Do pleadings matter?

UK Learning Academy Ltd v *Secretary of State for Education*
[2018] EWHC 2915 (Comm)

HHJ Klein sitting as a Deputy Judge of the High Court at [11]:

> "The parties' statements of case are discursive, unstructured and, in places, difficult to follow. Counsel who represented the parties at trial did not draft the initial statements of case and, although they may have had some input in the amendment of those documents, understandably, those documents were used as the framework for the amendments. As I reminded the parties at the pre-trial review and at trial, the statements of case ought, at the very least, to identify the issues to be determined. I recognise that a prevailing view may be that parties should not be held to their pleaded cases but it is unhelpful if parties proceed on the basis that the statements of case do not act as a limit on the issues to be tried. I was left with the clear impression, by the conclusion of the trial, that, in many significant respects in this case, both parties, more or less, were advancing cases which were unpleaded. As it appeared to me that both parties encouraged me to determine the proceedings on the basis of the cases they actually advanced at trial, that is what I propose to do. But for the very great assistance given to me by counsel, this would have been an even more difficult task that it has been."

UK Learning Academy Ltd v *Secretary of State for Education*
[2020] EWCA Civ 370

David Richards LJ at [47]

> "I endorse the view expressed by the judge to the parties at the trial and repeated in his judgment at [11] that the statements of case ought, at the very least, to identify the issues to be determined. In that way, the parties know the issues to which they should direct their evidence and their challenges to the evidence of the other party or parties and the issues to which they should direct their submissions on the law and the evidence. Equally importantly, it enables the judge to keep the trial within manageable bounds, so that public resources as well as the parties' own resources are not wasted, and so that the judge knows the issues on which the proceedings, and the judgment, must concentrate. If, as he said, there was "a prevailing

view that parties should not be held to their pleaded cases", it is wrong. That is not to say that technical points may be used to prevent the just disposal of a case or that a trial judge may not permit a departure from a pleaded case where it is just to do so (although in such a case it is good practice to amend the pleading, even at trial), but the statements of case play a critical role in civil litigation which should not be diminished."

Azhar v. *All Money Matters t/a TFC Home Loans*
[2023] EWCA Civ 1341

Facts

A, a putative borrower, entered into an agreement with AMM, a mortgage broker.

The agreement provided that AMM would be entitled to a fee if a "Finance Offer" was made which reflected a "Confirmation of Instructions letter as varied orally or in writing". Before entering into the agreement, A had completed a "Mortgage Fact Find" form.

A and AMM corresponded about a facility. In the event, A arranged a loan through different channels.

AMM sued for its fee on the agreement, the POC asserting that A had **accepted** mortgage finance arranged by it. A's Defence denied that she had done so.

AMM's witness evidence was that AMM had **procured** a mortgage **offer**, and it was not necessary for A to have accepted it for liability to arise.

This was a totally different case from the pleaded claim.

At the commencement of the fast-track trial, AMM obtained permission to amend the POC so it aligned with the witness evidence. There was no application to amend the Defence.

During trial, the judge raised the question of whether the mortgage offer had been accompanied by a "Confirmation of Instructions", causing it to be a Finance Offer within the meaning of the agreement. AMM referred to the "Mortgage Fact Find" form.

Although this point was not in the Defence nor the skeleton argument, Counsel for A cross-examined AMM's witness about the absence of a Confirmation of

Instructions in a particular form of letter, and relied on that in his closing submissions. Counsel for AMM submitted there was no requirement for any particular formality.

DDJ Arnold found for AMM.

AMM appealed on the basis that the judge had given insufficient weight to the lack of a "Confirmation of Instructions letter".

HHJ Letham dismissed the appeal on the basis that it was a new point which should not be allowed under the discretion to permit new points on appeal as summarised in *Notting Hill Finance* v. *Sheikh* [2019] EWCA Civ 1337 at [23]-[26]. He held:

- there was nothing to put AMM on notice of the point "before the parties walked into court";
- once the point arose out of the DDJ's questions it was open to A to apply to amend the Defence;
- when raised in closing submissions, AMM had to deal with it "on the hoof" and the issue was "fogged" by a lack of proper pleadings;
- it was not entirely clear from the transcript what the precise point was;
- if the point was allowed in the potential prejudice to AMM was significant – it was not a case where he could simply rely on the evidence in the lower court.

A appealed to the Court of Appeal.

Decision

The Court of Appeal declined to interfere with HHJ Letham's decision.

Lewison LJ set some fundamental principles of pleading derived from the authorities;

- [22] elementary fairness requires that each side knows what points the other side will take (*Prudential Assurance Co Ltd* v. *HMRC* [2016] EWCA Civ 376)
- [23] it is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary for trial (*Loveridge* v. *Healey* [2004] EWCA Civ 173)

- [24] statements of case play a critical role in civil litigation which should not be diminished (*UK Learning Academy Ltd* v *SoS for Education* [2020] EWCA Civ 370).

He held [28] that there is a spectrum of "newness":

> "The overriding question in each case is whether the party against whom the point is raised has had fair warning of it and is able to properly deal with it, with the aid (if appropriate) of evidence designed to confront or neutralise the point. That question should not be answered with the benefit of hindsight".

The Judge's decision was an (1) evaluative (2) case management decision. Because of these factors, [31] an appeal court will not interfere merely because it would have decided differently. There was no appealable flaw in the judge's evaluative decision.

Jacobs v. *Chalcot Crescent (Management) Company Ltd*
[2024] EWHC 259(Ch)

Facts

J's claimed a declaration that CCMC, the freeholder of the building in which his flat was situated, unreasonably withheld consent to alterations.

The claim began life as a Part 8 claim but was transferred to Part 7 and pleadings were ordered.

The pleadings were *ad idem* that the basis for CCMC's withholding of consent concerned whether the works complied with the fire safety requirements of Building Regulations.

Neither party's pleadings referred to a separate point which had arisen in the surveyors' correspondence (outside the scope of compliance with Building Regulations – which relate to occupier safety) as to whether a "chimneying" effect caused by the proposed reconfiguration of the flat could cause a fire to be more intense and more damaging to CCMC's roof or other retained structure.

At first instance, HHJ Hellman rejected as reasonable grounds for refusal anything within the scope of the Building Regulations. He treated the impact on the structural

integrity of the building as a separate issue, which constituted a reasonable ground for refusal even if the alterations complied with Building Regulations.
J appealed to the High Court. In refusing permission to appeal, the trial Judge said that the structural integrity issue "…was a central issue at trial. Confronting it was unavoidable".

Held

Fancourt J. allowed J's appeal on the ground that that it was not open to the Judge to find for CCMC on a basis that was not pleaded, nor fairly raised or addressed as a ground of refusal at trial.

The point was not pleaded, it was not addressed in the witness statements or expert evidence. It was not part of CCMC's opening. It was not put to J in cross-examination. It first emerged (without invitation by J) in answers given by CCMC's surveyor in cross-examination.

Without notice to J, CCMC's counsel took the point in closing, submitting that there were two aspects to fire safety: Building Regulations and structural integrity. In his closing submissions, J's counsel did not take the point that CCMC was seeking in this regard to rely on an unpleaded point.

Fancourt J. held J's counsel was not at fault in not identifying that the structural integrity point was heading towards being regarded as a freestanding ground for a reasonable refusal of consent. He held at [57]:

> "… where an issue has clearly not been pleaded and was not relied on at the start of the trial, **I consider that onus lies as much on counsel for the party seeking to rely on it as on their opponent to raise the matter with the judge and seek permission to amend**. For the reasons given by Dyson J in [*Al-Medenni* v. *Mars UK Ltd* [2005] EWCA Civ 1041] is entitled to rely on the pleaded case as defining the ambit of issues to be defined at trial".

Had an objection would have been made, a very late application to amend would have been refused [63].

The structural integrity issue was not a central issue but "emerged from nowhere at trial only when Mr Levy chose to say something about when asked about a different issue". "To say that confronting the issue was unavoidable would only be true if the trial were inquisitorial in nature" – which it was not [64].

Chapman and Lloyd Warwick Ltd v. Celtic Property Developments Ltd
[2024] EW Misc 6 (CC)

Per HHJ Davis-White KC:

> "12. This claim was commenced, wrongly in my view, as a Part 8 Claim Form. There were clearly disputes of fact which made the appropriate regime to be Part 7 of the CPR and not Part 8. By Order dated 4 October 2022, the case was transferred to the Part 7 regime.
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> 13. Unfortunately, at that time, it was ordered that a witness statement of Mr Chapman stand as particulars of claim. In my judgment that is usually not a convenient order to make and was not the best order to make in the context of these proceedings. Either particulars of claim are simple to draft, in which case there is no real prejudice in requiring them to be drafted; alternatively, the case is more complicated and proper particulars of claim are required for that reason. In this case, the relevant witness statement sets out (as one might expect) not just factual matters properly set out in particulars of claim but documents and other evidence which is not appropriately set out in particulars of claim and which then causes problems for the party pleading a defence and to the court when managing the case and conducting the trial. As is so often the case, a beguiling apparent cost saving short cut in place of following standard practice under the rules of court turns out, at the end of the day, to be a mistake."

Charles Holland
Trinity Chambers
May 2024