Neutral Citation Number: [2014] EWHC 1449 (Ch)

Case No: HC1ZE04570

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 20 February 2014

BEFORE:

MR JUSTICE SALES

BETWEEN:

GLADSTAR LIMITED

Claimant/Respondent

- and -

LAYZELLS

Defendant/Appellant

MR N BURROUGHS (instructed Blatchfords Solicitors) appeared on behalf of the Claimant

MR D LIGHTMAN (instructed by DAC Beachcroft LLP) appeared on behalf of the Defendant

---

Approved Judgment

Digital Transcript of Wordwave International Ltd (a Merrill Corporation Company)
8th Floor, 165 Fleet Street, London, EC4A 2DY
Tel No: 020 7421 4036 Fax No: 020 7404 1424
Web: www.merrillcorp.com/mls Email: courtcontracts@merrillcorp.com
(Official Shorthand Writers to the Court)

MR JUSTICE SALES:

1. This is an application by the claimant in this matter seeking permission to amend its Particulars of Claim. The claim relates to what is alleged to have been a breach of a solicitor's undertaking given by Mr Nigel S Hanon who was at the time with a firm, Clifford Watts Compton (CWC). The undertaking relied upon was given in a letter dated 3 October 2006 from CWC.

2. Proceedings were issued on 21 November 2012 but directed against Layzells, which was the successor firm in relation to CWC's practice. Layzells entered a defence in January 2013 pointing out that the relevant undertaking had not been given by them or on their behalf and that the claimant had sued the wrong party. In May 2013 the claimant issued its application seeking to amend the claim form and the Particulars of Claim so as to delete Layzells as defendant and to add CWC and its relevant partners at the material time as defendants.

3. The proposed new defendants have objected to that amendment being made on the basis that the claim, as it would be pleaded against them, has no real prospect of success.

4. A hearing was listed in early November 2013 for determination of the claimant's application to amend. However, in the lead up to that hearing in late October 2013, the claimants indicated that they would wish to adduce evidence from an expert witness in respect of the law and practice applied by the Jewish Beth Din in relation to what the claimant submits would have happened had the breach of the undertaking been detected by it at a relevant point in time and also intimated that it wished to consider further amending its pleading. Also, at about the same time, the proposed defendants indicated that they would be making an application for security for costs. The claimant considered that it needed time to respond to that application by arranging funding, insurance and the like for its claim.

5. At all events, by letter dated 25 October 2013 the claimants asked for the proposed defendants' agreement to adjourn the hearing of the application to amend the claim and the Particulars of Claim and other matters. Beachcrofts, the solicitors for the proposed defendants, responded by letter dated 29 October 2013 complaining of the dilatory conduct of the litigation by the claimant, but saying that their clients were prepared to agree to the adjournment of the amendment application, but only on the basis that the claimant agreed a fixed timetable to file and serve by 4.00pm on 13 January 2014 any further Draft Amended Particulars of Claim, any further evidence in support for their amendment application and any further evidence or information with respect to the issue of security for costs and with a provision in relation to costs.

6. The claimant agreed to those terms and a consent order was put before the court. On 1 November 2013, Master Teverson vacated the hearing of the application and issued the directions which had been agreed between the parties, but with a modification that the relevant date for the claimant to file and serve the documents referred to should be 13 December 2013.

7. The claimants asked Master Teverson to amend that order to bring the directions into line with the proposed consent order that the parties had put before the court. So, by

order dated 25 November 2013, Master Teverson extended the time for the claimant to serve the further materials to 13 January 2014, as asked. Accordingly, from 25 November 2013 the claimant was subject to an order to file and serve any further Draft Amended Particulars of Claim, any further evidence in support of their amendment application and any further evidence or information with respect to the issue of security for costs by 4.00pm on 13 January 2014.

8. The claimant failed by that date to produce the further Draft Amended Particulars of Claim to which Master Teverson's order referred. It produced an amended version of the proposed Amended Particulars of Claim only at the end of January 2013. No explanation has been given for that failure to comply with Master Teverson's order in relation to the pleading of the proposed Draft Amended Particulars of Claim. Similarly, the claimant failed by the due date to file any evidence in support of its amendment application.

9. The defendants filed evidence in the form of a witness statement of Lindsay Bowskill dated 5 February 2014, presenting evidence in relation to the background to the claim and referring to various defences which the proposed defendants would be seeking to put forward which they said should lead the court to refusing permission to amend the Particulars of Claim.

10. On the same day, Mr Jacob Plitnick, a director of the claimant, put in his first witness statement. In the event, a legible copy of that document was only made available to the proposed defendants on about 14 February 2014.

