within the time ordered or subsequently, the relevant section of the order stating the application has to be issued by 5 January. This very important point was draw to the claimant's attention in our letter of 5 April 2012, in that letter, which was partly drafted by the defendant's then counsel, Mr George Hayman QC. The claimant's attention was also drawn to what are and still are considered to be very serious deficiencies in the draft amended pleading.

> We would not expect the claimant himself to deal with this criticism, but the letter was also sent to his then legal representative, Mr Richard Wilson QC. To the best of my knowledge and recollection, this has never been addressed by Mr Wilson nor the claimant's new legal team."

60. The claimant says he never received the letter of 5 April 2012 and that his post was interfered with by a neighbour resulting in him only receiving certain items. Mr Ince rejects this saying (a) he believes that certain items that were readdressed to Goodman Derrick were in the claimant's handwriting, but no expert evidence has been tendered on this point; and (b) the claimant should have made alternative arrangements in view of that interference, which he was aware of, endorsing the approach the claimant appears to have done nothing in that respect at the time.

61. In any event, Ms Ife submits that the claimant has in fact confirmed, and as appears from Mr Ince's further evidence, that he did receive that letter as the claimant did receive Goodman Derrick's letter of 4 February 2013 referring to the claimant's application for an adjournment of the hearing before Deputy Master Clark, which stated:

> "We understand that Master Teverson is considering whether or not to grant permission for you to vacate the hearing listed for 18 February 2013. We enclose a copy of a letter we have sent to Master Teverson on behalf of our client."

62. The copy letter with it says:

> "Dear Master Teverson,
>
> …
>
> (iii) I responded by letter dated 5 April 2012 setting out my client's position. The letter (copy attached) was sent to the claimant with a copy being sent to his barrister, Mr Richard Wilson QC."

63. Therefore, Ms Ife submits, the claimant was in possession of that letter and was aware of the failure to serve in time because of the notification back in March 2012.

64. I find that the application notice was not received by the court by 4 pm on 5 January 2012 in breach of the order of Henderson J in these circumstances and for these reasons:

(1) The clerks of Mr Richard Wilson QC appeared under the impression that permission to amend had been granted as is set out in the heading to the draft claim form and the particulars of claim that I have quoted. There was therefore no need for an application in their view as they were under the impression that permission to amend had been granted. Further, the references in their three contemporaneous documents on behalf of the claimant are in the singular not the plural which would be expected if the application notice had been included with the pleadings.

(2) There is no mention of an application notice being the crucial document as far as Issue 1 is concerned in:

(a) Chambers' emails of 23 March 2012;

(b) Chambers' email of 27 March 2012;

(c) Chambers' letter of 13 April 2012. Therefore, on three occasions the only contemporaneous documentation in existence that the claimant relies on to prove his case omits any reference to the most important document of all.

(3) In fact, in two of the above three communications by David Green, the clerk concerned, there is only reference to "serving our amended particulars" in his letter of 13 April 2012, replying Goodman Derrick's letter of 5 April 2012. Then in his email of 23 March 2012 he states "further to the amended particulars of claim served on 5 January". I note Mr Green does not attempt to explain any of this in his witness statement which I consider to be a deliberate and substantial omission.

(4) The claimant's own evidence in his third statement at paragraph 199 where he says he did not see the application notice. I do not accept his attempt to explain this away in his fourth statement as I find it:

(a) self-serving,

(b) inherently improbably; especially

(c) in the light of the contemporaneous correspondence sent by counsel's clerks.

(5) The reference to three sets of documents. Now, there is an attempt to say that the three sets of documents were three documents, namely the application notice, the claim form and the amended particulars of claim. My suspicion is that this was an old-fashioned attempt at service, when parties, particularly in the county court, would provide the original to be kept by the court, one copy to be sent back to the applicant party, with a further sealed copy to be sent to the respondent party. The same also did apply in the High Court when one would issue application notices over the counter. That is the only way in which I think there could be a reference to three sets (and I emphasise "sets") of documents. What this indicates to me is that the clerks concerned do not appear to know what, as far as the CPR is concerned, they were supposed to do or actually did.

(6) No copy of the supposed application notice has ever been produced at any time. If it existed, someone somewhere connected with Chambers must have typed it and saved it to a personal computer or laptop so there must be a copy and associated metadata. But there is no evidence of it at any point over the last nine-and-a-half years.

