TOP 5 RISK AREAS
FOR PROPERTY LITIGATORS

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by

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PANEL DISCUSSION – TOP 5 RISK AREAS FOR PROPERTY LITIGATORS

Introduction

While the road of litigation is beset with traps for the unwary, inexperienced or just plain busy practitioner, everyone involved in property litigation will have had moments of anxiety when something has, actually or potentially, gone awry. Missing documents, inadvertent breaches of orders, non-compliance with that new pilot no one had mentioned… the list goes on. We have all had to deal with these stressful moments; more often than not you can get back on track by being proactive and addressing the problem head on.

Nevertheless, there are several areas where risk is particularly prevalent in matters of property litigation. One could name a dozen or more. For the purpose of this panel discussion we are going to discuss five areas which are most fraught with traps and which each of us has had to deal with recently. The panel discussion will proceed with panellists explaining how the risk may materialise, how parties and courts deal with it when it does materialise and what can be done to try to mitigate the risk. Attendees are encouraged to join in with the discussion by asking questions and/or giving their view on how best to mitigate the risks when they arise.

Problem area 1: The sound of silence. Shouldn't have gone *ex parte*.

<u>Top tip: Never go ex parte if you don't have to. If you do, remember your onerous obligations</u>

- Just because something is urgent doesn't mean it should be ex parte: short service is better than no service
    - There is a distinction between urgency and secrecy
    - Anecdotally: we are not infrequently asked to make an "ex parte application" because something is "urgent"!
    - The fact you've been hoping to do a deal and time has run out equally does not make something "urgent".
- Ex parte applications place considerable burdens on applicants. They can go horribly wrong in a way that on notice applications cannot. The fact that the other

side have a bad point should not lose you an on notice application. But it can lose you an ex parte application, if you fail to disclose it first time around and the other side raise it on the return date.

- Some recent cases exemplify the risks involved.
- *St Vincent v Robinson* [2017] EWHC 3267 (Comm)
    - The claim arose out of a series of agreements in relation to a property development project, including a deed by which C had charged and pledged its shares in a Cypriot company to D4-11.
    - C obtained a worldwide freezing injunction against D1-D3 on an ex parte basis
    - Return date: injunction discharged as C had failed to demonstrate that it had a good arguable case on 2 points of law: viz. whether Ds had repudiated the shares pledge by refusing to accept its tender of moneys; and whether Ds had produced the realisation of security by acting outside the terms of the shares pledge
    - Neither point raised on *ex parte*: material non-disclosure. Fairly described as fairly obscure points of law, but the failure to disclose was still material.
- *Frenkel v Lyampart* [2017] EWHC 3121 (Ch)
    - Held: Positive duty on a party to investigate the facts and fairly present the evidence on which they rely
    - C and D1 were former business partners litigating various claims in US / UK, including in California. In one claim in the US C alleged that D1 had been dissipating assets so as to defeat C's ability to enforce any judgment ("the fraudulent conveyance claim"). In the UK claim C claimed a 25% interest in D2 an English Company.
    - C obtained judgment in claims in California and served D1 with notice of a motion in the fraudulent conveyance claim seeking to prevent him dissipating assets.
    - In July 2017 C obtained an ex parte freezing injunction against D1 (which injunction covered D1's shares in D2 and dividend payments) in English court to support enforcement of Californian claims.
    - Injunction obtained; on return date, it was discharged for material non disclosure

- C had intimated the US motion had not been served but it had, and that was highly material
- C's lawyers had failed to make proper enquiries about the steps taken in the fraudulent conveyance claim; had they done so they would have been aware that C had made an ex parte application for an attachment order against D1 in May 2016 which had been dismissed
- C had not given judge complete picture in relation to the company's intention to issue shares to key staff; had he done do J would have understood the impact of the freezing injunction on company
- C had not drawn J's attention to all the ways in which the draft order differed from standard injunction wording. Further the application for continuance had not been served as soon as practicable.

- As a practical matter, if you're debating whether to disclose something, disclose it. If it's not damaging, you can deal with it in submissions. If it is damaging, then clearly it is material.
- Make sure that somewhere in your application – whether in the evidence or the skeleton, or even both – there is an apparently lengthy section dedicated to 'full and frank disclosure.'

Problem area 2: Under pressure. Missed deadlines.

Top tip: There is increasingly an implicit 'deadline' whereby Courts are refusing amendments made 'late' even when they are not close to trial. So get you case in order early. Don't think that you can amend at any time as long as you're willing to pay the costs of it.