11. Also, on 10 February an expert report was provided in legible form by the claimants from Dayan Berger dealing with the law and practice that would be applied by the Beth Din, had a dispute between the claimant and another party which had engaged CWC as its solicitors been put before it. Again, in relation to the late service of Mr Plitnick's first witness statement and Mr Berger's expert report, no explanation or excuse has been offered for the failure to comply with the order made by Master Teverson.

12. The nature of the case which is proposed to be brought against the proposed defendants is for compensation in respect of a breach of an undertaking given by a solicitor as an officer of the court, pursuant to the court's inherent jurisdiction to make an order for compensation. See Udall v Capri Lighting Limited [1988] 1 QB 907.

13. The Particulars of Claim in their proposed amended form are short and provide a useful rehearsal of the background. It is convenient to set them out in full, as follows:

> 1 The 1st Defendant ~~is the successor practice to Clifford Watts, Compton~~ (**CWC**) ~~who~~ carried on business as solicitors from, *inter alia*, 67 Stoke Newington Road, London, N16 8AG. The 2nd to 6th Defendants are the partners in CWC as at 3 October 2006.
>
> 2 By letter dated 21 March 2006 sent by fax from the Claimant to CWC, the Claimant offered to lend CWC's client, Shmuli Grosz, the sum of £700,000 (**the Offer**). There were the following express terms of the Offer:

2.1 The loan was repayable in no less than 3 months and no longer than 6 months;

2.2 Interest accrued at 2% per month on any outstanding balance; and

2.3 Security for the loan was an undertaking by CWC that they held the deeds to 35/37 Lough Road, London, N7 to the Claimant's order so long as the loan remained outstanding.

3 By letter dated 21 March 2006 sent by fax, CWC, on behalf of their client Mr Grosz, accepted the Offer subject to the loan being in the sum of £740,000. CWC confirmed their undertaking to hold the deeds to 35/37 Lough Road, London, N7 to the Claimant's order so long as the loan remained outstanding.

4 On 22 March 2006 the Claimant advanced the sum of £740,000 to Mr Grosz on the terms of the Offer (**the Loan**).

5 The Loan was further evidenced by a Hetter Isske made between JD Plitnick on behalf of the Claimant and Mr Grosz which recorded the sum advanced (£740,000) and the monthly interest payable (£14,800).

6 By letter dated 5 May 2006 sent by fax from the Claimant to CWC, the Claimant agreed to release the deeds to 35/37 Lough Road, London, N7 in return for a payment of £100,000 which was to be applied as to £21,500 for interest and £78,500 in repayment of the outstanding Loan. Security for the outstanding balance of £661,500 was to be an undertaking from CWC to hold the deeds to 219 Evering Road, London, E5 to the Claimant's order.

7 By letter dated 8 May 2006, CWC confirmed their undertaking to hold the deeds to 219 Evering Road, London, E5 to the Claimant's order.

8 On 20 July 2006 the Claimant released CWC from their undertaking in respect of 219 Evering Road, London, E5.

9 Continuation of the security for the outstanding balance of the Loan was an undertaking from another firm of solicitors, Bude Nathan Iwanier, to hold the deeds to 68-70 Green Lanes, London, N16 to the Claimant's order.

10 By letter dated 1 October 2006 sent by fax to CWC, the Claimant wrote to advise them that 200 Stamford Hill, London, N16 (**the Property)** was being purchased by Mr Grosz, and that the Property was to be held to the Claimant's order pending a decision whether to institute a first charge over the Property if it decided to do so.

11 By letter dated 3 October 2006 sent by fax, CWC gave the following undertaking to the Claimant (**the Undertaking**):

> We confirm that we are instructed by Mr Grosz (sic) and that the above property (the Property) is being acquired in the next day or so. We are also instructed to undertake to you that the title deeds are to be held to your order pending your decision as to whether to institute a first charge.

12 It is averred that in all the circumstances, and, in particular, where the Property was registered at HM Land Registry, the Undertaking should be construed as an undertaking by CWC to prevent any dealings with the Property until the Claimant had registered a first charge, or decided that it did not wish to do so.

13 As at 3 October 2006 the principal sum of £661,500 remained outstanding on the Loan from Mr Grosz to the Claimant together with interest at 2% which had accrued from 5 May 2006 to 3 October 2006.

14 On receipt of the Undertaking, the Claimant released Bude Nathan Iwanier from its undertaking in respect of 68-70 Green Lanes. London, N16.

15 On 6 October 2006 the purchase of Property was completed in the name of one of Mr Grosz' companies, Evering Estates Limited. The purchase price of the Property was £500,000.

16 In breach of the Undertaking, CWC allowed a first charge to be registered over the Property on 30 May 2007 in favour of Abbey National Plc.