(7) There is no evidence from Mr Richard Wilson QC of him drafting the application notice as the claimant says he did, nor of his involvement in the supposed compliance with the order of Henderson J by issuing and serving it. In circumstances where a solicitor would be expected, as indeed Mr Ince has here, to produce such a confirmatory witness statement, I see no reason why Mr Wilson as Direct Access counsel should be exempt from the same, namely setting out all he did both as to his creation of the application notice, the signing of it and the issue and service of it at this crucial time. Mr Bogle submitted that Mr Wilson's actions were protected by legal professional privilege. I disagree as:

(a) these were administrative acts and therefore do not attract the protection of the privilege; and

(b) in the alternative, if Mr Bogle is correct as to legal professional privilege existing in terms of what Mr Wilson did, it was waived, expressly or impliedly, by the claimant's description of what he says Mr Wilson did.

Mr Wilson could therefore have given evidence. In particular, I note no fee note indicating Mr Wilson's drafting of an application notice has been produced.

(8) I found the vagueness of Mr Green saying he sent the documents "by email and/or fax" of concern, especially as no telephone numbers nor email addresses are provided. That is imprecise and vague, and especially is in contrast to the level of detail he went to such as remembering, he said, that the evidence part of the application notice had been completed. The use of legalistic catchalls such as “and/or” is to be deprecated when so much can turn on such evidence.

(9) Likewise, there is no direct evidence from Mr Rowland Calthorpe, another clerk at Chambers, that he "sent the three sets of documents by email and by fax to all addresses". That is a lot to transmit, but there is no evidence as to what he sent and to whom and at which addresses.

(10) I cannot see how Gordon Derrick failed to receive copies both by email and also by fax. That in my judgment verges on the technologically unlikely, or at least extremely unlikely, bearing in mind the error messages Chambers would expect for both fax and email. Likewise, there are no fax transmission sheets in evidence. Chambers were on notice at an early stage that nothing had been received by Goodman Derrick. They had received no confirmation from the court. Alarm bells should have been ringing as of then. They did not.

(11) I prefer the descriptions of what was sent in Chambers’ contemporaneous documents rather than the moving target of the witness evidence tendered for the claimant, noting especially the change of position by the claimant. I am in particular suspicious of the detail set out by Mr Green some eight-and-a-half years after the event, compared to his contemporaneous correspondence. I prefer the latter.

(12) All the contemporaneous evidence points to there being no application notice let alone one being submitted by fax and email to the court, let alone again one being issued, filed and served.

(13) The claimant could and should have inspected the court file in 2012 or 2013 or subsequently. That would have evidenced the position but he did not progress his claims notwithstanding their importance to him. He let the matter go to sleep.

(14) I do not consider the evidence set out in the witness statements of the claimant, Mr Green and Ms Cornett Parkinson, to be sufficient to overcome the contemporaneous documentation produced by Chambers.

(15) The failure to properly issue at court is matched by the failure at the very same time to provide a copy of any document to Goodman Derrick – whether by way of service or otherwise.

65. I therefore find as to Issue 1 on the balance of probabilities the application for permission to amend was not issued, filed and served, whether or not with supporting evidence and proposed amended claim form and proposed amended particulars of claim, as the evidence of the claimant, Mr Green and Ms Collette Parkinson is insubstantial, unconvincing, mutually inconsistent and does not bear examination in the face of the contemporary documents. I find the claimant's evidence especially unsatisfactory as it is self-serving, unsupported and inherently improbable. I say this particularly in view of the now detailed recollections which have come about over events some eight-and-a-half years before the witness statements were made which fly in the face, as I have said, of the contemporaneous documents, which are deliberately ignored by especially Mr Green.

66. In those circumstances, I do not need to hear oral evidence and I am satisfied I can make the finding I have on the balance of probabilities; the contemporaneous documents trump the witness recollections of very long ago; *Wards Solicitors*, emphasising the primacy of contemporaneous documents; *Gestmin*.

67. I accept Mr Bogle's submission that I should not leave the matter there. I now therefore must turn to Issue 2, the claimant's application for a retrospective extension of time, even though there is no application for that before me. As to that I must, as counsel agree, apply the *Denton* principles for such a retrospective extension of time: see CPR 3.9(15).