- Everyone knows that to make an amendment which prejudices a trial date places a 'heavy burden' on the party seeking to amend. But other than that, in our experience there is generally an assumption amongst litigators that amendments are going to be allowed as long as they have a reasonable prospect of success and you agree to pay the costs. So you can be leisurely in getting your case in

order at the outset, or reacting to the documents disclosed by the other side, or pleading out the way you get round the cunning defence they have pleaded.

- That assumption is **wrong**. The Courts are increasingly willing to refuse amendments on the grounds of 'lateness' even when there is no risk to a trial date.
- The guiding principles were set out by Carr J in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), para [38]:

  d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

  e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

  f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

  *g) a much stricter view is taken nowadays of non-compliance with the **CPR** and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.*

- Again, some recent cases provide some salutary lessons.
- A recent example of this is *Rose v Creativityetc Ltd* [2019] EWHC 1043 (Ch)
    - C owned certain properties, and had borrowed money from D and executed mortgages over the properties.
    - D obtained a default judgment for payment of the underlying loan, but C responded with proceedings seeking to redeem the mortgages.
    - At a late stage in the litigation (after a trial had been vacated for other reasons), C applied to amend to allege that the mortgages were the result, in summary, of fraud and accordingly invalid.

- Permission however was refused:
    - Relying on the *Quah Su-Ling* line, the Judge thought that as this was a late amendment, it was relevant to ask not just whether it had reasonable prospects of success, but to consider in detail the strength of the proposed case
    - The result of that exercise was that he concluded that the case was weak
    - In those circumstances, he was not prepared to permit C effectively to 'go back to square one' of the litigation – all he could see that had changed to justify the new case was a changed assessment by C of the commercial merits of the claim, not a change in facts.

- Another recent example of this approach comes in the *Manchester Ship Canal* litigation, a case about the lawfulness of discharges from sewers into the Manchester Ship Canal. C's claim was that all such discharges were trespasses, unless authorised by an agreement:
    - On D's summary judgment application, the Supreme Court [2014] UKSC 40, [2014] 1 WLR 2576 held that as a matter of law discharges from sewers vesting in an undertaker prior to 1 December 1991 were authorised by statute.
    - The matter was remitted to the High Court for consideration of how it impacted on individual outfalls. C sought to amend its case to pursue a variety of new claims which it said were open to it still in light of the Supreme Court judgment.
    - This was a case which was going to go to trial in any event, as some discharges were not on any view covered by the Supreme Court ruling. No trial date was at risk.
    - But the application (save in relatively minor respects) was refused, partly on the basis that it was 'late.'

Problem area 3: What'd I say? Witness statements gone awry.

Top tip: Know the guidelines and know precisely what it is the witness is giving evidence about. Don't trip your witness up by tuning them into a lawyer or an expert.

- WB, Vol 1, 1060, 32.4.5: *"Unfortunately, rules, practice directions and guidance as to the content of witness statements appear to be habitually ignored by practitioners."*
    - A witness statement should be in the witness's own words and should be restricted to matters to which the witness could readily speak if cross examined on it: *Alex Lawrie Factors Ltd v Morgan* 18.8.99, (CA)
    - QBD Guide: Issues covered by a witness statement should consist only of the issues on which the party serving the witness statement wishes that witness to give evidence in chief on and should not include commentary on the trial bundle or other matters which may arise during the trial
    - See also PD32, 18.1
    - The temptation (sometimes only unconscious) is to adopt our own, lawyer's, style when drafting statements, a temptation made more alluring by the fact that so often witness statements for procedural matters are from lawyers.
    - That is not just contrary to the guidelines. A 'lawyered' witness statement will get the juices of a good cross-examiner flowing. When a witness giving oral evidence differs from their witness statement in style (even if not in substance) it undermines the Judge's faith in them overall. The witness who gives a statement which on first read is a bit 'rough round the edges', but which fully reflects their actual evidence, gives fewer open goals for cross-examination.
- *JD Wetherspoon plc v Harris (Practice Note)* [2013] EWHC 1088 (Ch)
    - A witness statement should contain evidence that the maker would be allowed to give orally, should cover those issues but only those issues on which the party serving the witness statement wished the witness to give in chief, should not provide a commentary on the documents in the bundle, nor set out quotations from such documents, nor engage in matters of argument and should not deal with other matters merely because they may arise during the course of trial
    - These are not "rigid statutes" and may be relaxed in order to achieve the overriding objective
    - Even opinion evidence may sometimes be included in the witness statement as to fact as part of the witness's account of admissible factual evidence in order to provide a full and coherent explanation and account

- Note the distinction and proper boundaries between evidence of fact and evidence of opinion
    - Not all evidence of opinion ought to be excluded from witness statements
    - Sometimes the opinion / belief / understanding of a person is material to a claim (e.g. rectification claims)
    - Opinion evidence is admissible from factual witnesses to convey relevant facts personally perceived by him: s.3(2) of the Civil Evidence Act 1972
    - There is a classic case for solicitors where opinion evidence is positively required: the summary judgment application: PD24.2
        - The witness statement must state inter alia that the applicant believes that on the evidence R has no real prospect of succeeding on claim / successfully defending the claim and that the applicant knows of no other reason why the disposal of the claim or issues should await trial
- What about using witness evidence as a 'gateway' for expert evidence, by exhibiting expert opinion which the witness has seen?
    - Our experience is that it can work in interim applications – e.g. exhibiting a letter from an expert to a witness statement to explain something technical which is relevant to the matters before the Court (such as why particulars of loss could not be given in the absence of expert engineering investigations)
    - But as a general rule this is not permissible. See *New Media Distribution Company Sezc Ltd v Kagalovsky* [2018] EWHC 2742
        - This was an application to exclude several paragraphs from K's witness statement. They introduced by reference and quotation two statements then exhibited to the statement, one by a New York Lawyer about matters of New York Law, one by a Professor Butler about matters of Ukrainian law.
        - K was expert in neither. The paragraphs were excluded. K could, if it was relevant, give evidence as to his belief about what New York and Ukrainian law were. But he could not give evidence as to what that law actually is.

Problem area 4: Oops I did it again! Waiving your right to forfeit.

Top tip: You cannot tell your landlord client enough times: the moment you are aware of a breach: move quickly; contact your lawyers; don't do anything until you hear from them, other than putting an immediate rent stop in place!

- This tip is hardly ground-breaking, but it cannot be reiterated enough. We all know the problems, particularly with large institutional clients, when the discovery of the breach giving rise to forfeit generates a flurry of excitement, which is swiftly dissipated when it transpires that the accounts team that day has sent out a demand for rent which has been paid….
- A recent case in the Upper Tribunal reminds us of the hazards of waiver: *Stemp v 6 Ladbroke Gardens Management Ltd* [2018] UKUT 375 (LC)
    - Rs were joint leaseholders of flats in a building comprising five flats; the freehold owned by A (a company in turn owned by the leaseholders)
    - Rs' leases required them to pay a service charge in respect of A's expenditure on inter alia keeping structure and exterior in repair. The service charge was reserved as rent.
    - The leases contained a right of re-entry if any sum of rent was unpaid for 21 days after it become due.
    - The building required works of repair; A demanded £18,971 for service charges on account due on 1.4.16.
    - Rs did not pay the on-account charge and on 29.4.16 A applied to the First Tier Tribunal for determination that the service charge was payable; making clear that this was in contemplation of forfeiture proceedings.
    - Subsequently, A's managing agents wrote to Rs on 17.6.16 and 5.7.16 concerning additional works required to the common parts: the letters were addressed to "dear leaseholders". Certain further letters were also sent by managing agents throughout 2016 and demands for on-account service charge were also sent by agents in September 2016.
    - In December 2016 the FTT held that on account service charges were payable; Rs paid those sums.
    - On 6.3.17 A demanded £43,969.96 from Rs, being the costs of seeking the determination of the on account charges; sought pursuant to contractual right to costs under the lease which provided that Rs were to pay *"all costs*

charges and expenses… which may be incurred… in contemplation of any proceedings in respect of" the flat under s. 146.

- Rs refused to pay and on 1.6.17 A applied to the FTT for determination that costs were payable; on 4.12.17 FTT determined Rs should pay £26,381.98. Rs appealed to UT contending that A had waived right to forfeit the lease so that none of the costs of the determination could be recovered from them because the costs could not be said to be in contemplation of forfeiture proceedings.
- A argued that as s.81 of the Housing Act 1996 precluded it from forfeiting the lease until it had a determination from the tribunal, it could not waive the right to forfeit until it had obtained the determination on 6.12.16
- Held:
    - The fact that A could not exercise its right to forfeit the lease before it had obtained a determination under s.81 of the Housing Act 1996, did not prevent it from waiving the right to forfeit prior to obtaining the determination; it is possible to make an unequivocal choice between two inconsistent rights prior to being in a position immediately to exercise each of them.
    - Managing agents had not waived the right to forfeit the lease by addressing Rs as “leaseholders” in correspondence.
    - A's application for determination of charges payable made it clear that it was contemplating forfeiture proceedings; service of the notices pursuant to s.20 of LTA 1985, was not an action so unequivocal as to waive the right to forfeit.
    - Where a landlord has informed the leaseholder that it intends to forfeit the lease and in the meantime performs its statutory responsibilities (fire hazard), reliance by the landlord on terms of the lease for the purpose of performing those responsibilities and its right of re-entry did not constitute waiver.
    - However, as the service charge was reserved as rent in the lease, the demand for the second instalment of the on-account service charges in September 2016 amounted to an act of waiver
    - Furthermore, A was demanding a large sum to provide funds for carrying out major works to put the building into proper repair which

was inconsistent with the contention that the lease was forfeit so that R would have had no future enjoyment of the building under the lease.

- A was entitled to £10,766 being its costs of seeking the determination up to 3 September 2016 when the right to forfeit the lease was waived.

Problem area 5: The Judge's Song. Trial traps and tricks.

Top tip: Don't wait until the trial, or the last throes of preparation for it, to get your approach to the evidence sorted. Know how you are going to approach the evidence a long time in advance, so that you can take all necessary steps in preparation

- First, work out at an early stage if you need your witnesses or your expert to give further evidence. Don't end up in conference the day before the hearing with your expert giving you wonderful attack lines on the other side for the first time, which unfortunately require a supplemental report to be admitted.
- Second, know if you're going to challenge the admissibility of any document. Don't just bung it all in the bundle and hope. You risk being hoisted on the petard of PD32 para 27.2:

  All documents contained in bundles which have been agreed for use at a hearing shall be admissible at that hearing as evidence of their contents, unless –
  (1) the court orders otherwise; or
  (2) a party gives written notice of objection to the admissibility of particular documents.

- Third, work out at an early stage if you want to challenge the authenticity of documents. Again, don't let the detailed forensic work wait for trial:
  - CPR32.19 requires a notice to prove to be served at the latest of the date for serving WSs or within 7 days of disclosure: otherwise you're deemed to admit the authenticity of the document.

- It is inherent in that deadline that you can serve a notice on time and leave the other party still having to put in witness evidence, and so Judges tend to be relatively relaxed about slightly out of time notices.
- But you can take it too late: see *UTB LLC v Sheffield United Ltd* [2019] EWHC 1377 (Ch). That was a case in which during trial a party noticed that a third party's signature on two documents was different to his signature on other documents, and that the document relied on in the bundle was different to the document produced for inspection.
- The defendant had to apply for relief from sanctions to serve a CPR 32.19 notice: the Court held it was too late. It should have investigated this issue much earlier, and it would not be right to pause the trial to allow the further evidence necessary in light of the forgery allegations to be prepared and adduced.

- Fourth, get your witness ready. Ensure the witness is prepared / understands his/her statement
  - This point is linked with witness evidence generally
  - Make sure you take the time to meet with the witness and that he/she understands his statement
  - Ensure they have access to the documents
  - It is common in low value property disputes to prepare witness evidence based on a short interview and then simply send it to the witness to sign
  - Has the witness understood his/her evidence? Don't leave it until the last minute to find out.
  - Does the witness wish to make any corrections to his/her evidence? It's human nature that people may want to make changes, and the quicker you realise this, the easier it is to address it.
- Fifth, work out if you need to give any late disclosure
  - One issue which frequently comes up during the course of trial is whether documents lately discovered ought to be disclosed
  - As mentioned in the context of the ex parte injunctions, if you find yourself considering whether to disclose a document or not the chances are it should be

- Late disclosure is not in practice as troublesome as it might seem: it is not uncommon for documents to turn up when witnesses are preparing themselves for upcoming cross examination
- Even if documents turn up post cross-examination, as long as the trial is still ongoing it may be possible to recall a witness
- Huffing and puffing by the other side about late disclosure is usually more posturing than anything and judges are more impressed by a party recognising and complying with its ongoing duty of disclosure than annoyed by the lateness
- Once the trial is over, it will be much harder to explain / fix any wrongful non-disclosure.
- Practical tip: as a general rule, if in doubt, disclose.

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