17 By an agreement in writing dated 7 September 2009 the terms of the Loan were varied.

17.1 The Loan was to be repayable in 18 months, or earlier on demand on breach of any term or condition.

17.2 Interest was payable monthly at the rate of 6% per annum on the capital balance outstanding.

17.3 In the event of default, interest on the Loan outstanding was to be charged at 2% per month.

18 11 monthly interest payments totalling £52,427 were made before Mr Grosz defaulted and the default interest rate of 2% per ~~annum~~ <u>month</u> became payable on the outstanding balance of £661,500.

19 By reason of the matters aforesaid, the Claimant has suffered loss and damage and is entitled to compensation for breach of the Undertaking. The Claimant is entitled to compensation on one of the following alternative bases:

19.1 If Mr Grosz had offered to pay to the Claimant the loan from Abbey National Plc (which the Claimant believes was in the approximate sum of £580,000), the Claimant would have agreed to release CWC from its undertaking in return for a payment equal to the loan made by Abbey National Plc. Accordingly, the Claimant should receive compensation in the sum of £580,000 (or such sum as Abbey National Plc lent to Evering Estates Limited in May 2007).

19.2 Alternatively, if Mr Grosz had decided not to pay to the Claimant the loan from Abbey National Plc, the Claimant would have taken a first charge over the Property (in priority to any charge in favour of Abbey National Plc). The Claimant is, therefore, entitled to compensation which represents the lesser of the sum outstanding on the Loan plus interest, namely £1,147,576, and the value of the Property (which the Claimant currently estimates to be around £780,000).

20 If, contrary to the Claimant's case, Mr Grosz would not have offered to pay to the Claimant the loan from Abbey National Plc, or the Claimant was unable to take a first charge over the Property because it had been transferred to Evering Estates Limited, it was a breach of the Undertaking for CWC to allow the Property to be transferred to Evering Estates Limited.

21 By reason the matters pleaded in paragraph 20, the Claimant has suffered loss and damage and is entitled to compensation on the same basis as is pleaded in paragraph 19.

22 Further, the Claimant is entitled to interest pursuant to section 35A of the Senior Courts Act 1981 on such compensation as it would have received from the date it would have received payment to the date payment is received at such rate as the court thinks fit."

14. In response to Ms Bowskill's witness statement, Mr Plitnick filed a second witness statement dealing with the question of whether the Beth Din would have accepted reference of a dispute between the claimant and Mr Plitnick on the one hand and Mr Grosz on the other. Since Ms Bowskill had put matters forward in her witness statement to suggest that the Beth Din would not have accepted jurisdiction because of their dealing with a previous case involving the claimant and Mr Plitnick, Mr Lightman (who appears for the defendants) accepts that Mr Plitnick's second witness statement is properly responsive to Ms Bowskill's statement and is properly admissible on the present application. Mr Lightman also accepts that in that witness statement, Mr

Plitnick has said sufficient to give rise to a triable case for the claimant that had a dispute arisen between the claimant and Mr Plitnick and Mr Grosz which was referred to the Beth Din for determination and resolution, the Beth Din would have accepted jurisdiction in relation to that.

15. The first issue which arises on the present application is whether the claimant is entitled on this application to rely upon the first witness statement of Mr Plitnick and the expert report of Mr Berger. The proposed defendants object to the admission of this material, on the basis that it was filed and served very late with no good explanation for the delay and that accordingly both under the overriding objective in CPR Part 1 (which now refers at sub-paragraph (f) of CPR Part 1.1(2) to enforcing compliance with rules, practice directions and orders as one of the matters to be brought into account in determining what is in accordance with the overriding objective) and also in relation to the requirement to seek relief from sanctions under CPR Part 3.9. They say that, as a result of the guidance given in relation to the exercise of the court's discretion both generally and in particular in relation to applications for relief from sanctions under CPR Part 3.9 in the recent case of Mitchell v Newsgroup Newspapers Limited [2013] EWCA Civ 1537, the court should refuse in its discretion to admit Mr Plitnick's first statement and Mr Berger's expert report and/or should refuse to grant relief from sanction under rule 3.9.

16. The position as to whether the current case is, in substance, one involving an application for relief from sanction made by the claimants is not entirely straightforward. The order by Master Teverson directed the claimants to file their further evidence by the time I have indicated. In my view it was implicit in that order that if there was failure to comply with that order and the timetable set out in it, any further evidence which the claimant would seek to put before the court in support of its application (other than purely responsive evidence such as in Mr Plitnick's second witness statement) would be excluded from consideration by the court and it would be incumbent on the claimant to make an application for relief from that effect of the order and for permission to adduce the further evidence filed late which it sought to rely upon.

17. In my view, as a matter of substance, that is a form of sanction which was implicit in the order made by Master Teverson. The effect of this is that the effect of the application made to me today by Mr Burroughs for the claimant seeking permission to adduce the evidence in Mr Plitnick's first witness statement and in Mr Berger's expert report is that he is seeking relief from sanction. Thus it is not simply the overriding objective which applies, but also more directly rule 3.9 and, specifically, the guidance given by the Court of Appeal in the Mitchell case. That guidance, to put it shortly, is to emphasise the importance that parties to civil litigation actually comply with rules of court and orders of the court.

18. In my view, that is a particularly strong consideration bearing on the current case. I am dealing here with the terms of a consent order procured at the last minute by the claimant on terms that it agreed to provide any such further evidence in accordance with the timetable which was ultimately set by the court and which reflected the terms of that agreed order. These factors point strongly to the seriousness with which the claimant should have approached the question of adherence to the timetable set down

by Master Teverson, which was directed to the important objective of ensuring that there could be a prompt and fully-effective hearing of the present application.

19. The claimant made no attempt to apply for an extension of that timetable before it expired. The claimant has offered no excuse why it failed to comply with that timetable. There was a clear and serious failure to comply with the order, and there is no mitigation nor extenuating factors which apply.

20. In these circumstances, I consider that the just and appropriate course is to exclude from consideration in the present application the first witness statement of Mr Plitnick and the expert report of Mr Berger.

21. That leaves, then, the question whether the proposed defendants can show at this stage – to a summary judgment standard - that they have a clear defence to the claim now proposed to be brought against them. The relevant standard to be applied on this question was common ground between the parties. As a general rule, amendments should be allowed so long as any prejudice to the other party can be compensated for in costs: see Cobbold v Greenwich London Borough Council, unreported, Court of Appeal, 9 August 1999. However, permission to amend can be refused where the case set out in the amendment has no real prospect of success.

22. In addressing this question, the test to be applied is the same as that under CPR Part 24 (summary judgment). In accordance with well-known principles, what is required to be shown is that there is a real prospect of success which is more than fanciful or imaginary: see the commentary in the White Book at paragraph 24.1.3 and Clarke v Marlborough Fine Art London Limited [2002] 1 WLR 1731 at paragraph [31]ff, per Patten J.

23. There are a number of points which, if the case proceeds to trial, will require careful attention. The first relates to the interpretation of the undertaking given on 3 October 2006. The property is registered land and the reference to holding title deeds to the order of the claimant was not apt when addressing a case of dealings with registered land. Nonetheless, I consider that there is an arguable case for the claimant to the effect that the undertaking should be construed in line with what was arguably its obvious purpose, namely to provide the claimant with a measure of security for its lending to Mr Grosz along the lines indicated in the proposed Amended Particulars of Claim at paragraph 12.

24. The claimant's case is that CWC came under an obligation to inform the claimant if CWC wished to withdraw from and terminate the effect of the undertaking. In that regard, the claimant relies upon John Fox v Bannister King and Rigby [1988] 1 QB 925, in particular at 929C-E in the judgment of Nichols LJ where he said this:

> "Nor can I accept the further submission that the words relied upon were not sufficiently clear in their meaning to amount to a solicitor's undertaking. To my mind there is no material ambiguity. Mr. Bannister stated that he would hold on to the money until Mr. Fox had come to some arrangement regarding it with their mutual client. This did not mean, however, that if Mr. Fox was unable to come to some such arrangement, Mr. Bannister's obligation would have continued indefinitely. Mr. Bannister could have terminated his obligation on giving reasonable notice to Mr. Fox. So that if Mr. Watts sought

> payment, Mr. Bannister would have been at liberty to pay over the money to him but only after giving reasonable advance warning of this to Mr. Fox, thus affording Mr. Fox an opportunity to take whatever steps he wished to protect his position. In this way the object for which Mr. Bannister's undertaking was given, to provide Mr. Fox with some immediate protection against the dissipation of the £18,000, would have been achieved as intended at the time. (It will be recalled that at the same time as the cheque for £11,500 was handed over with the letter of 30 September, Mr. Bannister had said to Mr. Fox that he would not part with the balance, of £18,000, without referring to him.)

25. As may be seen from that passage, there were some differences on the facts between that case and this. Nonetheless, I consider that the claimant has an arguable claim that in the context in which the undertaking in this case was given, the obligation upon CWC was such as to subject them to an obligation to give reasonable notice to the claimant before anything was done or steps were taken to the knowledge of CWC which contradicted the obvious intention and purpose of the undertaking which they had given, in line with the approach indicated by Nichols LJ.) that the words relied upon were not sufficiently clear in their meaning to amount to a solicitor's undertaking. To my mind there is no material ambiguity. Mr. Bannister stated that he would hold on to the money until Mr. Fox had come to some arrangement regarding it with their mutual client. This did not mean, however, that if Mr. Fox was unable to come to some such arrangement, Mr. Bannister's obligation would have continued indefinitely. Mr. Bannister could have terminated his obligation on giving reasonable notice to Mr. Fox. So that if Mr. Watts sought payment, Mr. Bannister would have been at liberty to pay over the money to him but only after giving reasonable advance warning of this to Mr. Fox, thus affording Mr. Fox an opportunity to take whatever steps he wished to protect his position. In this way the object for which Mr. Bannister's undertaking was given, to provide Mr. Fox with some immediate protection against the dissipation of the £18,000, would have been achieved as intended at the time. (It will be recalled that at the same time as the cheque for £11,500 was handed over with the letter of 30 September, Mr. Bannister had said to Mr. Fox that he would not part with the balance, of £18,000, without referring to him.)

26. As may be seen from that passage there were some differences on the facts between that case and this. Nonetheless, I consider that the claimant has an arguable claim that in the context in which the undertaking in this case was given, the obligation upon CWC was such as to subject them to an obligation to give reasonable notice to the claimant before anything was done or steps were taken to the knowledge of CWC which contradicted the obvious intention and purpose of the undertaking which they had given, in line with the approach indicated by Nichols LJ.

27. The question then arises: if the claimant had been notified by CWC at the time that the company Evering was seeking lending from Abbey National in return for grant of a charge over the property in favour of Abbey National (which ultimately occurred on 30 May 2007), what would the claimant have been able to do to protect itself? In the passage just quoted from Nichols LJ, he referred to the protection which would have been afforded to Mr Fox in that case as involving provision to him of an opportunity to take whatever steps he wished to protect his position. In the present case, the claimant says that it would have sought to invoke the jurisdiction of the Beth Din and would have taken the dispute between itself and Mr Grosz to the Beth Din. The claimant

plainly has an arguable case, based on the background dealings between itself and Mr Grosz and the form of the agreement which was entered into between them, that if it had been told that the undertaking was no longer to apply it would have sought to invoke the jurisdiction of the Beth Din. In relation to the loan, the parties to the arrangement were prepared to accept the jurisdiction and ruling of the Beth Din in respect of matters of business disputes between them. As I have already indicated, Mr Lightman accepts that on the question of whether the Beth Din would have accepted a reference of the dispute which might have arisen between them if Mr Grosz had failed to ensure that either the Abbey National lending on the security of a charge over the property was passed on to the claimant or alternatively that a first charge over the property was granted to the claimant, the claimant has a good arguable case that the Beth Din would have accepted jurisdiction in a dispute referred to it by Mr Plitnick and the claimant.

28. Against this background, however, the proposed defendants maintain that there is a series of defences available to them by reference to which it can be seen at this stage, on the materials available to the court, that the claimant would have no real prospect of success on its claim against CWC and have no good arguable case to the summary judgment standard against CWC.

29. First, the point is taken that the claimant could not enforce any charge agreement in relation to the property because of the absence of any written agreement complying with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. The claimant accepts that it could not have sought specific performance of any agreement to grant a charge over the property for that reason. However, the claimant's claim is that in circumstances where Mr Grosz refused to honour the agreement to the effect that security should be provided for the lending by the claimant to him, the dispute between Mr Grosz and the claimant would have been referred to the Beth Din for resolution. Both of them were familiar with and happy to submit to the jurisdiction of the Beth Din and would respect its orders. The Beth Din would be prepared to require Mr Grosz to procure provision of a charge by Evering Estates Limited, the owner of the property, or equivalent security by alternative means, provided that it was persuaded that the justice of the case required that. Further, if the Beth Din had so ruled, Mr Grosz would have complied and this would have been done, provided that Mr Grosz could lawfully do so.

30. On this first point, in my view the claimants have a good arguable case fit to be examined at trial that these steps in the asserted likely chain of causation would indeed have been followed through. It is in relation to the last part of this reasoning (whether Mr Grosz could lawfully have complied with a requirement to procure that Evering Estates Limited should give security) that the main argument has taken place before me today and which leads on to the other grounds of defence and submissions of Mr Lightman.

31. The second ground of defence is that Mr Grosz, despite being the sole director and shareholder of Evering Estates, could not lawfully have procured the grant of a first legal charge by Evering Estates or the diversion of loan monies paid by Abbey National to Evering Estates in favour of the claimant.

32. Mr Lightman rightly reminded me in forceful terms of the important principle that a company's assets are, in law, entirely distinct from that of its owners: see Prest v Petrodel Resources Limited [2013] 2 AC 415. He also rightly reminded me in forceful terms of the limits of freedom of action by directors of a company in circumstances where the company is or may become insolvent. In such circumstances the directors will owe fiduciary duties in favour of the company which require them to have regard to the interests of the creditors of the company.

33. The underlying principle is that directors are not free to take action which puts at real (as opposed to remote) risk the creditors' prospect of being paid without first having considered their interests rather than those of the company and its shareholders: see Hellard v Carvalho [2013] EWHC 2876 (Ch), paragraphs [88] to [89], per John Randall QC sitting as a deputy High Court judge, who helpfully reviews the relevant authorities and states the relevant principle.

34. The proposed defendants call attention to the following features of the case. Evering Estates had on 21 July 2006 granted a debenture to Barclays Bank PLC which included charges to be granted both over current property owned by the company and also over future property acquired by the company. This would have applied to and covered the property. It is unknown whether and what lending was extant from Barclays Bank to Evering Estates at the relevant time, in particular around May 2007.

35. Next, as at 3 October 2006, the date of the undertaking, Evering Estates was not a debtor of the claimant and, most importantly, it is maintained that at the relevant time (in particular at around May 2007) Evering Estates' financial position was highly precarious.

36. Both sides have been in difficulty in getting the bottom of the question of the financial state of Evering Estates because, as Mr Lightman informed me, Mr Grosz has not been willing to co-operate to explain matters. What is put before the court by the proposed defendants are the abbreviated accounts for Evering Estates for the year ended 31 March 2007 and the abbreviated accounts for Evering Estates for the year ended 31 March 2009, from which one can also see its financial position in 2008.

37. In March 2007, Evering Estates' balance sheet showed fixed tangible assets of about £804,000, current assets in the form of debtors and cash at bank of about £243,000, creditors' amounts falling due within one year of £27,654, giving net current assets of £215,289 with total assets less liabilities being a little above £1 million. Then, against the entries "creditors' amounts falling due after more than one year", there is a figure of £1,079,541, giving negative shareholders' funds of -£60,361.

38. As at 31 March 2008, the figure for tangible assets had gone up to £1.45 million. Total assets less current liabilities were £1.69 million and creditors' amounts falling due after more than one year were £1.43 million, giving shareholders' funds as £257,045.

39. It is impossible to tell from these summary accounts how the change between the financial state of the company as at 31 March 2007 and 31 March 2008 had occurred. It is also not possible to reconstruct with confidence what may have been its financial position in May 2007.

40. Of considerable importance on the present application, in my view, is that the figure for creditors' amounts falling due after more than one year has not been broken down to offer any explanation of who those creditors might be. It is possible that Mr Grosz himself was a major creditor of the company. It is possible that Barclays Bank was a major creditor of the company. We just do not know simply by looking at these accounts.

41. However, what does appear to be the case is that Mr Grosz was prepared to deal with the claimant upon the footing that he effectively controlled a series of corporate entities which were the holders of the properties referred to in paragraphs 2 to 10 of the draft Amended Particulars of Claim. Evering Estates, as the corporate owner of the property in issue in the present proceedings, was a further one-man corporate vehicle operated by Mr Grosz.

42. Mr Grosz caused the undertaking in October 2006 to be given. It seems that the only basis upon which he could lawfully have conducted his affairs and sought to procure the giving of security over the property in accordance with the undertaking in light of his decision to acquire it using Evering Estates would be if he was himself one of the major creditors of Evering Estates, as is possibly the case having regard to the entries which appear in the abbreviated balance sheets for Evering Estates to which I have referred.

43. If, and I appreciate it may be a big 'if', he was a major creditor of the company in a sufficiently large sum, he would have been in a position to make arrangements with the company for it to provide either payment or the giving of security in favour of the claimant against concessions on the loans due to be repaid by the company to him, without thereby prejudicing the interests of other creditors of the company.

44. From the way in which Mr Grosz conducted himself, in which (at least, arguably) he plainly appears to have thought that he could have properly arrange for security to be given by Evering Estates in favour of the claimant, I consider that the claimants do have an arguable case fit to be tested at trial that, in fact, the financial position of Evering Estates was such that Mr Grosz would have been in a position to arrange for the provision of the money or the security which the claimant says should have been provided to it in or about May 2007, had it been informed by CWC that the undertaking was to be terminated. Such an inference might be drawn from the way in which Mr Grosz behaved. At trial, the trial judge will be able to assess in the light of all the evidence relating to Mr Grosz and Evering Estates whether such an inference should be drawn.

45. The alternative pressed upon me by Mr Lightman would involve finding that Evering Estates was in a precarious financial position in about May 2007 and that those arrangements could not lawfully have been made by Mr Grosz without jeopardising the interests of third party creditors. That would involve reaching the conclusion on the limited material currently available to the court that Mr Grosz was acting unlawfully and in a way tantamount to acting dishonestly.

46. However, in circumstances where there is clear evidence of the way in which he did act; where that evidence is capable of giving rise to a possible inference as to the financial state of the company to the effect that it was in fact positive and healthy at

that time; and where such an inference is not necessarily rebutted by the form of the balance sheets which Mr Lightman took me to, I do not consider that I can properly at this stage and without exploration at trial reach the conclusion which Mr Lightman invites me to arrive at. In my view, the claimant has an arguable case fit to be tested at trial that it would indeed have been lawful and possible for Mr Grosz to arrange to provide it with the payment or security which it says he would have done, had CWC acted properly and informed it that the undertaking was to be withdrawn. The background of the circumstances of the various companies, including Evering Estates, and Mr Grosz's position in relation to them is murky but it cannot be said, at this stage, according to the summary judgment or strikeout standard, that the claimant has no case fit to proceed to trial.

47. It is also possible that significant evidence bearing on this issue will be adduced at trial. It is a striking feature of the present case that the court has seen no evidence from Mr Hanon, the solicitor involved with Mr Grosz and Evering Estates, to explain his involvement with both of them and his understanding as to the financial position of Evering Estates. When I pressed Mr Lightman about that, he said no evidence had been adduced by Mr Hanon because he believed he had confidentiality obligations owed to Mr Grosz. I found that somewhat surprising, in that the nature of the present application is in the form of a disciplinary proceeding, in particular against Mr Hanon, and at first glance I would have thought that his right to defend himself would permit reference in these proceedings to relevant information even if otherwise governed by solicitor-client confidentiality obligations.

48. At all events, I do not think it can be concluded that at trial Mr Hanon will feel the need to be so reticent. I would be very surprised if it transpires that whatever confidentiality obligations he may owe to Mr Grosz would prevent him from giving full and frank evidence about his knowledge of the background circumstances. I obviously make no final judgment in relation to that, but it does seem there is a real prospect - quite aside from the argument and debate which may take place at trial, in the light of the evidence of all the circumstances of the case, regarding the inferences that can be drawn from Mr Grosz's conduct and the limited financial information we have from the abbreviated accounts of Evering Estates - that the court, at trial, will have further material before it on which it could properly conclude that the claimant's case in this respect has been made out.

49. The third point of defence relied upon by the proposed defendants is that, they say, there would have been no reason for Mr Grosz to pay the Abbey National loan to the claimant because he was still repaying the loan to the claimant and was not in default; therefore, there was no cause for the claimant to call in any security for the loan. This is a causation argument on the facts. On this point, the claimant plainly has a good arguable case that whether or not Mr Grosz was continuing to repay the loan due to the claimant, the claimant would have wished to preserve its security in respect of that loan which, up to that point in time, it believed was covered by CWC's undertaking.

50. The fourth ground of defence put forward is that it is said the undertaking contained no terms as to the period in which the claimant was required to make a decision regarding taking a first charge. It is suggested that after more than six months with no correspondence from the claimant, it was reasonable for Mr Hanon to assume that the claimant did not intend to take a charge over the property. Again, the claimant plainly

has a good arguable case in relation to this issue to the effect that it was not reasonable for Mr Hanon to proceed in this way. It could be argued, with force, that it is very unlikely that such a serious matter as a solicitor undertaking in the form that was given in October 2006 could be found to have lapsed simply because of an absence of correspondence. It is well arguable for the claimant that CWC had an obligation to give notice if they no longer wished to be bound by the undertaking, in line with the approach of the Court of Appeal in John Fox v Bannister, King & Rigbys [1988] QB 925.

51. The fifth point of defence which was canvassed in the evidence is that it was by no means certain that, had Mr Grosz refused to procure the first legal charge, Mr Plitnick would have taken the dispute to the Beth Din for arbitration or that the Beth Din would have accepted jurisdiction over the dispute. As I have indicated, these were matters which were covered by the properly admitted evidence of Mr Plitnick in his second witness statement and in relation to them, as Mr Lightman concedes, there is a triable issue on these points.

52. A sixth ground of defence put forward was an illegality defence, that Mr Grosz could not lawfully have arranged for the giving of security or payment of monies by Evering Estates. This is, in substance, the same as the second ground of defence which I have already discussed and analysed above. In relation to this sixth ground, the claimant again has an arguable case fit to be taken forward to trial, essentially for the same reasons as in respect of the second ground.

53. Similarly and finally, Mr Lightman submitted that the proposed defendants would have a clear and unanswerable defence to the claim by reason of the delay associated with the bringing of the claim. He referred me to the decision of the Court of Appeal in Taylor v Ribby Hall Leisure Limited [1988] 1 WLR 400. That case makes it clear that where compensation proceedings are brought in relation to breach of a solicitor's undertaking, a court may in certain circumstances refuse to punish the solicitor and/or refuse to grant compensation in respect of loss arising where there has been significant delay on the part of the claimant in bringing the case.

54. In the present case, whilst I acknowledge the proposed defendants may have arguments which can be advanced with force at trial that such delay as has occurred in the bringing of the present action should result in a refusal of relief in favour of the claimant at the end of the day, I do not consider their arguments to that effect, in light of Taylor v Ribby Hall Leisure Limited, are so strong as to allow this court to conclude that the claimant has no reasonable prospect of success at trial by reason of these matters.

55. The background is that the claimant learned of the alleged breach of the undertaking in November 2008. It promptly complained by letter dated 14 November 2008 to CWC. CWC were, therefore, promptly notified that a complaint about their conduct might well be made and were in a position to seek to preserve evidence and so forth from that point in time.

56. A letter before claim was sent on 16 October 2009 and a letter dated 21 December 2009 was sent on behalf of the claimant to the insurers of CWC. Only the latter letter was in evidence before me. I was told by Mr Burroughs for the claimant that since that

time there has been extensive correspondence between the parties which accounts for the delay which then occurred down to the issue of the original claim (albeit against the wrong defendant) on 21 November 2012. I was not taken through that correspondence, nor was the entirety of it before the court.

57. In those circumstances, it is not clear to me, at this stage, that the court at trial would exercise its power to disallow a claim such as this on grounds of delay. Whether there has been any serious fault or delay on the part of the claimant in commencing proceedings will require examination at trial. The Court of Appeal in Taylor itself emphasised this in relation to the exercise of the court's discretion at page 409H:

> "In our judgment, it is in general preferable to make submissions on delay, prejudice, potential injustice and other factors relevant to the court's discretion in its contempt and supervisory powers at the substantive hearing rather by a preliminary pre-emptive move to strikeout. That procedure may be open to the objection that it increases the costs and delay that preliminary procedures are intended to avoid."

58. The Court did also emphasise, at page 410A, that proceedings of this kind should, in the absence of a good reason, be initiated within a reasonable time of a party obtaining knowledge of a breach of a court order. But, as I have said, the impact of this principle in the context of the present case will be a matter which requires examination at trial in the light of all the relevant documentation and evidence, including that which is not currently before this court.

59. In Taylor v Ribby Hall Leisure Limited, a claim to invoke the court's penal jurisdiction in respect of a solicitor was struck out at the preliminary stage. However, as I read the judgment, that was a decision very much informed both at first instance and in the Court of Appeal by the assessment of both courts that the claimants in that case would not be able to establish causation of loss flowing from those breaches and so would not be able to derive any benefit from the motion for committal for contempt, as they would not be awarded any compensation by the court: see page 405H in relation to the first instance judgment and page 409C, 409H and 410C in the judgment of the Court of Appeal.

60. As I have already concluded in relation to the other defences put forward by the proposed defendants, the present case is one in which, at this stage, there is a real prospect of success for the claimant in its claim for compensation at trial and one in relation to which it has a good arguable case fit to be taken to trial. In those circumstances and in light of the guidance given by the Court of Appeal in Taylor v Ribby Hall Leisure Limited at page 409H, set out above, I do not consider it would be right to refuse permission for the claimant to amend its Particulars of Claim and to prevent it from proceeding to take the case to trial.

61. In relation to the form of the draft Amended Particulars of Claim, I debated with Mr Burroughs whether the proposed new paragraph 20 should be allowed to go forward in the form in which he had drafted it, since there seemed to be confusing chronological issues in relation to it. In the event, he was content to reformulate paragraph 20 so it would simply read:

> "The claimant's alternative case is that it was a breach of the undertaking for CWC to allow the property to be transferred to Evering Estates Limited."

62. It is in relation to the draft pleading with paragraph 20 in that form that I give permission to amend.

63. Finally, I should say something in relation to the failure of the claimant to bring forward the particular amendments in paragraphs 20 and 21 of the proposed Amended Particulars of Claim according to the timescale indicated by Master Teverson in his order. I give permission for the amendments notwithstanding that there was a failure to comply fully with the order of Master Teverson and despite the fact that the evidence which was filed late has been excluded from the present hearing, as I have explained.

64. At this juncture, in my view it is appropriate to give permission for amendment of the Particulars of Claim to include paragraphs 20 and 21. The consequence of my judgment is that the already existing form of the Amended Particulars of Claim (that is, excluding paragraphs 20 and 21 in the further proposed draft) is to be allowed to go forward to trial. That being so, and since a party is potentially able to bring forward amendments to a pleading at any stage and since, taking due account of the overriding objective in the usual way, all matters properly in issue between the parties should be brought into one set of proceedings to be determined at a trial to do justice between them, I consider the just and appropriate course is to allow that pleading with the new paragraphs 20 and 21 to proceed to trial along with the rest of the claim.

65. For these reasons, the claimant's application is for permission to amend the claim and Particulars of Claim is granted.