
[2020 Gib LR 229]

SOUTHEASE LIMITED v. RIVERWALL LIMITED

SUPREME COURT (Restano, J.): July 31st, 2020

Civil Procedure—judgments and orders—summary judgment—whether claim fraudulent to be determined at trial unless no prospect of success—no summary judgment where evidence of fraud limited and untested

Civil Procedure—pleading—striking out—particulars of claim must include concise statement of facts on which claimant relies—claimant cannot refer to previous proceedings and exchanges between parties to supplement otherwise deficient statement of case—opportunity given to cure defects

The defendant applied for an order striking out a claim form and particulars of claim or for summary judgment.

The defendant sold tobacco and had purchased tobacco on a wholesale basis from the claimant (and others) for many years. The defendant said that, although there was no contract governing its relationship with the claimant, tobacco was generally supplied on a “cash on delivery” basis and it was rare for credit to be provided.

The claimant alleged that a debt of £64,916.16 was due relating to cigarettes and/or tobacco delivered to the defendant in April and May 2015. The defendant denied the claim. It set out the details of deliveries which it received during that period and which it said were paid for at delivery. It pointed out that the goods delivered and paid for during this

period did not match the goods itemized or the amounts shown on the invoices on which the claim was based.

The defendant received a statutory demand which he did not comply with and opposed an application for the appointment of a liquidator. The defendant noticed discrepancies between the invoices attached to the statutory demand and the copies and originals which he had kept, in particular the signatures endorsed on the invoices and the amounts concerned. The matter was reported to the police as the defendant was concerned he was a victim of fraud. A director and shareholder of the claimant was charged with furnishing false information, namely that he had dishonestly furnished information to his lawyers which he knew to be misleading, false or deceptive. The criminal proceedings were subsequently discontinued.

The defendant stated that despite the fact that the criminal proceedings had been discontinued, the claimant had presented forged invoices in support of its application to appoint a liquidator to be passed off as originals in an attempt fraudulently to show the defendant's acceptance of the invoices to obtain payment. The defendant relied on the defence of *ex turpi causa non oritur actio*. Attached to a witness statement on behalf of the defendant were emails from a police officer which included: "[W]e never arrived at a conclusion on the point of whether the debt was genuine. We were simply arguing that the forged invoices were presented by the defendant to be passed off as originals in an attempt to fraudulently show [the defendant's] acceptance of the invoices, thereby intending to obtain payment." And: "The case was dropped as we had only charged . . . and there was a lack of evidence to prove to the criminal standard that it was specifically him who had committed the offence, hence why I said that we should have reported the company."

The claimant denied the fraud allegation and considered the criminal complaint to have been hopeless. The claim against the defendant was set out in para. 3 of the claim form:

"During April and May 2015 the claimant delivered various quantities of cigarettes and/or tobacco products to the defendant at its place of business, in respect of which only part payments made, leaving a balance owed by the defendant to the claimant of £60,016.16."

The defendant applied (a) to strike out the claim form and particulars of claim on the grounds that they disclosed no reasonable grounds for bringing the claim (CPR r.3.4(2)(a)), that it was an abuse of the court's process (CPR r.3.4(2)(b)), and as part of the court's inherent jurisdiction (CPR rr. 3.1(1) and 3.4(5)); and (b) for summary judgment on the whole claim under CPR r.24.2(a)(i) on the ground that the claimant had no reasonable prospect of success and there was no other compelling reason for a trial.

The defendant submitted that (a) the particulars of claim were inadequate as they were too vague with no specific date when it was alleged goods had been delivered and/or failed to be paid; (b) the claim was bound to fail as it was based on documents which had been found to be forged

and which it was highly likely would be declared inadmissible; (c) the forged documents were likely to provide the basis of any oral evidence in support of the claim; (d) the claim was an abuse of process being “incurably incapable of proof” as the invoices which formed the evidential basis of the claim had been found to be contaminated by fraud; (e) the invoices jeopardized the fairness of the trial; and (f) the claim had no real prospects of success.