(1) Is this a serious and significant breach?

68. I consider the failure to comply with the order of Henderson J cannot be anything other than a serious and significant breach. Mr Bogle submits it is not serious in context. I disagree. Any breach of a direct order in such circumstances must be serious and significant, especially at the end of a primary limitation period.

(2) What is the explanation?

69. The claimant says at paragraph 217 in his third witness statement:

> "I would like to address the reasons why I have been unable to progress my claim until now. In summary and in general terms the reasons may be listed as follows:
>
> (a) lack of funds;
> (b) an absence of legal representatives willing to take on the case until now;
> (c) my fear and belief I may not be able to get relief at all;
> (d) my discovery after encountering my present lawyers that I may still be able to proceed with my claim and the need to locate and recover documents; and
> (e) other factors that have delayed me getting to this stage."

70. That appears to be the explanation for this substantial, indeed until the application was issued, eight-and-a-half year delay. As to (a), the lack of funds, I do not think impecuniosity is a good reason not to progress the matter - see in particular *R (Hysaj) v The Home Secretary* [2015] EWCA (Civ) 1633.

71. As to (b), the absence of legal representatives, there is no correspondence produced by the claimant showing attempts to obtain legal advice. As to (c) namely his fear that he may not be able to get relief and (d) the discovery he may still be able to proceed some

time later, I do not think that this is a good explanation for delaying for so long, particularly as at the start of that period, it appears he did have the advice of counsel. I would add that not proceeding until he had solicitors who could address the claim is not a good explanation. It could mean, if he was correct in that, that time is open-ended, which must be wrong.

(3) All the circumstances

72. As I do not accept his explanation for this incredibly long delay, I must now move to stage three and consider all the circumstances. The factors I take into account are:

(1) Delay. Nine years have passed. Henderson J said that a tight timetable was appropriate at paragraph 50 of his judgment. This claim was just within I think one year of the end of the six year limitation period when it was issued in issued in December 2009, so now we are concerned with events of 18 years ago.

(2) That delay is prejudicial to the evidence and the fair trial. The claimant himself cannot give evidence as his medical evidence shows. Mr Hughes has passed away. The key document, which the defendants in any event claim is forged, exists only in copy form, the original allegedly being destroyed by a fire in 2006. There could, therefore, be substantial prejudice to the defendant if the claimant went to trial as the quality of the evidence would be poor, especially with fading memories and lack of documentation.

(3) The claimant had capacity in 2012 and 2013, and indeed until quite recently. He sadly does not now. He cannot be cross-examined and that is a major concern here in terms of prejudice to the position of the defendant.

(4) Significant costs. The defendant has incurred some £140,000. None of the costs orders of some £45,000 made in its favour have been met. The defendant, from Mr Ince's evidence, is a family business with limited resources and has been prejudiced financially already.

(5) Proportionality as to time and costs. The claimant's costs apparently for this application or leading to this application are some £160,000. With the defendant's costs, that totals £300,000 so far and the claim as set out in the proposed draft amended particulars of claim is £250,000 being the investment which the claimant says amounts to unjust enrichment plus certain interest. It is therefore not proportionate.

(6) Compliance with court orders. The claimant failed to comply with the key order of Henderson J. He has failed to meet any of the orders for costs. He failed to serve evidence in support of his alleged claim in restitution until recently.

(7) Finally, the circumstances also include the destruction of the court file at some point before January 2019. That would have resolved the claimant's application and the claimant could have should have obtained it when it was possible to do so. That to my mind is a factor against the claimant when I consider all of the circumstances.

73. All of those factors, in my judgment, mean I find against the claimant in that my consideration of all the circumstances does not enable the claimant to surmount his lack of a good explanation for the serious and significant breach that I have found. As to Issue 2, I therefore refuse the claimant's application for a retrospective extension of time in which to issue this application for permission to amend his claim form and particulars of claim. I do not determine the issue of whether permission to amend should be given to plead restitution, because as I said at the hearing yesterday, Ms Ife has not had the opportunity to review the authorities relied on by Mr Bogle and now, for the reasons I have given, the claimant having failed on both Issues, there is no need nor point in doing so now.

Deputy Master Linwood 1st July 2021

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge