Drafting pleadings

These particulars were recently served in a county court small claim arbitration, in which informality is encouraged and lawyers discouraged. The style is particularly inappropriate now that the courts are anticipating the Woolf reforms, which will outlaw it. **Mark Adler** looks at how the particulars might have been better written.

Pleading

IN THE SOMEWHERE COUNTY COURT[1]

CASE NUMBER_____

B E T W E E N

ALISON ANONY
First plaintiff

and

BRIAN ANONY
Second plaintiff

-v-

CLAIRE BROWN-COOM (otherwise known as CLAIRE BROWN - nee COOM)[3]
First defendant

and

DONALD BROWN
Second defendant

PARTICULARS OF CLAIM

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1. At all material times[4] the Plaintiffs[5] were and remain[6] co-habitees[7] and tenants in common[8] of a property known as and in situ at[9] Angus Cottage, Wolsey Road, Somewhere, Surrey, KT1 2AB.

   1.1[10] The First and/or[11] Second Defendants live at and own (subject to any mortgage and/or other security and[12] encumbrances) the neighbouring[13] property known as Henry Cottage, Wolsey Road, Somewhere, Surrey, KT1 2AB[14].

2. By an agreement entered into[15] in or about[16] November 1996, it was agreed that subject to local planning authority approval[17], the Plaintiffs and Defendants (the parties[18]) would simultaneously and in

Commentary

1. The emboldening, underlining, and capitalisation are intended to highlight the important parts, but fail. The underlined parts are not more important than the other parts of the heading; not all parts of the non-underlined bold text are equally important; and the emboldening of so large a block of text defeats its purpose. The heading is far too busy, and the line spacing in the original is erratic.
2. Jointly claiming (or jointly liable) parties should not be split into "first" and "second" plaintiff or defendant.
3. Mrs Brown-Coom *never* calls herself Claire Brown - nee (or née) Coom). And as can be seen from the pleading, her maiden name was irrelevant.
4. I doubt this traditional catch-phrase is necessary, and it will be interesting to see if it survives the reforms.
5. "Plaintiffs" and "defendants" are common nouns, and do not deserve a capital.
6. If we have established the position "at all material times" any other time must be irrelevant.
7. This was a breach of contract case between neighbours. Who cares about the plaintiffs' love-nest arrangements?
8. Or financial arrangements?
9. "Of Angus Cottage" would have done. Apart from being absurdly pompous the drafting is inaccurate: the property wasn't *in situ at* Angus Cottage; it was *called* Angus Cottage.
10. As paragraphs 1 and 1.1 are parallel they should be equivalently numbered and indented. The usual custom would have them 1 and 2, but 1(A) and (B) is better, to show them two parts of a single topic.
11. What does the stroke itself mean, if not "one or both"? So the expression becomes "and and/or or", and so on to infinity. "And/or" has been repeatedly condemned by bench and academics but continuesin use. In this case the plaintiffs were in no doubt that both defendants lived at that house, so they presumably meant (though they do not say) "the defendants live at and one or both of them own ...". Had this not been irrelevant the claim could have been struck out, since an allegation against "A or B or both of them" does not justify a claim against either.
12. "A and/or B and C" is particularly dangerous; mathematical members are invited to count the alternative possible meanings. But as all this detail was entirely irrelevant the plaintiffs' solicitors avoided a claim for negligence.
13. The dispute arose because the plaintiffs and defendants were in the two semi-detached parts of a pair of cottages. Amidst all the irrelevance, that one useful piece of information is omitted.
14. The address is useful only as background information, and need not have been repeated in all its detail. Is the postcode a material fact?

keeping[19] convert their properties from two[20] bedroomed,[21] to three bedroomed cottages with additional and matching dormer windows.

3. In part performance[22] of their respective obligations the parties submitted a joint application[23] for planning consent to the Somewhere District Council (the local authority[24]) on 8 December 1996, at a cost of £90.00,[25] plus[26] a building regulations fee of £70.50 each.

4. The requisite[27] consent was granted by the local authority on 7 February 1997 subject to *the dormer windows to Angus Cottage and Henry Cottage...* being *implemented as a joint scheme and neither element of this scheme shall be implemented independent of the other* ...in order to ... *safeguard the appearance of the premises and character of the area generally*[28].

5. As a consequence of the planning consent[29], the parties obtained and agreed a fee for the works with a builder on or about 29 May 1997 at a cost of £4,296.97 each[30]. It was agreed between the parties and the builder that the works would commence[31] on 1 September 1997

6. On or about 22 August 1997, the Defendants purportedly[32] withdrew[33] from the agreement. Despite freely entering into the agreement and being bound by it[34], they categorically[35] refused to perform[36], as a consequence of[37] which[38], the Plaintiffs have suffered loss and damage[39].

7. In an attempt to mitigate their subsequent loss[40], on 1 September 1997 the Plaintiff's[41] submitted an appeal/request[42] to[43] the local authority for permission to convert their property independently of the Defendants. The appeal/request was granted on 27 October 1997.

8. As a result of the Defendants[44] failure and/or refusal[45] to perform their obligations in accordance with[46] the agreement, the Plaintiffs have suffered loss and damage[47].

PARTICULARS

....

15. By whom? It cannot reliably be assumed that the defendants were party to it, since someone else (or one of them) might have agreed on their behalf without authority. This unnecessary "blind passive" could have founded an application to strike out the claim. And as all material facts must be pleaded (RSC 18/7/5) we should be told more about the agreement. Was it oral or in writing? What was arranged about agreeing a builder, or the time at which the work was to be done? What was to happen if one couple needed to sell their house before it could be improved? All these important matters (including the intention to create legal relations) were in issue, and a more disciplined approach to drafting would have alerted the plaintiffs' solicitor to several weaknesses in their case before they negligently incurred the cost of taking the dispute to the door of the court.
16. Only lawyers say "in or about"; in normal speech "about" includes "in". The full expression is often included out of habit when there is no doubt about the date.
17. The drafter has forgotten the first of what should have been a pair of parenthetical commas (before "subject to").
18. To the contract or this litigation? Either way, the definition is pointless.
19. With each other (in which case "matching" is otiose), the rest of the building, or the neighbourhood?
20. The necessary hyphen has been omitted.
21. This comma makes nonsense of the phrasing.
22. The doctrine of part performance was abolished in 1989 (and before then had no place here).
23. "Submitted a joint application" = "applied jointly".
24. Why intrude into the flow of the sentence with so futile a subordinate clause?
25. A comma has no place between two parts of a sum.
26. "Plus" for "and" is an abomination from the tabloid press and has no place in a professionally drafted document. In any case the last part of the sentence does not fit what comes before: the building regulation fee was not part of the cost of the planning application; the parties "applied for planning permission at a cost of £90 and *paid* a building regulation fee of £70".
27. We know that planning permission was needed, and the fancy "requisite" was gratuitous.
28. This explains - though inadequately - the unusual circumstances. The plaintiffs' own application for planning permission had been refused, the council wanting the two halves of the building to be kept the same. So the plaintiffs persuaded the defendants to join in the scheme. When the defendants had to sell before the work could be done the plaintiffs sued.
29. This pompous introductory phrase repeats what we already know.
30. This is gibberish. The parties did not "obtain... a fee ... with a builder ... at a cost of £4,296..". And the essential details of the defendants' commitment to the builder are omitted. In fact, the plaintiffs' evidence supported the defendants' denial that they had contracted with the builder, and again a proper concern for the pleading would have alerted the plaintiffs' solicitor to a fatal weakness in his case.
31. "Commence" = "start" or "begin".
32. There was nothing "purported"; they *did* withdraw. It was their *right* to do so which the plaintiffs challenge.
33. Are the plaintiffs alleging that the defendants rescinded or repudiated the agreement? Again, essential detail is omitted.
34. Theplaintiffs have already pleaded the agreement; this sentence is mere petulance, out of place in any professional writing but especially in a formal document.
35. "Categorically" is otiose.
36. "It" is missing.
37. This is the second "as a consequence of" in a few lines.

9. The Plaintiffs are entitled to[48], and hereby[49] claim[50] interest pursuant to[51] Section[52] 69 of the County Court[53] Act 1984 on the amounts deemed[54] due, at such[55] rates and for such period as the Court think[56] fit.

AND THE PLAINTIFFS CLAIM:-[57]

1. £1,029.98.

2. Interest on sums claimed[58] pursuant to the relevant[59] statute on any sum found due at such rate and for such period as the Court shall[60] think fit.

NOTE

The Plaintiffs limit their claim herein[61] to the sum claimed[62], plus interest[63], and in any event to the arbitration limit[64].

Dated this 5 day of November 1997[65]

[Formal parts followed]

For a suggested rewrite, see next page

38. This is another misplaced comma.
39. "Loss" adds nothing to "damage".
40. Is this loss subsequent to the loss pleaded in the last paragraph? Or does the pleader intend "subsequent" as a synonym for "consequent" (which it isn't)? If so, the repetition is unnecessary.
41. The apostrophe mistakenly converts an intended plural into a singular possessive.
42. The pleader seems to admit that he does not know whether the submission was an appeal. Of course it could not have been, as an appeal must go to the secretary of state, not to the council.
43. "Submitted a request to" = "asked".
44. This time an apostrophe *is* needed.
45. If it matters whether the defendants failed or refused, "and/or" is unacceptably vague. If it doesn't matter, why plead both? (In paragraph 6 the refusal was "categorical".)
46. "Obligations in accordance with" should be "obligations under".
47. Paragraph 8 repeats paragraph 6 for no apparent reason but with presumably unintentional differences.
48. If they were entitled it would be a matter of law, and so not to be pleaded. In fact they aren't entitled: under s.69 interest on damages for breach of contract is discretionary.
49. "Hereby" is otiose.
50. An essential comma (to close the parenthesis) is missing.
51. "Pursuant to" = "under".
52. "Section" does not warrant a capital.
53. It is the County Court*s* Act.
54. Interest will be awarded on the amount actually, not deemed, due; the abstraction is unnecessary.
55. The use — particularly the overuse — of "such" for "the", "that", or "those" is stilted.
56. Another "s" has been overlooked.
57. The colon alone is adequate.
58. It is unnecessary to claim interest twice. But if the claim is repeated the two versions should be consistent. Here the basis of calculation has switched from"the amounts deemed due" to "any sum found due".
59. If they mean the 1984 Act they should say so.Not all readers would know whether there was another "relevant statute".
60. The archaic "shall" is usually justified as being unambiguously mandatory. Here it is clearly not mandatory but indicating the future tense. That it is inappropriate can be seen by comparing this phrase with its present-tense predecessor in paragraph 9.
61. Another superfluous archaism. What other claim would they be limiting?
62. This is circular, so means nothing.
63. How can they claim only what they claim plus something else? In any case, they have already included interest in their claim.
64. Does this mean that they limit it to whichever sum is higher or to whichever is lower?
65. "Dated this" and "day of" are otiose. But if "day" is included "5" must be "5th".

In Somewhere County Court Case number______

B e t w e e n:

(1) **Alison Anony**
and
(2) **Brian Anony** Plaintiffs

and

(1) **Claire Brown** (also known as Claire Brown-Coom)
and
(2) **Donald Brown** Defendants

Particulars of claim

1. (A) Angus Cottage and Henry Cottage are the two semi-detached parts of a building in Wolsey Road, Somewhere.

   (B) The plaintiffs are owner-occupiers of Angus Cottage and the defendants are owner-occupiers of Henry Cottage.

2. In November 1996 the parties agreed that if they could get planning permission they would each convert their property from two- to three-bedroomed cottages, with matching dormer windows, according to plans which they jointly submitted to Somewhere District Council.

3. Planning permission was granted on 7 February 1997. As anticipated it was conditional on the two cottages being converted together.

4. On (when?) the plaintiffs and (separately?) the defendants contracted with A. Builder & Son Ltd that he would do the work for £4,296.97 for each cottage. Work was to start on 1 September 1997 and be completed within (how long?).

5. On 22 August 1997 the defendants repudiated the agreement by saying (without justification) that they did not intend to convert their cottage.

6. As a result of this breach the plaintiffs could not lawfully convert their cottage and have accordingly suffered loss.

7. The plaintiffs have reduced their loss by persuading the council to permit their conversion without matching work to the defendants' cottage, but meanwhile the work was delayed (for how long?).

Particulars of paragraphs 6 and 7 ...

And the plaintiffs claim:

1. £1,029.98.
2. Interest at the rate of 8% a year under section 69 of the County Courts Act 1984 from ... to ... (at a daily rate of 22p).

5 November 1997