The claimant submitted that (a) while the particulars of claim were lacking in detail this was because it was believed the issues between the parties were clear following the application to appoint a liquidator and the material provided in support of that application; (b) in any event, any lack of detail could be cured with further information being provided, which would be more appropriate than the order sought by the defendant; (c) little or no weight should be accorded to the view expressed by the police officer in his emails; (d) the court could not at this stage conduct a mini-trial to determine whether the invoices were genuine and whether the debt was due, which were clearly matters for trial; and (e) in respect of a complaint by the defendant that the claimant had breached the terms of its wholesale licence, that was a matter for the Collector of Customs to investigate and did not warrant the striking out of the claim.

Held, dismissing the applications:

(1) CPR r.16.4.1 required that particulars of claim included a concise statement of the facts on which the claimant relied. In a case such as this, the particulars of claim should have dealt with the terms which it was alleged governed the parties’ commercial relationship and details of how the amount claimed arose so that the scope and nature of the dispute could be clearly identified. Further, as purchasers of cigarettes must sign copies of each invoice, one would expect this issue to have been canvassed in the particulars of claim. The very brief pleading in the particulars of claim did not comply with the requirements of CPR Part 16. The vagueness of the claim as it was currently drafted meant that it was difficult to determine the scope and detail of the dispute and that could only serve to create confusion and increase costs, which was the very opposite of what was required, which was that cases were dealt with justly and proportionately. The running accounts attached to the particulars of claim might well be documents to be taken into account when the matter came for trial, but they were not a substitute for a proper pleading. Similarly, it was no answer for the claimant to refer to previous proceedings and exchanges between the parties as a means of supplementing an otherwise deficient statement of case. While the court agreed with the defendant that the particulars of claim were vaguely pleaded, it did not agree that this warranted striking out the claim at this stage. The claimant should first be given an opportunity to cure the defects by filing and serving amended particulars of claim (paras. 24–26).

(2) In relation to the summary judgment application on the ground that the claimant had no reasonable prospect of success, the defendant alleged

that the claim was fraudulent whereas the claimant alleged the defendant was simply trying to avoid payment. It was a matter for trial as it could not be said that the claimant had no prospect of succeeding on the evidence. Disclosure and inspection would need to take place and witness evidence would be required on a number of issues surrounding the alleged supply of tobacco and corresponding invoices on which the claim was based. As for the allegation that the claim was tainted with fraud, the question was whether there was a finding of fraud which warranted a strike out of the claim. The police officer's statements were not contained in a witness statement but exhibited to another person's witness statement. The emails did not provide underlying reasoning for the conclusion reached nor supporting documentation. If that officer, or another police officer, gave evidence at trial which bore out his view, it might be very valuable to the defendant. At this stage, however, the untested and limited evidence could not be said to constitute a finding of fraud and was far from the sort of probative material which justified the draconian step of striking out a claim at this early stage. It was important for judges not to reach conclusions about very serious allegations which were disputed until they had been properly adjudicated upon. If the court were to accede to the defendant's application, it would be making a finding of fraud on a summary basis without hearing live evidence from witnesses making the fraud allegation and without giving the claimant the opportunity to cross-examine those witnesses (paras. 27–30).

(3) The allegation that the signatures endorsed on the invoices were attempts to forge the signatures of the defendant's employee did not appear to be conceded by the claimant and would therefore be an issue at trial. Even if there had been some irregularities which pointed to the claimant having breached the terms of its licence and having committed an offence under the Tobacco Act, it did not appear on the material currently before the court at this early stage and without the issues being ventilated at trial that it necessarily followed that the claim must fail even if the goods were supplied to the defendant as it alleged. There might be regulatory implications for such conduct or even that a criminal offence had been committed, but that was another matter (para. 31).

(4) To strike out the claim would not be a just and proportionate response, especially as the main concerns relied on by the defendant were the ongoing costs of litigation and the waste of court resources. If the defendant successfully showed at trial that the claim was brought fraudulently, an appropriate costs order could be made in its favour. Although it was no doubt important to ensure that court resources were not wasted, that could not justify dispensing with the need properly to adjudicate upon serious allegations of fraud and improper conduct in cases where the evidence of fraud was limited and disputed (para. 32).

(5) The applications would therefore be dismissed. Permission would be granted for the claimant to amend the particulars of claim within 14 days to properly particularize its case against the defendant and for the

defendant to have permission to make consequential amendments to the defence 14 days thereafter (para. 33).

Cases cited:

- (1) *Alpha Rocks Solicitors v. Alade*, [2015] EWCA Civ 685; [2015] 1 W.L.R. 4534; [2015] 4 Costs L.R. 483, considered.
- (2) *Arrow Nominees Inc. v. Blackledge*, [2000] EWCA Civ 200; [2000] 2 BCLC 167; [2001] BCC 591, distinguished.
- (3) *Fairclough Homes Ltd. v. Summers*, [2012] UKSC 26; [2012] 1 W.L.R. 2004; [2012] 4 All E.R. 317; [2012] 4 Costs L.R. 760, considered.
- (4) *McDonald's Corp. v. Steel*, [1995] 3 All E.R. 615; [1995] EMLR 527, referred to.
- (5) *Zahoor v. Masood*, [2009] EWCA Civ 650; [2010] 1 W.L.R. 746; [2010] All E.R. 888; [2010] Bus. L.R. D12; [2009] C.P. Rep. 44, considered.

G. Lima for the applicant/defendant;

C. Finch for the respondent/claimant.

1 RESTANO, J.:

The application

On March 6th, 2020, the defendant filed an application seeking an order that the claim form and particulars of claim be struck out on the grounds that it discloses no reasonable grounds for bringing the claim (CPR, r.3.4(2)(a)), that it is an abuse of the court's process (CPR, r.3.4(2)(b)) and as part of the court's inherent jurisdiction (CPR, rr. 3.1(1) and 3.4(5)). Further, an application for summary judgment is made on the whole of the claim under CPR, r.24.2(a)(i) on the ground that the claimant has no reasonable prospect of succeeding on the claim and there is no other compelling reason why the case should be disposed of at a trial. The defendant's application is supported by the witness statement of Grace Marie Lima dated March 6th, 2020 and the witness statement of Rajesh Shukla dated May 27th, 2020. The claimant opposes the application and has filed the witness statement of Avinash Rupani dated June 10th, 2020 in response to it. The original hearing of this application had to be adjourned due to the coming into force of the Supreme Court (Covid-19 Contingency) Rules 2020 but it was later relisted for hearing on July 23rd, 2020.

Background

2 The defendant sells tobacco on a retail basis from a shop in Ocean Heights called "Tienda de la Reina" and has purchased tobacco on a wholesale basis from the claimant (and others) for many years. Mr. Shukla, who is a director and shareholder of the defendant, has explained

that whilst there was no contract in place governing its relationship with the claimant, tobacco goods were generally supplied on a “cash on delivery” basis, and it was rare for credit to be provided. This meant that upon delivery of tobacco, an invoice would be presented detailing the goods delivered which would then be signed by him or a member of his staff and at which point the goods would be paid for in cash.

3 This claim concerns an alleged debt of £64,916.16 relating to cigarettes and/or tobacco delivered to the defendant in April and May 2015. The defendant denies the claim and sets out the details of the deliveries of tobacco which it says it received during the period between April and May 2015 and which it says were paid for fully when delivery took place. Further, it points out that the goods delivered and paid for during this period do not match the goods itemized or the amounts shown in the invoices on which this claim is based. The defendant denies that it has accepted the debt by making part payments totalling £2,700, and says that these payments were in fact additional payments demanded by the claimant as a condition of their ongoing commercial relationship.

4 Mr. Shukla states that in January 2015 he attended the claimant’s offices and informed them that any tobacco to be supplied as from then was to be on a “cash on delivery” basis because he was leaving Gibraltar for a time to accompany his wife in London where she was to receive cancer treatment. In the event, Mr. Shukla and his wife left for London in April 2015 and did not return to Gibraltar until October 2015 and in his absence he left an employee in charge.

5 In July 2015, and whilst Mr. Shukla was still in London, he was informed that a letter of demand had been received by the defendant claiming the sum of £63,766.16. It was alleged that this debt represented the shortfall due under invoices amounting to £131,272.75 covering the period April 16th, 2015 to May 15th, 2015 and in respect of which £67,506.59 had been paid. This did not make any sense to Mr. Shukla given the arrangements which he believed he had put in place, and he decided to deal with this matter when he returned to Gibraltar. In October 2015, and shortly after he had returned, the defendant received a statutory demand claiming the same amount. When Mr. Shukla examined the invoices attached to the statutory demand, he says that he noticed discrepancies between these copies and the originals which he had kept, in particular the signatures endorsed on the invoices and the amounts concerned. The statutory demand was not complied with and this led to an application being made for the appointment of a liquidator over the assets of the defendant. Mr. Shukla filed an affidavit dated January 13th, 2016 in opposition to that application, where he denied the debt. Further, he said that he was suspicious of the signatures contained in the invoices as he did not recognize the majority of them and that when he compared these invoices with the counterfoils in his possession, the signatures did not

match. As a result, he reported the matter to the RGP as he was concerned that he was the victim of a fraud. Further, the parties agreed to vacate the application to appoint a liquidator which was set down for hearing on March 7th, 2016 on condition that either party could apply for it to be relisted for hearing.

6 As a result of the complaint made to the RGP, Ashok Rupani, a director and shareholder of the claimant, was charged with furnishing false information contrary to ss. 425(1)(b) and 425(2) of the Crimes Act 2011. The particulars of the offence were that Mr. Rupani had between April 20th, 2015 and October 13th, 2015 dishonestly furnished information to his lawyers which he knew to be misleading, false or deceptive for the purposes of a civil demand being made by the claimant, and this specifically referred to invoice numbers 34505, 34512, 34522, 34776 and 34821.

7 The criminal proceedings against Mr. Rupani were discontinued on August 3rd, 2018 and Ms. Lima exhibits an exchange of emails between her and D.S. Schembri, including an email from D.S. Schembri dated January 27th, 2020 which states as follows:

“To be clear, we never arrived at a conclusion on the point of whether the debt was genuine. We were simply arguing that the forged invoices were presented by the defendant to be passed off as originals in an attempt to fraudulently show Riverwall Limited’s acceptance of the invoices, thereby intending to obtain payment . . .”

8 In an email dated January 31st, 2020, D.S. Schembri further confirmed as follows:

“The case was dropped as we had only charged Mr. Ashok Rupani and there was a lack of evidence to prove to the criminal standard that it was specifically him who had committed the offence, hence why I said that we should have reported the company.

There were two issues with the prosecution case. First in proving who had caused the statutory demand to be made . . . The second issue was to ascertain who had produced the invoices. Although Ashok Rupani was the only managerial person registered in the business at the ETB other than storemen/deliverymen, subsequent evidence from unconnected investigations relating to Southease revealed that at least one other person was significantly involved in its day-to-day running.

Consequently, the only safe prosecution that we could have filed was that against the company, which would have avoided the above issues. However, this was considered in the midst of a legal argument to dismiss, and it was decided that the best course was to drop the

case against Ashok Rupani, and not start any new prosecution against the company.”

9 The defendant states in its defence that despite the fact that the criminal prosecution was not proceeded with, the claimant presented forged invoices in support of its application to appoint a liquidator to be passed off as originals in an attempt to fraudulently show the defendant’s acceptance of the invoices to obtain payment. As a result, the defendant relies on the defence of *ex turpi causa non oritur actio*, i.e. the court will not assist a party who founds an action on an illegal or immoral act, in this case the alleged production of false invoices. In his witness statement, Mr. Shukla gives examples of the discrepancies to which he refers. For example, invoice number 34512 dated April 21st, 2015 in the amount of £1,660 bears a different signature from the copy invoice which was left at the defendant’s premises and which was for the amount of £1,640 and which it says was paid. Mr. Shukla gives some other similar examples and observes that some of the signatures on the invoices which the claimant is relying on do not correspond to the signature of anyone working at his shop.

10 The claimant denies the fraud allegation and says that the criminal complaint against Askhok Rupani was hopeless and that it was brought to avoid making payment for the goods received. He explains that an application to strike out the prosecution which was made and the grounds supporting that application (dated July 14th, 2018 and which are exhibited)—

“were very much more profound, detailed and compelling than the hearsay upon hearsay suggestion given by Mark Schembri, who did not make the legal decision in any event.”

In the event, the Crown immediately discontinued the criminal proceedings when it received the grounds in support of its application to strike out the prosecution.

11 As regards the invoices, Avinash Rupani explains in his witness statement that there can be no doubt that the goods in question were delivered to the defendant because all the relevant invoices were retained and the defendant has never shown a receipt confirming payment for those goods. If goods had been paid for on delivery, he points that this would have been reflected on the invoices which would have been endorsed accordingly. He also says that the only reason certain invoices were reissued and endorsed with the deliveryman’s name was because they were reissued from the claimant’s records in order to demand payment. Further, he states that even the police conceded that the goods and price information on the copy invoices were identical to the defendant’s invoices. Further, he says that the defendant did accept the debt because he began paying in instalments of around £200 after a demand was made and that due to the

large amount outstanding, credit was withdrawn from the defendant and goods had to be paid on delivery after then.

Submissions

12 The first part of the defendant's application relates to the alleged inadequacy of the particulars of claim. This consists of four paragraphs contained in the claim form. Paragraphs 1 and 2 simply describe the parties and the claim is set out in para. 3 as follows:

“During April and May 2015 the claimant delivered various quantities of cigarettes and/or tobacco products to the defendant at its place of business, in respect of which only part payments made, leaving a balance owed by the defendant to the claimant of £60,016.16.”

13 Paragraph 4 then refers to detailed accounts no. 1 and no. 2 which are attached to the statement of case and which it is alleged reflects the course of trade between the parties for the relevant period and which contains columns setting out the date, invoice, amount due, amount paid and balance owing. The defendant submits that the terms in which the claim has been pleaded is too vague as there is no specific date when it is alleged goods were delivered and/or failed to be paid and only refers to goods having been delivered “during April and May 2015.” As for the accounts attached to the particulars of claim, on careful consideration, these add no substance to the claim nor is it of any use to the court in making any determinations.

14 The defendant further submits that the claim is unwinnable because it is based on documents which have been found to be forged and which it is highly likely will ask to be declared inadmissible should the claim proceed. Further, it submits that the forged documents are likely to provide the basis of any oral evidence in support of the claim which will present a further difficulty for the claimant. Consequently, the defendant submits that the claimant's claim is bound to fail.

15 The defendant's second submission is that the claim is an abuse of process in that it is “incurably incapable of proof”: see *McDonald's Corp. v. Steel* (4). This is because it is alleged the invoices which form the evidential basis of the claim have been found to be contaminated and any oral evidence is likely to be based on those invoices. The defendant further submits that the importance of the invoices and the signatures on them is heightened in the case of tobacco sales, where it is a criminal offence under the Tobacco Act for a wholesale licence holder not to produce invoices and obtain signatures on them upon delivery of tobacco to a particular retailer. Ms. Lima points out that Mr. Rupani himself has admitted in his witness statement that he has violated the terms of his licence requirement when he says that certain invoices were reissued with

the deliveryman's name affixed on them for the purposes of demanding payment.

16 The defendant's third submission is that the invoices which have been contaminated by the respondent's forgery jeopardize the fairness of any trial, and the court is therefore invited to exercise its case management powers to strike out the claim. The defendant also asks for summary judgment to be entered in its favour for the whole of the claim because the claimant has no real prospects of success.

17 It can be seen therefore that, apart from the pleading complaint, the central plank of the defendant's case is that because of D.S. Schembri's view that the invoices were forgeries, the claimant does not have a basis on which to bring its claim, it has forfeited its right to have its claim adjudicated upon in a final hearing and it should therefore be struck out. The defendant relies principally on two authorities in support of this submission: *Arrow Nominees Inc. v. Blackledge (2)* and *Zahoor v. Masood (5)*.

18 In *Arrow Nominees*, the Court of Appeal overturned the decision of the judge below not to strike out a petition under s.459 of the Companies Act 1985 following the revelation that one of the petitioners had produced fraudulent letters and diary entries, and which he admitted. The judge had found that despite the acknowledged fraud, a fair trial was still possible. On appeal it was held that the fraud of the petitioner was such that a fair trial was not possible having regard to the overriding objective under the Civil Procedure Rules, in particular the requirement that the parties to an action should be on an equal footing.

19 In *Zahoor*, the trial judge had found that both sides attempted to deceive the court by forging documents and lying in their evidence. The defendant's application at trial that the action should be struck out or dismissed without deciding its merits was rejected. On appeal, the Court of Appeal held that where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim, the claim can be struck out for that reason, even at the conclusion of the hearing. Since, however, one of the objectives of striking out a claim is to stop the proceedings and prevent the further waste of resources on proceedings which the claimant has forfeited the right to have determined, it must be a very rare case where at the end of a trial it would be appropriate to strike out a claim, rather than dismiss it in a judgment on the merits in the usual way.

20 Mr. Finch accepts that the particulars of claim are lacking in detail but says that this is because he was under the impression that the issues between the parties were clear following the application to appoint a liquidator and the material which was provided in support of that application. In any event, he submits that this can be cured with further

information being provided, which is more appropriate than the draconian order being sought by the applicant.

21 Mr. Finch does not dispute any of the principles set out on the authorities relied on by Ms. Lima and further refers to *Fairclough Homes Ltd. v. Summers* (3) which approved the approach taken in *Zahoor* (see [2012] UKSC 26, at paras. 61–62). This case concerned a claim for personal injury concerning a heel injury and where the claimant alleged that he required the use of crutches and was in constant pain and a claim made of over £800,000. Surveillance evidence was obtained showing that the claimant was leading a normal life and that the claim was grossly and dishonestly exaggerated and thus an abuse of the court’s process such that it should be struck out. Like *Zahoor*, the application to strike out was made after the trial. The trial judge accepted that the claim was largely fraudulent but felt unable to strike out the claim in its entirety after the trial because it was tainted by fraud. Rather, it was held that compensation should be awarded for the genuine part of the claim and he went on to award damages of just under £90,000. The trial judge’s approach was upheld on appeal. Lord Clarke, JSC giving the judgment of the Supreme Court held that it was not appropriate for the case to be struck out instead of giving judgment for the claimant for a specified amount, even though it was a case of a serious abuse of process. The court noted that whilst it had power under the CPR and its inherent jurisdiction to strike out a statement of case at any stage in the proceedings, even when it has already determined that the claimant is entitled to damages in an ascertained amount, the power should in principle only be exercised where it is just and proportionate to do so which is likely to be a very exceptional circumstance. Lord Clarke said ([2012] UKSC 26, at para. 49):

“The draconian step of striking a claim out is always a last resort, *a fortiori* where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial. It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate. Such circumstances might, however, include a case where there had been a massive attempt to deceive the court but the award of damages would be very small.”

22 Moreover, Lord Clarke pointed out (*ibid.*, at para. 52) that—

“a party who fraudulently or dishonestly invents or exaggerates a claim will have considerable difficulties in persuading the trial judge that any of his evidence should be accepted.”

He referred expressly to an expectation that, in the ordinary way, in such a case, one would expect the judge to penalize the dishonest and fraudulent claimant in costs. Lord Clarke noted as follows (*ibid.*, at para. 62):

“We note two points by way of postscript. First, nothing in this judgment affects the correct approach in a case where an application is made to strike out a statement of case in whole or in part at an early stage. As the Court of Appeal put it in *Masood v Zahoor* at para 73 (set out above) in a passage with which we agree, one of the objects to be achieved by striking out a claim is to stop proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. Secondly, nothing in this judgment affects the case where the fraud or dishonesty taints the whole claim. In that event, if the court is aware of it before the end of the trial, judgment will be given for the defendant and, if it comes to light afterwards, it will be open to a defendant to raise the issue in an appeal.”

23 Mr. Finch submits that far from amounting to a finding that the defendant can rely on, little or no weight should be accorded to the view expressed by D.S. Schembri in his emails. Further, he says that the court cannot at this stage conduct a mini-trial to determine whether the invoices are genuine and whether the debt is due, which he says are clearly matters for trial. As regards the complaint that the claimant, by its own admission, has breached the terms of its wholesale licence, Mr. Finch says that that is a matter for the Collector of Customs to investigate but does not warrant the striking out of the claim.

Discussion

24 CPR r.16.4.1 requires that particulars of claim include a concise statement of the facts on which the claimant relies. In a case such as this one, the particulars of claim should deal with the terms which it is alleged governed the parties’ commercial relationship and details of how the amount claimed has come about so that the scope and nature of the dispute can be clearly identified. Further, as purchasers of cigarettes must sign copies of each invoice relating to the sale of those cigarettes, one would expect this issue to be canvassed in the particulars of claim as well. The very brief pleading as set out in para. 12 above clearly does not comply with the requirements of CPR Part 16.

25 This is not just a pedantic pleading point. The defendant says that it received some goods during the period in question that it paid for and the claimant alleges that goods were delivered during that same period which have still not been paid for. The invoices which relate to these transactions are very similar in various respects but not identical. The vagueness of the claim as it is currently drafted means that it is difficult to get to the bottom of the scope and detail of the dispute and that can only serve to create confusion and increase costs, which is the very opposite of what is required, which is that cases are dealt with justly and proportionately. The running accounts attached to the particulars of claim may well be

documents to be taken into account when the matter comes on for trial but they are not a substitute for a proper pleading. Similarly, it is no answer for the claimant to refer to previous proceedings and exchanges between the parties as a means of supplementing an otherwise deficient statement of case.

26 Whilst I agree with the defendant that the particulars of claim are vaguely pleaded, I do not agree that this warrants a striking out of the claim at this stage. In my view, the claimant should first be given an opportunity to cure the defects in its statement of case by filing and serving amended particulars of claim.

27 Turning to the summary judgment application on the ground that the claimant has no reasonable prospect of success, the defendant alleges that the claim is a fraudulent one and the claimant says that the defendant is simply trying to avoid payment. The matter is therefore one for trial unless it can be said that the claimant has no prospect of succeeding on the evidence. I do not consider that this is a case where it can be said that the claimant's claim is a fanciful one, as it is the sort of case where disclosure and inspection will need to take place and witness evidence is required on a number of issues surrounding the alleged supply of tobacco and corresponding invoices on which the claim is based.

28 As for the allegation that the claim is tainted with fraud, the principles derived from the various authorities relied on are not in issue. The question is whether there is a finding of fraud which warrants a strike out of the claim. D.S. Schembri's statements are not contained in a witness statement but are exhibited to Ms. Lima's witness statement. Those emails provide neither underlying reasoning for the conclusion reached nor supporting documentation. Further, D.S. Schembri says that he cannot say whether the claim is genuine or not and that the RGP's allegation was limited to saying that forged invoices were presented by the claimant to be passed off as originals to obtain payment. D.S. Schembri has also confirmed that the RGP discontinued its prosecution against Ashok Rupani because it did not have evidence to link him personally to the alleged fraud and that a prosecution was never brought against the claimant. If D.S. Schembri (or some other police officer) gives evidence at trial which bears out his view, this may be very valuable to the defendant. At this stage, however, this untested and limited evidence cannot be said to constitute a finding of fraud as the defendant alleges, and is far from the sort of probative material which justifies the court coming to the conclusion at an early stage in the proceedings that the draconian step of striking out a claim is appropriate. This case is distinguishable from *Arrow Nominees* (2) where fraud was admitted at an early stage or from cases where the court is satisfied at an early stage that the claim is tainted by fraud and that a fair trial is not possible.

29 Another helpful authority is *Alpha Rocks Solicitors v. Alade* (1), where the Court of Appeal further considered *Zahoor* (5) and *Fairclough Homes Ltd.* (3) in the context of a claim brought by a firm of solicitors against a former client for costs and expenses. The judge held solely on the documents that one claim was partly false or deliberately exaggerated and that the other was based on fabricated documents. He accordingly struck out those claims in their entirety. Whilst he accepted that the step he was taking was draconian, he held that the abuses which he had identified both involved a serious misuse of the court's procedure. The Court of Appeal overturned the judge's decision and held that the court should only strike out a statement of case in whole or in part at an early stage of proceedings in exceptional cases where it was just and proportionate to do so. As regards striking out a claim at an early stage, Vos, L.J. stated as follows ([2015] EWCA Civ 685, at para. 22):

“Returning to the early stages of proceedings, it is, of course, always open to the court to strike out or grant summary judgment in respect of the impugned part of the claim, as opposed to the whole. In my judgment, the court should exercise caution in the early stages of a case in striking out the entirety of a claim on the grounds that a part has been improperly or even fraudulently exaggerated. That is because of the draconian effect of so doing and the risk that, at a trial, events may appear less clear cut than they do at an interlocutory stage. The court is not easily affronted, and in my judgment the emphasis should be on the availability of fair trial of the issues between the parties.”

30 In that case, the Court of Appeal found that the judge erred when he conducted an inappropriate mini fraud trial without hearing witnesses and failed to consider the proportionality of his actions (see paras. 25–26 of the judgment). It is therefore important for judges not to reach conclusions about very serious allegations which are disputed until they have been properly adjudicated upon. If I were to accede to the defendant's application, I would be falling into the same trap that the judge fell into in *Alpha Rocks* as I would be making a finding of fraud on a summary basis without hearing live evidence from witnesses making the fraud allegation and without giving the claimant the opportunity to cross-examine those witnesses.

31 The defendant further relies on the claimant's alleged breach of the terms of its licence and alleged commission of a criminal offence because of its failure to procure the retailer's signature on invoices and instead getting a deliveryman to endorse copy invoices. The allegation that the signatures endorsed on the invoices were attempts to forge the signatures of the defendant's employee does not appear to me to be conceded by the claimant and this will therefore be an issue for trial. Even if there have been some irregularities which point to the claimant having breached the

terms of its licence and having committed an offence under the Tobacco Act, I cannot see that on the material before me at this early stage and without these issues being ventilated at trial that it necessarily follows that the claimant's claim must fail even if the goods were supplied to the defendant as it alleges. When that evidence unravels at trial it may have consequences for the claimant's claim but it is too early to say. It may well also be the case that there are regulatory implications for such conduct or even that a criminal offence has been committed, but that is another matter.

32 Further, I do not consider that a strike out of the claim would be a just and proportionate response, especially as the main concerns relied on by the defendant are the ongoing costs of litigation and the waste of court resources. If the defendant succeeds with its claim and shows at trial that the claim was fraudulently brought, an appropriate order for costs can be made in its favour. Whilst it is no doubt important to ensure that court resources are not wasted, this cannot justify dispensing with the need to properly adjudicate upon serious allegations of fraud or improper conduct in cases where the evidence of fraud is limited and disputed. I should add that it is also important to ensure that fraudulent conduct is penalized by the courts but in my view this can be achieved by the bringing of contempt of court proceedings if fraud is proved in due course.

Conclusion

33 For these reasons, the strike out and summary applications are dismissed. As I have said above, however, I agree with the defendant's complaint about the inadequacy of the claimant's particulars of claim although I do not consider that this should result in a strike out of the claim. I therefore grant permission for the claimant to amend the particulars of claim within the next 14 days so that it can properly particularize its case against the defendant in accordance with this judgment, and for the defendant to have permission to make consequential amendments to the defence 14 days thereafter. Further, I will hear the parties as to any further orders to be made following the handing down of this judgment.

34 I note that this claim was commenced in December 2019 and that it relates to events which took place in 2015. It is therefore important for this claim to now proceed expeditiously and I also order that a CMC be listed for hearing on the first available date after September 15th, 2020, once the parties' amended statements of case have been exchanged, with a view to an order for directions being entered.

Applications dismissed.